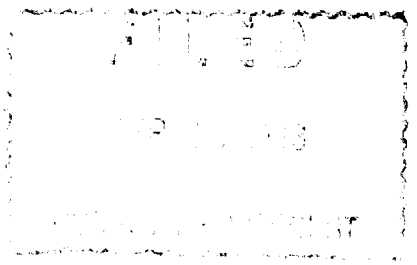
IN THE COURT OF APPEALS OF IOWA

No. 8-381 / 98-0032
Filed September 30, 1998



IN RE THE MARRIAGE OF JAMES EDWARD BLACK AND LOIS ADELE BLACK

Upon the Petition of
JAMES EDWARD BLACK,
Appellee,

And Concerning
LOIS ADELE BLACK,
Appellant.

Appeal from the Iowa District Court for Kossuth County, Charles H. Barlow, Judge.

Lois Adele Black appeals from a temporary custody order. James Black cross-appeals from the economic provisions of the same order. **AFFIRMED.**

Leslie Babich, of Babich, McConnell & Renzo, P.C., and Thomas D. Hanson of Hanson, Bjork & Russell, L.L.P., Des Moines, for appellant.

Lorraine J. May of Finley, Alt, Smith, Scharnberg, May & Craig, P.C., Des Moines and Thomas W. Lipps of Peterson & Lipps, Algona, Stephen G. Kersten of Kersten Brownlee Hendricks L.L.P., Fort Dodge, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Jim and Lois Adele Black (Adele) were married on December 21, 1985. They have three children: Byron, age ten, and twin daughters, Rachael and Elizabeth, age seven.

This action was commenced with James' petition filed October 10, 1997. On the same day, the district court enjoined Adele from interfering with James' custody of the children based on allegations of Adele's mental instability and resulting danger to the children. The court's order also effectively removed Adele from the family home pending a hearing on temporary custody of the children.

After a hearing on temporary matters, the district court entered an order placing the children in the parties' joint custody. James was granted temporary physical care subject to Adele's liberal visitation rights. The temporary order summarizes the district court's reasons for granting James physical care as follows:

> This court believes that allowing the children to live, for the most part, in the home that they are used to and with the parent who appears to be the more physically and emotionally stable at this point, would be in their best interests.

The district court's temporary order also addressed economic issues of child support, spousal support, and attorney fees. After determining the parties' respective incomes, financial resources and needs, the court concluded Adele was unable to pay

child support. James was ordered to pay $2000 per month for Adele's temporary support and $3000 of her attorney fees.

Adele has appealed, and Jim has cross-appealed. Adele contends the district court erred in awarding Jim temporary physical care of the children. Adele asserts the district court gave little weight to the fact she was the children's primary caregiver during the marriage. Adele also requests an award of appellate attorney fees.

Jim contends the district court erred in ordering him to pay Adele spousal support of $2000 per month. Jim additionally argues the district court erred in failing to order Adele to pay him temporary child support.

II. Standard of Review.

We review this equity action de novo. Iowa R. App. 4. We examine the entire record and adjudicate anew those issues properly raised and preserved for appellate review in the district court. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981).

III. Temporary Physical Care.

In child custody cases, our first and governing consideration is the best interests of the children. The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interests of the child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long-range

best interests of the child. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status. *Id.*

There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Insofar as is reasonable and in the best interests of the child, the court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. *See* Iowa Code § 598.41(1) (1997). To effectuate that policy the court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979). These considerations presumably apply with equal force in determining temporary as well as permanent custody.

At issue here is the immediate welfare of three children caught in the middle of a nasty custody fight. The difficulty of their situation was compounded by frequent and unnecessary exposure to the parties' confrontational uncivility preceding the district court's intervention.

As noted earlier, the district court was expressly concerned with Adele's emotional instability and its negative implications for the children. Our review of the record indicates the court's concerns were well founded. Evaluations by mental health professionals indicate Adele suffers from a major depressive and personality disorder. Although she was in need of treatment, the record indicates Adele rejected attempts by James and others to provide it. In addition to her strained relationship with James, Adele has alienated herself from her parents and siblings, refusing to allow the children any association with them. Under these circumstances, we find considerable wisdom and equity in the district court's decision to leave the children in their accustomed and secure environment. We affirm on this issue.

IV. Temporary Child and Spousal Support.

Iowa Code section 598.14 provides:

> In making temporary orders, the court shall take into account the age of the applicant, the physical and pecuniary condition of the parties and other matters as are pertinent . . . .

The record indicates the parties possess considerable financial means. Their net worth is nearly one million dollars. James' net monthly income at the time of the temporary hearing was $3108 and Adele's was $568. Adele's net monthly income

was not sufficient to meet her subsistence needs and pay child support. Although the amount of temporary spousal support awarded is substantial, we cannot say, in view of Adele's needs and James' financial means, it was inequitable. We affirm on this issue.

V. Attorney Fees.

Adele requests attorney fees for defending this matter on appeal. In making such a determination, we are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). Each party shall pay their own attorney fees. Costs on appeal are assessed equally to both parties.

AFFIRMED.