IN THE COURT OF APPEALS OF IOWA

No. 8-116 / 97-1375

FILED
APR 24 1998
CLERK SUPREME COURT

Upon the Petition of
RAYMOND F. ADAMS,

Petitioner-Appellant,

And Concerning
DAWN M. GORDON,

Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Carl D. Baker, Judge.

Petitioner appeals from the district court order granting respondent primary physical care of the parties' minor child. **AFFIRMED.**

Donald G. Juhl, Nevada, for appellant.

Kathy Goudy and Russell E. Lovell, II, Drake University Legal Clinic, and Thomas J. Joaquin, Student Intern, Drake University Legal Clinic, Des Moines, for appellee.

Heard by Streit, P.J., Vogel, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Raymond Adams appeals the district court's award of primary physical care of the parties' son to Dawn Gordon. He contends the district court erred because he is better able to provide for the best interests of the child. We affirm.

Raymond is fifty-nine years old and Dawn is thirty-seven. Raymond and Dawn lived together but were never married. They have a son, Ryan, born in 1996. Dawn also has a seventeen-year-old son, Mark, who lived with them. Mark has Tourette's Syndrome.

Eleven days after Ryan's birth, Dawn moved out of Raymond's home because Raymond kicked Mark out of the house. Raymond had given Mark an ultimatum -- go to school or get a job or he would be thrown out of the house.

Neither Raymond nor Dawn have sparkling histories. Raymond has three felony convictions: (1) forgery of a check thirty-six years ago; (2) sexual abuse of his sixteen-year-old stepdaughter ten years ago; and (3) a recent conviction for felon in possession of a firearm. Raymond had four children prior to Ryan. He surrendered his parental rights to the two oldest by allowing them to be adopted by their stepfather. Raymond did not have contact with the other two for several years; however, he contends they now have a good relationship.

Dawn has had her share of problems raising Mark. In 1988, Mark was determined to be a child in need of assistance and placed in foster care for four years.

He was returned to Dawn in 1992. She admits Mark continues to have problems but contends they are mostly caused by the Tourette's Syndrome.

Raymond points to journals and letters written by Dawn and contends they show she is mentally and emotionally unstable. Raymond also argues Dawn attempted to set him up to look like a bad parent. Raymond contends Dawn failed to change Ryan's diapers so Ryan would suffer from a severe case of diaper rash; he alleges she then took pictures and claimed they were taken on days when Ryan was returning from his father's care.

Dawn contends she has learned from her past experiences and continues to make attempts to better herself and her ability to be a good parent. As evidence, she cites her recent rental of a place of her own, her attendance at a parenting class, her recent efforts to quit smoking, maintaining two jobs to earn a net monthly income of $1381, and the fact she no longer has animals in her home. Dawn also argues her journals and letters are her method of venting her feelings and are not meant to be complete or congruous thoughts. She maintains these documents were like a bubble bath to her. She argues the letters were never meant to be read by the people listed as the recipient. Dawn admits Ryan had diaper rash, but claims Raymond is lying about who caused the rash.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact

findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. PRIMARY PHYSICAL CARE. The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The issue in determining the best interests of the children is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

In making its decision, the district court found:

> The overriding negative factor which Ray brings to this case is his three felony convictions. The first conviction occurred in 1961, for which Ray served 23 months in prison following his conviction for

forgery. In 1987, he was charged with sexual abuse in the third degree concerning his 16-year-old stepdaughter. This Court is troubled by Ray's contention that the young woman came on to him or that it was her fault. Clearly, by his plea of guilty to the crime Ray admitted that he committed the offense. Certainly now is not the time to try to persuade others the crime was not his fault.

More recently, Ray has been convicted of possession of a firearm by a convicted felon. Ray also offered an excuse for this crime, as well, stating that the two shotguns which he possessed were actually his brother's, which were used for hunting. However, once again, Ray has pled guilty to the crime, admitting his guilt.

On her part, Dawn has had problems raising children. As noted in the Findings of Fact, her son Mark was not properly cared for by her, and as a result he was found to be a child in need of assistance. Dawn was not providing the care Mark deserved and required at the time the juvenile court made the finding in 1988. What Dawn has seen as her failure with Mark has continued to trouble her, she stated she was going to give Ryan to her sister and brother-in-law, and she was going to leave and "hit the road." Although Dawn has taken a parenting class, this Court sees her as one who does not have much confidence in her abilities as a parent. However, she testified that she believes she can provide Ryan with a stable and adequate home, and is willing to do so. . . .

While it is difficult for this Court to predict with certainty the quality of care that will be provided to Ryan by either Ray or Dawn, the conclusion reached is that his physical care should be placed with Dawn. Ray's criminal history is a concern. Ray has difficulty accepting responsibility for his crimes, even though he pled guilty to them. On the other hand, Ray appears to have a good work ethic. He has worked at Burke Marketing for seven years. He also owns real estate near Colo and in Collins, Iowa.

The letters written by Dawn reflect a woman who is more focused on her own needs and desires. She is more self-centered than Ray. This quality may have been a factor in the problems she had in raising her son Mark. This court is concerned that this characteristic will make it difficult for her to understand and meet Ryan's needs. Will she give priority to the needs of her one-year-old son? To her credit, she has taken a parenting class, she is employed, and she has moved into her own home.

There are factors on both sides of this case which give rise to concerns for Ryan's long-term welfare. The issue of who should be

> made responsible for Ryan's daily physical care presents a close question. However, this Court concludes that the facts tilt in favor of Dawn as Ryan's primary care provider

Given the history of the two parties, the ability to see them at the hearing was critical. The district court judge was called on to make important judgments about credibility and demeanor. The district court was required to determine if Dawn was emotionally and mentally stable enough to raise Ryan and determine whether Raymond had been completely rehabilitated. We give weight to the findings of the district court and determine it correctly determined Dawn could better serve Ryan's best interests as the primary physical care giver.

We affirm the decision of the district court.

AFFIRMED.