

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 31 1983

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JOHN H. HULING AND LORI L. HULING

UPON THE PETITION OF.
JOHN H. HULING,

Filed May 31, 1983

Petitioner-Appellee,

AND CONCERNING
LORI L. HULING,3-59
3-69086

Respondent-Appellant.

Appeal from Clinton District Court, C. H. Pelton, Judge.

Respondent-wife appeals from the decree dissolving the parties' marriage. On appeal, respondent-wife asserts (1) that the trial court should have awarded her custody of the parties' child, and (2) that if the appellate court does not reverse the custody award, it should remand the case for an investigation of the parties' parenting abilities by the department of social services or an appropriate agency. AFFIRMED.

John J. Carlin, Davenport, for respondent-appellant.

Edward T. Kross of Shaff, Farwell & Senneff, Clinton, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

PER CURIAM

Petitioner John H. Huling and respondent Lori L. Huling were married in July 1978. One son, Nicholas, was born in April 1980. The parties worked different shifts at a local packaging company; the party who was not working at a particular time would take care of Nicholas. John and Lori are both high school graduates. At the packaging plant John earns a gross salary of approximately \$380 per week and Lori earns approximately \$300 per week.

On March 9, 1982, John filed a petition for dissolution of the marriage, which he amended on June 8 to pray that he be awarded custody of Nicholas. At trial evidence was presented that Lori was involved in an extra-marital sexual affair with another man during her marriage to John; that there was marital discord when John found out about it; and that the parties tried unsuccessfully to reconcile. The parties separated in February 1982, at which time Lori was pregnant by John. Shortly after the separation, Lori had a voluntary abortion without first consulting John. She later told him she had a miscarriage. Lori requested that the parties be awarded joint custody.

The trial court found that either party would be a suitable custodian for Nicholas. It gave the parties joint custody but awarded physical care to John. Lori now appeals from this ruling, asserting that this court should reverse and grant custody to her, or alternatively, that this court should remand the case for an investigation of the parties' parenting abilities by the department of social services or an appropriate agency.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law and determine anew those rights properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). We give weight to the findings of the trial court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

In support of her argument that she should have been awarded custody, Lori claims that the trial court placed too much emphasis on her extra-marital affair and on her decision to have an abortion without consulting John. She contends that the trial court's apparent motivation in reaching its determination on the custody issue was to punish her for her past indiscretions. If this were the case, we would be compelled to agree that the trial court acted inappropriately. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973)("[w]e do not make a determination of custody to reward one of the parents or to punish the other").

We are convinced, however, that the conduct in question was considered only insofar as it reflected on the best interests of the child. The trial court stated, in its findings of fact and conclusions of law:

Much was made upon the trial of Lori's extra-marital affair and the abortion. The Court is inclined to believe that neither have a great deal of relevance to the best interests of the child Nicholas. The Court is disinclined to make any moral judgment on the abortion; and, of course, the fault concept as to the breakdown of the marriage long ago left the Iowa law. About all that can be made of the affair and the abortion matters [sic] is that in both cases the Respondent was deceitful to the Petitioner, and that might reflect on her credibility or character. The fact that she had an affair during the marriage and lied about it until he found out is not surprising, but may reflect on her character as that in turn reflects on the child's best interests. The fact that she had an abortion while married but separated and did not consult with her husband who she acknowledges was the father of the child, tells us something. Perhaps better judgment would have dictated that she consult with him and at least discuss it or advise him when she in fact deceived him stating she had a miscarriage. Again, not the act, but the deceit may reflect on her character; and that might have some bearing on the best interests of the child.

It is well established that a parent's "moral misconduct" or "disregard for truth" may reflect adversely on custodial fitness, In re Marriage of Kramer, 297 N.W.2d 359, 362 (Iowa 1980); In re Marriage of Gutermuth, 246 N.W.2d 272, 274 (Iowa 1976), which is one of the factors to be considered in determining what custody arrangement is in the best interests of the child. Iowa Code § 598.41(3); see In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). We agree with the trial

court's conclusion that, on balance, either parent would be a suitable custodian, but that the balance tilts in John's favor with regard to maturity, character, and responsibility, and that consequently joint custody with physical care in John is the most appropriate custodial arrangement. Lori concedes that the positions of the parties with regard to custody were in "equipoise" except for the findings of the court as to the alleged deceit. The Iowa Supreme Court has previously determined that when "the operative facts under the Winter criteria are in equipoise" in a custody dispute, the scales tip in favor of the party who was awarded custody by the trial court by our appellate rule giving weight to that court's findings. In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). We now hold that this guideline applies with equal force to our review of joint custody physical care determinations made under Iowa Code section 598.41.

On appeal Lori requests that, if the custody award is not reversed, the case be remanded for an investigation of the parties' parenting abilities. Her assertion of error in the trial court's failure to order such an investigation is derived from Iowa Code section 598.12(2) which provides, in part:

The court may require that the department of social services or an appropriate agency make an investigation of both parties regarding the home conditions, parenting capabilities, and other matters pertinent to the best interests of the child or children in a dispute concerning custody of the child or children.

It is clear that the ordering of an investigation under this section is not mandatory, and we think that the trial court acted within the latitude of its permissible discretion in refusing to order one here and in relying instead on the information before it to make the custody determination. See Boyes v. Boyes, 247 N.W.2d 265, 268 (Iowa 1976)("[i]t is obvious to us. . . that the provisions of section 598.12 of the Code are directory only and not mandatory"). The decision is accordingly affirmed.

AFFIRMED.