IN THE COURT OF APPEALS OF IOWA

No. 4-086 / 93-1422

FILED
APR 26 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GARY ALLEN DITTMER AND BARBARA ANN DITTMER

Upon the Petition of
GARY ALLEN DITTMER,

Appellee,

And Concerning
BARBARA ANN DITTMER,

Appellant.

Appeal from the Iowa District Court for Warren County, Michael J. Streit, Judge.

Barbara appeals from the child custody provisions of the dissolution decree. She challenges several of the district court's factual findings and contends she should have been awarded primary care of the parties' minor son. **AFFIRMED.**

Jane Kopp Morris of Huffer Law Office, Story City, for appellant.

Kermit L. Dunahoo of Dunahoo Law Firm, Des Moines, and Robert A. Gottschald, Indianola, for appellee.

Heard by Donielson, P.J., and Schlegel, Hayden, Sackett, Habhab, and Cady, JJ., but decided by Donielson C.J., and Sackett, Habhab, Cady, and Huitink, JJ. Hayden, J., takes no part.

CADY, J.

Barbara Dittmer appeals from the child custody provisions of the district court's dissolution decree. She challenges several of the district court's factual findings and contends she should have been awarded primary care of the parties' minor son.

Gary and Barbara Dittmer were married in 1988 and had a son, Anthony, in 1989. The parties separated in January 1993, and Gary filed a petition for dissolution of marriage.

Both Gary and Barbara requested physical custody of Anthony. Independent custody evaluator, Thomas Searcy, noted Gary and Barbara are good parents and testified it was a "close case." Although Searcy found Gary abused alcohol, he concluded Gary would provide a more stable environment and recommended custody be awarded to him.

Gary lives in a house owned by his parents and is a partner in the family farm operation. Gary has been arrested twice for operating a motor vehicle while intoxicated, "OWI." Although he claims he is no longer drinking alcohol, he was seen buying beer and wine one month before trial.

Early in the marriage, Barbara worked as a customer service representative. She took two months off to care for Anthony after his birth. She then suffered from a series of health problems which incapacitated her for about one year. She has taken numerous medications for

headaches, anxiety, and depression. At the time of trial, Barbara was employed and renting a house on an acreage. She testified she had not taken any medication nor suffered from health problems since her separation from Gary.

Barbara maintained custody of Anthony during the separation. Gary exercised regular visitation. Both parties were active in Anthony's care during the marriage. They shared in the preparation of meals. As a farmer, Gary was frequently in and around the house.

In September 1993, following a trial, the district court awarded primary physical care of Anthony to Gary. The court ordered Barbara to pay $130 per month in child support.

I.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In child custody cases, the best interest of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in Weidner, 338 N.W.2d at 355-56,

and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child 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).

We first examine Gary's use of alcohol and its subsequent affect on his parenting. We recognize that a parent's abuse of alcohol may interfere with the ability to effectively minister to a child's needs. In re Marriage of Harris, 499 N.W.2d 329, 331-31 (Iowa App. 1993); In re Marriage of Fite, 485 N.W.2d 662, 664 (Iowa App. 1992); In re Marriage of Le Grand, 495 N.W.2d 118, 120 (Iowa App. 1992).

Gary has been convicted twice for OWI. His second arrest was June 6, 1993, three months prior to trial. His blood alcohol content was .195. Gary was placed on two years of probation and given a "work permit," which limits his driving to farm-related purposes. Thomas Searcy evaluated Gary's alcohol use and diagnosed him with an alcohol abuse disorder. He testified that although Gary did not need treatment for alcoholism, he needed to stop

using alcohol. Gary testified he no longer consumed alcohol, but admitted purchasing beer and wine one month before trial. He testified he purchased the alcohol for friends. Despite Gary's testimony, the district court found that Gary was still drinking at the time of trial. Other witnesses testified that Gary frequently consumed between twelve and twenty-four cans of beer in Anthony's presence. Further testimony indicated that while Gary was drinking, he watched television and worked on race cars and was inattentive to Anthony.

Although there is no evidence that Anthony has suffered physical harm while under Gary's care, we are, nevertheless, deeply disturbed by the active role of alcohol in Gary's life. Our concern is compounded by the trial court's finding that Gary has not stopped consuming alcoholic beverages despite his contrary testimony. Denial can be a wicked enemy. Gary may not be alcohol dependent, but his excessive use of alcohol has adversely affected his effectiveness as a parent.

We next examine the recommendations of the Thomas Searcy, the appointed child custody investigator. We recognize that the recommendations of an independent custody investigator may be considered in determining primary physical custody. In re Marriage of Riddle, 500 N.W.2d 718, 720 (Iowa App. 1993). However, these recommendations should in no way be considered binding. Id.; In re Marriage of Dawson, 214 N.W.2d 131, 133 (Iowa 1974).

Searcy spent between four and five hours evaluating the Dittmers. He administered several standardized tests, conducted a clinical interview, and observed each parent interact with Anthony. He did not interview any collateral sources or conduct a home visit. In his report, he stated Gary was an alcohol abuser. He testified Gary should stop drinking. Searcy's report indicated that the psychological testing conducted on Barbara did not suggest any problems with anxiety or depression. From his report and from his trial testimony, it appears that Searcy's custody recommendation was largely based on Barbara's living and employment situation at the time of trial. His report states:

> Barb has reported that she is currently living with her sister and is unemployed, even though she is seeking employment. It is not my intention to be critical of Barb or her position in life. In fact it is quite the contrary and I empathize with her situation, especially since she expresses no interest in being divorced from her husband and having her family torn apart. Practicalities, however, would suggest to me that Mr. Dittmer offers the most stable home environment for Anthony.

At trial, evidence indicated that Barb had since become gainfully employed and had a stable home life. When asked whether the testimony regarding Barb's changed circumstances would affect his recommendations, he indicated it would not. However, he was unable to elaborate as to the reasons underlying his recommendation. He was also unable to indicate why Barb's changed circumstances did not affect his recommendation, except to say that the change needed to have lasted for a year.

Our review of the record reveals that the instability experienced by Barbara following the separation was no different than what would be expected to occur to most unemployed spouses who move from the family home because of marital difficulties. As a whole, the recommendation of the custody evaluator carries limited weight in the final decision. Even Searcy's testimony and report indicated that the custody recommendation was a "close call."

We next examine the evidence concerning Barbara. The trial court found Barbara displayed a temper on occasions. More importantly, there was repeated testimony that she used extremely vulgar language towards Anthony. Barbara denied the use of vulgar language, yet admitted to using the phrase "little jerk or something like that." The trial court also recognized that Barbara suffered from depression and displayed other negative characteristics, such as compulsive behavior. The home was generally messy. Like Gary, Barbara, too, had problems which adversely affected her parenting.

In the difficult and arduous custody decisions such as this, our preference is to follow the trial court. In doing so, we are not ignoring the numerous positive changes made by Barbara and the importance of Anthony's contact with her. We also strongly urge Gary to refrain from consuming alcohol and to seek support in Alcoholics Anonymous.

In summary, we affirm the trial court's decision awarding primary physical care of Anthony to Gary. Fees and costs are taxed equally between the parties.

AFFIRMED.

All judges concur except Sackett, J., who specially concurs without opinion.