

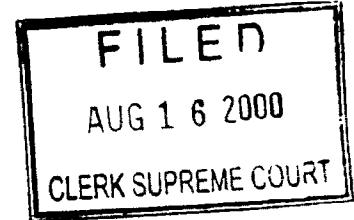
IN THE COURT OF APPEALS OF IOWA

No. 0-353 / 99-1688
Filed August 16, 2000

KENNETH J. DRISCOLL,
Petitioner-Appellee,

vs.

VICKY FULLER,
Respondent-Appellant.



Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson,
Judge.

Vicky Fuller appeals from the district court's ruling in a custody action
granting primary physical custody to her son's father, Kenneth Driscoll.

AFFIRMED.

Thomas A. Bitter of Bitter Law Offices, Dubuque, for appellant.

Mary M. Schumacher, Dubuque, for appellee.

Heard by Streit, P.J., and Zimmer and Hecht, JJ.

000071

HECHT, J.

Vicky Fuller appeals from the district court's ruling granting Kenneth Driscoll primary physical care of their son. She contends the court erred in granting primary physical care to Kenneth as (1) he did not meet the appropriate burden of proof to modify a de facto custody arrangement, (2) the factors enumerated in Iowa Code section 598.41(3) (1999) demonstrate she is the appropriate party to have physical care, (3) separating the child from his half-siblings is not in the best interest of the child, (4) his actions have not been in the best interest of the child, and (5) the child wishes to remain with her. We affirm.

I. Factual Background and Proceedings. Kenneth Driscoll and Vicky Fuller are the parents of Joshua Driscoll, born February 4, 1990. Kenneth and Vicky were never married. At the time of Joshua's birth, Kenneth was nineteen and Vicky was seventeen. Soon after the birth, the child support recovery unit instituted a paternity action that established Kenneth as Joshua's father and set child support at \$267 per month. The custody and visitation issues were never adjudicated prior to commencement of this action.

During the first six years of Joshua's life, Vicky was his full-time caregiver. Kenneth and Vicky lived together until Joshua was one year old, but they separated and have not lived together since. Kenneth rarely cared for his son during his early years, although his parents exercised regular visitation with Joshua, and Kenneth would occasionally be present. Kenneth's parents have a good working relationship regarding visitation with Vicky and reported no problems with Vicky letting them see Joshua. When Joshua entered the first

grade, Kenneth became increasingly more active in his life. Kenneth has more recently showed a strong interest in Joshua's education and extra-curricular activities.

Vicky dropped out of high school before Joshua was born but received her GED by the time she was twenty-one. She currently is employed at a hotel earning \$5.95 per hour working approximately thirty-six hours per week. Kenneth has graduated from community college and works for Medical Associates Health Plan full-time making \$8.22 per hour plus medical and dental benefits.

In 1993, Vicky began a relationship with Joshua Frost. They have two children together, Haley and Aaron, who were six and two respectively at the time of trial. In February of 1998, Frost physically abused Joshua resulting in a founded report of child abuse. Vicky immediately ended her relationship with Frost and he moved out of their home. However, the parties agreed to have Joshua live with Kenneth until the situation at Vicky's house was resolved. Vicky exercised regular visitation during this time. This arrangement lasted until the end of the school year, approximately June of 1998. During the summer of 1998, Joshua split time equally between Kenneth's home and Vicky's home. In August of 1998, Vicky terminated the arrangement and the parties returned to a more traditional visitation schedule with Kenneth exercising visitation on the weekends.

Kenneth is currently married to Shelley Husemann. Shelley has custody of her daughter, Katie, from a previous marriage. Katie lives with Shelley and Kenneth but visits with her father as well. Vicky lives with her boyfriend,

Christopher Bibb. Christopher has a four-year-old daughter, Megan, from a prior relationship who lives with her mother. Megan visits with Christopher in the home regularly. Shelley and Christopher reportedly both have good relationships with Joshua and are appropriate parental figures.

On March 2, 1999, Kenneth filed a petition requesting the district court award the parties joint legal custody of Joshua, with primary physical care with Kenneth. After a trial on June 9 -11, 1999, the district court entered its decree on July 8, 1999, awarding primary physical care to Kenneth and visitation to Vicky. Vicky appeals.

II. Standard of Review. We review custody orders de novo. *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). The primary consideration is the best interests of the child. Iowa R. App. P. 14(f)(15); *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility, but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Primary Physical Custody. The criteria governing custody decisions are the same regardless of whether the parties are dissolving their marriage or are unwed. *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa App. 1994). The child's best interests are paramount in this decision, and the court's objective is to place the child "in the environment most likely to bring him to healthy physical, mental, and social maturity." *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999); *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). The

court determines placement according to which parent can minister more effectively to the children's long-range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Urban*, 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 re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996).

Vicky argues the parties entered into a de facto custody arrangement and as such, Kenneth's action for primary physical custody was actually an action for modification of the custody agreement. She argues the district court erred by determining the parties had the equivalent burden of proof and asserts to the contrary Kenneth's burden of proof should be to prove a substantial change in circumstances had occurred since the parties agreed on a custody arrangement. Vicky cites no authority for this proposition. Unless there has been a court order adjudicating the custody of a child, a custody action is treated as an original custody action rather than as a modification action. *See generally, In re Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995) (stating neither party should have a greater burden than the other in an original custody action where unwed parents had never filed a custody petition); *Nicolou v. Clements*, 516 N.W.2d 905, 906 (Iowa App. 1994) (analyzing the appeal using the modification standard because custody of and visitation with the child were established by court decree in a paternity action). We determine the district court did not err in considering this

case as an original custody action and holding neither party to the greater burden of showing a substantial change in circumstances.

Vicky next argues the district court erred by determining placement of primary physical care of Joshua with Kenneth was in the child's best interests. Numerous factors help determine which parent should serve as the primary caretaker of the children. Iowa Code § 598.41 (1997); *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997). Some factors are given greater weight than others and the weight ultimately assigned to each factor depends on the particular facts of each case. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa App. 1998).

Vicky and Kenneth are both good parents and both have a close bond with Joshua. In turn, Joshua clearly loves both of his parents and has established emotional ties with them, their respective partners, and his stepbrother and stepsisters. We acknowledge Vicky was Joshua's primary caregiver for most of his life and shouldered most of the responsibilities of being a single parent, working, and continuing her education. Kenneth has just more recently taken an active interest in his son's care. However, we concur with the district court's statement: "custody and physical care decisions are not matters of reward and punishment. The Court does not look to fairness for a parent but, rather, to the child's best interests."

Several factors influence our decision to affirm the district court's determination Kenneth is the more appropriate parent to bring Joshua to "healthy physical, mental, and social maturity." We are impressed first by Kenneth's

stable home life and establishment of a regular routine for Joshua. As a child with some special needs because of behavioral problems, Joshua benefits greatly from this routine. At Kenneth's house, Joshua receives help and encouragement with his homework. Kenneth communicates frequently with Joshua's teachers and reacts in a proactive manner to address any problems he has at school. Joshua's behavior and performance in school improved drastically since Kenneth became involved in his life and particularly during the months he lived with Kenneth.

By contrast, the record reflects Vicky's home life is more chaotic. She has moved her family frequently, causing disruption in Joshua's schooling as he was forced to change schools with most of the moves. Evidence was presented Vicky is less supportive of Joshua's education. He was often late or absent from school while in her care. The record also reflects Vicky's personal life is not as stable as Kenneth's is. She has lived with several boyfriends in Joshua's lifetime, including one who physically abused him. While we see no indication her current relationship is abusive or unstable, this is one factor we consider in making our determination of which parent is better suited to provide Joshua's needs.

Vicky contends separation of Joshua from his two half-siblings who live in her home is not in his best interests. There is a strong interest in keeping children from broken homes together. *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). However, if circumstances arise which demonstrate separation may better promote the long-term best interests of a child, then the court may

depart from this rule. *Yarolem*, 529 N.W.2d at 298. Those circumstances exist in this case. Although it will be difficult for Joshua to be separated from Haley and Aaron, it is in Joshua's long-term best interests to live with his father. We are confident he will still be able to have a good relationship with his half-siblings due to the time he will spend with them when visiting in Vicky's home.

Finally, Vicky contends we should consider Joshua's strong preference to live with her rather than with his father. When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining child custody rights. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). We acknowledge Joshua's clear statements of his desire to live with Vicky. However, Joshua was only nine years old at the time of trial. The evidence presented at trial in this regard was testimony of friends and family of the parties who stated they heard Joshua say he likes living with his mom and he wants to live with his mom. However, deciding custody is far more complicated than asking children with which parent they want to live. *In re Marriage of Harris*, 530 N.W.2d 473, 475 (Iowa App. 1995). After considering all relevant factors, we determine it is in Joshua's best interests to place primary physical care with Kenneth.

We acknowledge the custody question in this case is very close. Both Vicky and Kenneth are good parents and would make appropriate caregivers for Joshua. Our responsibility, nonetheless, is to determine which parent will better

serve Joshua's long-range interests. See *Heyer v. Peterson*, 307 N.W.2d 1, 9 (Iowa 1981). Accordingly, the district court's determination is affirmed.

AFFIRMED.