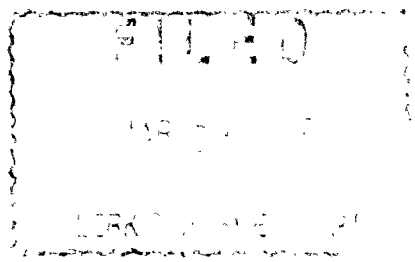
IN THE COURT OF APPEALS OF IOWA

No. 7-044 / 96-1084

IN RE THE MARRIAGE OF BRIAN E. KELLEY AND ANDREA J. KELLEY



Upon the Petition of
BRIAN E. KELLEY,
Petitioner-Appellant,

And Concerning
ANDREA J. KELLEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Thomas N. Bower,, Judge.

Brian Kelley appeals from various provisions of the decree of dissolution.

AFFIRMED AS MODIFIED AND REMANDED.

Mark S. Beckman and Frank Gilloon of Fitzsimmons, Beckman & Gilloon, Dubuque, for appellant.

Monica L. Ackley, Dubuque, for appellee.

Considered by Habhab, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

Brian Kelley appeals from the economic and custodial provisions of the decree dissolving his marriage to Andrea Kelley. We affirm as modified.

I. Background Facts and Proceedings.

Brian and Andrea were married in August 1989. They have four children: Joshua, born December 15, 1989; Allison, born March 8, 1991; Jason, born March 13, 1992; and Amanda, born July 21, 1994. All of the children reside with Andrea at the family's apartment in Dubuque.

Brian is now twenty-seven years old. He is employed as a security guard on a river boat. His net monthly income is $1136. Brian has received special training and intends to find a better paying job in law enforcement.

Andrea is twenty-six years old. She is unemployed. Her financial statement indicates she has a net monthly income of $80. Andrea receives a variety of public benefits to support her children. She has recently obtained an associate degree in business. Andrea testified she expects to earn seven to ten dollars per hour when she finds suitable employment.

Although the Kelleys agreed on joint custody, they were unable to agree on physical care. Each presented evidence of their positive parental qualities and the other's custodial deficiencies and character flaws. The district court found the parties' negative attributes were overstated. Andrea's primary care experience was

cited as the factor distinguishing her as the preferred physical caretaker. The parties were awarded joint custody. Andrea was awarded physical care. Brian was granted liberal and well-defined visitation and ordered to pay $585 per month child support pursuant to the applicable guidelines. Brian was also ordered to provide medical insurance coverage for the children. The parties were also ordered to maintain life insurance equal to the value of the child support the children will receive until age eighteen.

On appeal, Brian contends he should be awarded physical care of the children. He alternatively argues for increased visitation and reduced child support. He also challenges the district court's order requiring him to maintain life insurance and the provisions for payment of Andrea's attorney fees.

II. Scope of Review.

In this equity action, our review 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. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Physical Care.

In child custody cases, the best interests 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). *See also In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983); *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) (quoting *In re Marriage of Bowen,* 219 N.W.2d 683, 689 (Iowa 1974)).

The demands of physical care in this case are extraordinary. The parent awarded physical care will be required to attend to the daily details of primary care of four children ranging in age from five to eight years of age. This is a formidable assignment under the best of circumstances. Its difficulty is compounded in this case because the burden will fall on a single parent with limited financial resources.

We, despite Andrea's shortcomings, find that she is better suited to the task. The record is replete with evidence of her greater primary care experience and insight regarding the children's needs. Although Brian's physical care request stems from the best of intentions, his recently acquired interest in primary care provides

insufficient assurance that he will be able to meet the primary care needs of four children.

In making this determination we do not intend to minimize the significance of Andrea's misconduct. Her indiscreet behavior and lengthy social agenda raise serious and legitimate questions about her parental judgment. The district court, because of its trial perspective, was in a better position than we are to measure the sincerity of Andrea's commitment to these children. She is a most fortunate beneficiary of our willingness to defer to the district court's favorable assessment.

We also find consolation in Brian's strong interest in maximizing his role as joint custodian. His vigilant exercise of his joint custodial rights will ensure the children the moral and spiritual guidance they will need to cope with the many adjustments resulting from their parents' decision to divorce.

We affirm on this issue.

IV. Visitation.

Liberal visitation is in the children's best interests and should not be denied except for the most cogent reasons. *Lamansky v. Lamansky*, 207 N.W.2d 768, 770 (Iowa 1973). Reference to the visitation provisions of the decree indicates they were tailored to fit the Kelleys' special circumstances. In the absence of any provision resulting in a substantial deprivation of Brian's visitation rights, we decline to modify the visitation provisions of the decree.

V. Child Support.

Brian's child support obligation was set at $585 per month or 51.5% of his $1136 net monthly income. The district court's calculation of this amount included Andrea's net monthly income of $80. Brian argues Andrea's earning capacity exceeds her net monthly income and his child support should be recalculated accordingly.

The record indicates Andrea has recently obtained an associate degree in business. She testified her earning capacity is seven to ten dollars per hour. We, based on this evidence, find her earning capacity is greater than $80 per month. The record is not sufficient to permit us to recalculate Brian's child support because there is no evidence of the cost of child care resulting from Andrea's anticipated employment. We therefore remand this issue with instructions to recalculate Brian's support obligation based on Andrea's earning capacity and adjusted child care expenses. We do not retain jurisdiction.

VI. Life Insurance.

Both parties take issue with the district court's decision requiring them to purchase life insurance for the benefit of the children. They cite the expense associated with this requirement and their inability to pay the premiums. Although life insurance provides an extra measure of security for these children, there is simply

not enough money available to pay for it. We modify the decree by deleting this requirement.

VII. Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

We find no abuse of discretion by the district court in its award of $1000 trial attorney fees to Andrea. However, we determine each party should pay their own appellate attorney fees. The costs of this appeal should be assessed one-half to each party.

The judgment of the district court is affirmed as modified and this case is remanded for further proceedings consistent with this opinion.

AFFIRMED AS MODIFIED AND REMANDED.

IN THE COURT OF APPEALS OF IOWA 000235

No. 7-642 / 96-1084

FILED
NOV 25 1997
CLERK SUPREME COURT

IN THE INTEREST OF J.R., T.R., and A.F.,
Minor Children,

T.R., Mother,
Appellant.

Appeal from the Iowa District Court for Polk County, Constance Cohen, Associate Juvenile Judge.

The mother of three minor children appeals a district court ruling terminating her parental rights. **AFFIRMED.**

Mike Christensen, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Chris C. Odell, Assistant Attorney General, and Jaki L. Livingston, Assistant County Attorney, for appellee.

Marcia Schober, Des Moines, guardian ad litem for minor children.

Considered by Cady, C.J., and Huitink and Streit, JJ.

CADY, C.J.

A mother appeals the termination of her parental rights to her three minor children. She claims the State did not produce clear and convincing evidence her parental rights should be terminated. We affirm on appeal.

Traci is the mother of Jessica, born in September 1986; Tiffany, born in May 1989; and Alissa, born in November 1991. Scott is the father of Jessica. Joe is the father of Alissa. The father of Tiffany is unknown.

The Department of Human Services intervened in June 1993 following a report Traci and Joe were extremely intoxicated and assaultive. There were reports Joe was forcing Jessica to perform oral sex. Traci and Joe were arrested and the children were placed in emergency foster care. DHS entered a founded report of denial of critical care.

The children were adjudicated children in need of assistance on September 18, 1993. The children were placed in the care of Joe's mother, Ruth. Jessica was later placed in a psychiatric hospital for evaluation due to acting-out behaviors associated with the sexual abuse. She was then placed in foster care. Jessica and Tiffany receive individual therapy.

Traci has been diagnosed with dependent personality disorder. She has a history of relationships with abusive men. The juvenile court directed Traci to complete a parenting evaluation, attend parenting classes, continue in individual therapy, and submit random urinalysis. Traci was permitted supervised visitation with the children.

Traci participated in services, and on July 25, 1994, the children were returned to her care. Traci began a relationship with Jeff. In December 1994, the juvenile court ordered that Traci should not permit any male friends to visit the home when the children were present, except Jeff could be present during in-home counseling sessions.

On January 20, 1995, Jessica called 911 because Traci was being beaten by Jeff. The children were removed from Traci's care. Jessica was placed in a foster home. Tiffany and Alissa were placed with Ruth. DHS issued a founded report of denial of critical care. The juvenile court found Traci was in contempt of court for violating its order prohibiting her from having men in the home.

In February 1996, the State filed a petition to terminate the parental rights of Traci, Scott, and Joe. On September 27, 1996, the juvenile court entered an order terminating Joe's parental rights to Alissa. Traci, however, had shown recent progress. She had remained free of illegal substances. She had obtained a job, and was no longer involved in an abusive relationship. The court determined Traci and Scott should be granted an additional six months to show they could care for the children. The court noted Traci had recently been diagnosed with post-traumatic stress syndrome and battered women's syndrome. The court determined she should receive counseling to deal with these problems.

Traci began individual counseling with Toni Bell. She exhibited a negative attitude, however, and did not make any progress in dealing with the issues of post-traumatic stress syndrome and battered women's syndrome. Traci's visitation was

suspended in January 1997 due to her tendency to discuss inappropriate topics with the children. In February 1997, the juvenile court determined visitation should resume in a therapeutic setting.

Jessica was placed in the home of her father, Scott, and the State decided not to pursue termination of his parental rights. Ruth has cared for Tiffany and Alissa since February 1995, and remains committed to caring for them.

In April 1997, the State requested the juvenile court to reconsider the termination of Traci's parental rights. The court terminated Traci's parental rights pursuant to Iowa Code section 232.116(1)(e). Traci has appealed.

I. The scope of review in termination cases is de novo. *In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1994). The grounds for termination must be proven by clear and convincing evidence. *In re R.K.K.*, 554 N.W.2d 274, 277 (Iowa App. 1995). Our primary concern is the best interests of the children. *In re A.B.*, 554 N.W.2d 291, 293 (Iowa App. 1996).

II. Traci contends the State did not show, by clear and convincing evidence, her parental rights should be terminated. She claims she substantially completed all of the recommendations of DHS for the return of her children. She admits she had been resistant and uncooperative with therapy, but asserts this is due to battered women's syndrome.

In September 1996, the juvenile court gave Traci six more months to address the issues of post-traumatic stress syndrome and battered women's syndrome. Traci did not make any progress in therapy. Traci felt she did not need to address the issue

of how her relationships with abusive men had affected her children. Because she has not progressed in therapy, Traci's parenting skills have not improved. Traci continues to blame others for her current situation. We find the children could not be returned to Traci's care. We affirm the termination of Traci's parental rights under section 232.116(1)(e).

III. Traci claims termination of her parental rights is not in the children's best interests because it will effectively sever the sibling contact between the children. Jessica presently lives with Scott, while Tiffany and Alissa live with Ruth. Traci believes it is important for the children to maintain a relationship through her.

Jessica has been separated from her siblings since February 1995. She has now attached to her father, Scott. Tiffany and Alissa have lived with Ruth during this time, and she is committed to their care. The juvenile court has ordered liberal sibling visitation. Under the facts of the case, we find termination of Traci's parental rights is in the children's best interests.

We affirm the decision of the juvenile court terminating Traci's parental rights to Jessica, Tiffany, and Alissa.

AFFIRMED.