

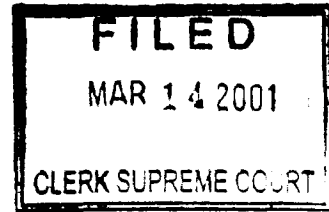
IN THE COURT OF APPEALS OF IOWA

No. 0-778 / 99-1703
Filed March 14, 2001

JOHN JOSEPH GOTTILLA,
Petitioner-Appellant,

vs.

WENDY SUE FRANKLIN,
Respondent-Appellee.



Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

John Gottilla appeals from a district court order on his petition to establish paternity, custody and child support. He contends the district court erred in awarding primary care of the parties' son to Wendy Franklin. **AFFIRMED.**

Jack E. Dustheimer, Davenport, for appellant.

David R. Treimer, Davenport, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Appellant John Joseph Gottilla challenges the decision of the district court awarding physical care of his son, Tyler, born on June 5, 1996, to Tyler's mother, Appellee Wendy Sue Franklin. John contends he, not Wendy, is the better physical custodian. Wendy requests an award of appellate attorney fees. We affirm.

John and Wendy had a long-term relationship but never married. The parties were cohabiting and living in New York at the time Tyler was born. Shortly after his birth they moved to Iowa where they continued to cohabit until Tyler was almost two years old.

This matter came before the court on John's petition to establish paternity and other matters filed in February of 1999. At the time the paternity action was filed John had been awarded custody of Tyler by way of a Domestic Abuse Order. In April of 1999 a guardian ad litem was appointed to represent Tyler's interests. The guardian ad litem later reported to the court he felt that Wendy should be given primary physical care.

Tyler remained in John's custody until the time of hearing on the paternity petition on September 7, 1999. Following the hearing the district court named the parties joint custodians and gave Wendy primary physical care, the court finding her the best person to provide day-to-day care for Tyler. John was given visitation and ordered to pay child support.

The controlling consideration in determining custody is the interest of the child. Iowa R. App. P. 14(f)(15). In deciding this question, we review the record de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but

are not bound by them. See *In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). There is no inference favoring one parent as opposed to the other in deciding which one should have custody. See *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long-range interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding. See *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985). The criteria governing custody decisions is the same regardless of whether the parties are dissolving their marriage or are unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988), *Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995).

Both John and Wendy love their son and have been involved with his care. Either can handle the responsibilities of primary physical care, a fact recognized by the district court in naming them joint physical custodians. However, the evidence shows that both John and Wendy have bad tempers.

John and Wendy met in New York City where Wendy, a native of Iowa, had gone to serve as a nanny for several years. Wendy became pregnant early in her relationship with John and initially wanted an abortion. John, born in 1964, had just finished spending a three-year term in prison at the time he met Wendy. During Wendy's pregnancy he was arrested on an intoxication charge and spent several months in jail. He was with Wendy, however, at the time of Tyler's birth and assisted with Tyler's care thereafter. John was still on parole at the time of

the paternity hearing. He received a transfer from New York when the couple moved to Iowa a short time after Tyler's birth.

John's probation officer testified giving John excellent marks for having an extremely clean home, having a good relationship with his son, and for being a hard worker. The officer further testified that he received calls from Wendy reporting John was drinking in a certain place, but on investigation the parole officer found Wendy's allegations to be untrue. The officer believed John may have gotten a bad deal originally but was of the opinion John was not bitter about it. Further, the officer said he would be shocked if John was to have further charges.

Wendy, born in 1972, graduated from high school in Muscatine, Iowa, and attended the University of Iowa for a semester before she took a job as a nanny in New York. At the time of trial Wendy was living with a man she met at the Baptist church who has a five-year-old son in his care. She testified they planned to be married in February of 2000.

Tyler is an outgoing, likable child who was three years old at the time of the custody hearing. His physical and mental health are quite good, although he does have asthma. His speech is limited for a child his age. Tests show his hearing is probably within normal range. His teeth are poor. He has been tested by the area education group and at the time of the hearing was enrolled in classes structured to help develop his speaking ability.

Wendy has extended family in Iowa. Although her parents are divorced, she contends they have a good relationship. John's family is in New York.

John contends that the district court did not give sufficient weight to the fact that Wendy was found guilty of domestic abuse. John argues evidence of domestic abuse essentially trumps all other factors that courts are directed to consider in making custody determinations. That one partner may have abused another is a factor considered in determining the custodial parent. See *In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa Ct. App. 1998); see also *In re Marriage of Brainard*, 523 N.W.2d 611, 614-15 (Iowa Ct. App. 1994).

Wendy hit John, and she was found guilty of a "domestic abuse assault." A protective order was entered finding that Wendy committed the act and that she represented a credible threat to the physical safety of John. We note in addition to charges of Wendy assaulting John there also was evidence that when arrested, she threw a telephone at officers trying to arrest her, kicked their legs and scratched their faces. John also admitted hitting Wendy. The district court said it considered domestic abuse a factor in awarding custody. We cannot say the district court did not give this factor sufficient weight.

Wendy complains that John still gives Tyler a bottle, takes him to work with him if he cannot find someone to care for Tyler, and has had four or five different childcare providers. She also advanced that John smokes cigarettes. John admits he smokes but says he generally goes outside or smokes in his office, the one room in the house where Tyler is not allowed.

Giving the required deference to the findings of the district court, particularly as to credibility of the parties, and recognizing the recommendation of the guardian ad litem, we affirm the custodial award.

Wendy asks that she be awarded appellate attorney fees, contending that John's income exceeds hers. Iowa Code section 600B.25 provides that upon a finding of paternity, "The court may award the prevailing party the reasonable costs of suit, including but not limited to reasonable attorney fees." *See Audas v. Searcy*, 549 N.W.2d 520, 523 (Iowa 1996). We award \$750 in appellate attorney fees.

AFFIRMED.