IN THE COURT OF APPEALS OF IOWA

No. 1999-597 (9-858) / 99-784
Filed March 15, 2000

IN RE THE MARRIAGE OF ERIC A. HOWE and KIM A. HOWE,

Upon the Petition of
ERIC A. HOWE,
Petitioner-Appellee,

And Concerning
KIM A. HOWE,
Respondent-Appellant.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, James Q. Blomgren, Judge.

Respondent appeals from the child custody provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

R.E. Breckenridge of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellant.

J. Terrence Denefe and Paul Zingg of Kiple, Kiple, Denefe, Beaver & Gardner, L.L.P., Ottumwa, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

When parents ask the courts to determine custody of their child, we must rely on numerous statutorily and judicially fashioned factors that evidence the child's best interests. Kim Howe asks this court to employ these factors in determining whether she or Eric should have primary physical care of their son. After reviewing the record and weighing all appropriate factors, we modify the trial court's decree and place primary physical care with Kim.

I. Background Facts & Proceedings.

Kim and Eric Howe met one evening at a local Ottumwa bar. At the time of the chance encounter, Kim was suffering through an unsuccessful marriage, and Eric had a girlfriend. Nevertheless, Eric called Kim the following day, and within a week's time they were living together. A few short weeks later she was pregnant. At the news, Kim told Eric the child was not his and returned home to live with her family. She later recanted, but Eric refused to be involved in the pregnancy.

Kim gave birth to her son, Eric Lynn, in June of 1996. Shortly thereafter, paternity was established, Eric acknowledged he was young Eric's father, the couple made amends, and once again began living together. They married a year later. Both Eric and Kim exercised poor judgment during the course of the relationship, and their marriage, as well as their ability to parent, suffered. They tended to drink to excess, had short tempers, grew easily frustrated with the challenges of parenthood, were verbally abusive, were prone to confrontation, and placed their son in situations that did not foster his growth. Eric was alleged to have become physically assaultive on various occasions and to have exhibited

racial bias. Kim made a somewhat feeble attempt at suicide and allegedly lacked stability in forming appropriate relationships. The couple, however, was not without their strengths—especially their mutual love for their son, their steady employment, and the strong support of their respective families. These strengths notwithstanding, the couple separated nearly a year after the marriage. Eric filed for divorce two weeks later. A couple of weeks later, Kim was involved with another man and again became pregnant.

The parties originally stipulated they would share equal physical custody of Eric Lynn. Kim then applied for modification, seeking temporary custody. The court held a hearing on affidavits only and awarded Eric temporary, primary physical care subject to Kim's visitation. In preparation for the dissolution proceedings, the court also ordered a home study. At trial the court, based in part on the home study's recommendations, ordered primary physical care with Eric, finding Kim lacked stability and emotional strength and Eric Lynn would be unnecessarily disrupted by further moves. Kim filed a motion pursuant to Iowa Rule of Civil Procedure 179(b), in part requesting primary physical care be awarded to her. The court denied her motion in that respect.

Kim appeals, claiming the court denied her due process of law by determining temporary custody by affidavit and erred in awarding Eric primary physical care.

II. Preservation of Error.

Kim claims her constitutional right to due process was violated when the court determined temporary custody by affidavit. Pursuant to local rule 34 of the eighth judicial district, "an application for temporary custody is made and

supported by affidavit." Rule 34, however, also allows the court, within its discretion, to hold an evidentiary hearing if requested. Kim did not request a hearing, nor did she object to the court's determination of temporary custody by affidavit. Therefore, error was not preserved as she did not apprise the court of her alleged constitutional violation. *See In re C.D.*, 508 N.W.2d 97, 100 (Iowa App. 1993). Merely because she thought such a motion would be futile does not alleviate her responsibility to preserve error. *See id.*

III. Primary Physical Care.

Kim next claims the trial court erred in granting Eric primary physical care of Eric Lynn.

A. Standard of Review. We review child custody determinations de novo. Iowa R. App. P. 4; *see In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings but give them deference because it had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

B. The Merits. In child custody cases, the child's best interest is our governing consideration. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996). Determining which parent will do better in raising the child is the critical issue. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). The 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 Harris*, 499 N.W.2d 329, 332 (Iowa App. 1993).

There are a number of statutorily and judicially recognized factors designed to assist in determining the primary caregiver. *See* Iowa Code § 598.41 (1997); *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). Those applicable to this case include: (1) The traits of each parent, including stability, character, and mental health; (2) The reports and recommendations of an independent professional; and (3) The parent with greater primary care experience. *In re Marriage of Winter*, 223 N.W.2d at 166-67; *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Each factor, however, does not necessarily impact the decision with equal force. *In re Marriage of Daniels*, 568 N.W.2d at 54. To the contrary, some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Id.*

The actions of *both* parties in the course of this marriage and separation betray poor judgment. However, the award of primary physical custody is not to be used as a punishment for bad decisions or a reward for good ones; rather the absolute best interests of the child must predominate. *In re Marriage of Brogden*, 344 N.W.2d 271, 173 (Iowa App. 1983). Pursuant to that goal, we will not mire our present determination by stacking the iniquities of each party and then assessing who has the smaller stack. Such an exercise is not contemplated by the overarching goal of the best interests of the child and would only serve to lower the parties. Our discussion will be to utilize those factors salient in reaching a just adjudication of which parent should be the primary caregiver.

1. Stability, Character, and Mental Health. The stability, character, and mental health of each parent will play a large part in the healthy maturation of

Eric Lynn. Although neither party is sound in all these areas, Kim's stability appears better suited to meet Eric Lynn's long-term needs. At the time of trial Kim, with assistance from her parents, purchased a mobile home. Kim's home would provide Eric Lynn a stable place to live, ample space to grow, and the continuity that a child demands. Conversely, Eric is living with his parents. He indicated that in time he would be moving out but could not articulate with specificity the type of home he would provide for Eric Lynn. Based on these circumstances, it appears Kim has taken identifiable strides to provide a stable living environment for her son.

The character and mental health of the respective parents are also of obvious concern. With regard to character, both parties have demonstrated traits that would hamper their effectiveness as parents. But as the home study evaluator noted many of these traits can be attributable to the parties' young age, and those objectionable character traits demonstrated by the parties have notably subsided with time. Additionally, they both have exhibited an increased understanding as to the requisite responsibility needed to properly raise a child. Their growth as parents is to be applauded but virtually cancels one another with respect to which parent should be the primary caregiver.

With regard to mental health, Kim did make a feeble attempt at suicide rather early in the marriage, but there is accurate medical documentation that she currently displays no symptoms associated with depression. Eric has displayed equally disturbing behavior but regarding anger management and his attitudes towards race. He has threatened Kim's social acquaintances and has

been prone to acts of violence. The parties' respective mental health issues fail to cut in favor of either parent.

2. Independent Reports and Recommendations. The court ordered the parties to submit to an independent home study. The professional conducting the study concluded Eric should retain custody of Eric Lynn. His conclusion, however, was not based on his analysis of the parties as parents, but rather on the proposition that to move Eric Lynn would disrupt the continuity of the living arrangement mandated by the temporary custody order. To rely on such a presupposition counters the well-established rule that "neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding." *In re Marriage of Roberts*, 545 N.W.2d 340, 342 (Iowa App. 1996). Because the evaluator relied on a proposition contrary to established case law, his final recommendations must be subjected to well-deserved scrutiny. Additionally, the evaluator concluded Kim demonstrates instability due to the frequency with which she engaged in romantic relationships. Eric, however, also had similar sporadic relationships.[1] We do not find this differentiation compelling. Because the parties have displayed equal instability in their relationships, the evaluator's conclusions are not substantiated. See *Id.* (ruling gender is irrelevant in determining the best interests of a child).

3. The Parent with Greater Primary Care Experience. The record indicates Kim has greater primary care experience. Eric acknowledged Kim was

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[1] Although the parties' conduct was substantially similar, Kim became pregnant on two occasions. We are not prepared to claim that a woman has an obligation to more closely guard her virtue then a male counterpart.

the primary caregiver during the first fifteen months of Eric Lynn's life. She continued to be the parent responsible for both taking and picking up Eric Lynn from daycare. Conversely, Eric continues to rely on his parents for Eric Lynn's needs. Eric had never lived alone with his son, his parents get Eric Lynn up in the morning, and his mother does the majority of the cooking. Kim simply has superior parenting experience and skill. She has demonstrated her superior parenting abilities. Although it is a benefit to Eric Lynn to have his father's family around him, Eric simply has not demonstrated he is the better parent. Kim has been Eric Lynn's caregiver. It is best for the child to continue with Kim.

C. Conclusion. The best interests of Eric Lynn require placement with his mother. We recognize the trial court had the opportunity to weigh the credibility of the parties, but the facts necessitate a different outcome. When the home study is discounted and Kim's parenting skills are coupled with her demonstrated stability, we find it is in Eric Lynn's best interest to appoint his mother the primary caregiver. The trial court is affirmed as modified, and the matter remanded for application of the proper child support guidelines, as well a determination as to an appropriate visitation schedule. Costs are taxed to appellee.

AFFIRMED AS MODIFIED AND REMANDED.

Miller, J., concurs; Huitink, P.J., dissents.

HUITINK, P.J. (dissenting)

I respectfully dissent. Unlike the majority, I am not prepared to second guess the professional judgment of the custody evaluator concerning Eric L.'s physical care. I also believe the trial court's perspective and resulting assessment of the credibility and sincerity of the parties' testimonial assertions are entitled to more deference than the majority allows.

Although the majority's decision is an apparent vindication of established principles concerning the appropriate weight given temporary custody orders, it does so at this child's expense. There is every indication that Eric L. is happily and comfortably situated in his present circumstances. His best interests are not served by disrupting this placement in favor of placement with a parent possessing such a troubling and substantial history of instability and poor parental judgment.

I also disagree with the majority's negative view of the custodial role assumed by Eric L.'s paternal grandparents. Their unselfishness and substantial contributions to his welfare are commendable. Eric A.'s willingness to rely on them for assistance, in my view, should weigh in favor rather than against awarding him physical care.

I would affirm.