IN THE COURT OF APPEALS OF IOWA

FILED
AUG 17 1995
CLERK SUPREME COURT

No. 5-288/94-1528

IN RE THE MARRIAGE OF PATTI ANN SUMMERS AND TIMOTHY PAUL SUMMERS

Upon the Petition of
PATTI ANN SUMMERS,

Appellant,

And Concerning
TIMOTHY PAUL SUMMERS,

Appellee.

Appeal from the Iowa District Court for Clarke County, James W. Brown, Judge.

Patti Summers appeals the custody, visitation, and child support provisions of the parties' dissolution decree. **AFFIRMED.**

Richard O. McConville of Coppola, Sandre & McConville, P.C., Des Moines, for appellant.

Eric Borseth of Borseth & Genest, Pleasant Hill, for appellee.

Heard by Donielson, C.J., and Sackett and Huitink, JJ.

DONIELSON, C.J.

Patti Summers appeals the district court's award of physical care of the parties' three children to Timothy Summers. She also requests an award of appellate attorney fees. We affirm the custody decision and deny the request for attorney fees.

I. CUSTODY.

"In child custody cases, the best interests of the child is the first and governing consideration." *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa App. 1991). We look to determine which parent will in the future provide an environment where the children are most likely to thrive. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App. 1993). Our review is de novo. Iowa R. App. P. 4. In reviewing a district court's award of custody we are not bound by its findings, but we give them deference because the district court had an opportunity to view the demeanor of the parties and evaluate them as custodians. *See Engler*, 503 N.W.2d at 625.

The evidence at trial revealed both Patti and Timothy love their children and could provide for their needs. The district court was correct in concluding each parent could do a competent job as the children's caretaker. However, both parents have faults which impact on their effectiveness as parents. In disciplining their children, Timothy utilizes a considerable amount of corporal punishment and Patti engages in a great deal of screaming and yelling. Neither method appears to be particularly successful. The district court found Patti's behavior to be somewhat

immature. She exhibits childish behavior when visiting her daughter's school and is resentful of Timothy's access to free child care and household assistance from his mother.

Dr. Porter is a child psychologist who treated the parties' oldest child. Dr. Porter concluded Patti had unreasonably placed the oldest child in the middle of her disputes with Timothy, and the child's outbursts and behavioral problems were a result of that conduct.

Custody decisions are not easy, and we are keenly aware of the superior vantage point of trial courts due to their ability to consider firsthand the demeanor and appearance of the parties. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). The trial court's assessment of the parties' credibility is particularly important in a case like this where there are conflicting allegations of physical abuse. The district court apparently did not find the allegations of domestic abuse to have been particularly credible as it did not refer to them in its ruling. Upon our de novo review we also find they are unsubstantiated and lack credibility.

The trial court found, and we agree, Timothy is a steady, reliable person and demonstrates good judgment. He has not attempted to undermine the children's relationship with their mother and appears likely to foster their relationship in the future. Patti, in contrast, has involved the children in her disputes with Timothy and has undermined their relationship with their father and paternal grandmother.

We are aware the social worker appointed to complete a home study recommended Patti be awarded the physical care of the children. While the recommendation of an independent custodial investigator may be considered in determining primary physical custody, it is not controlling. *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa App. 1993). After a review of the record, we concur with the district court's determination that several of the custodial investigator's conclusions were not supported by the evidence.

While Patti was the children's primary caretaker during the course of the marriage, Timothy has reduced his work hours and assumed more of the child care responsibilities. We find Timothy is better able to provide for the children's long-term best interests, and we affirm the district court's award of physical custody.

II. APPELLATE ATTORNEY FEES.

Patti has requested appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). Due to the parties' financial positions and our affirmance of the custody award, equity does not warrant an award of appellate attorney fees to Patti.

AFFIRMED.