

FILED

MAR 26 1985

281 SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RENEE OLBERDING AND MARK OLBERDING

UPON THE PETITION OF
RENEE OLBERDING,

)

Filed March 26, 1985

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Petitioner-Appellee,

)

AND CONCERNING
MARK OLBERDING,

)

4-549
84-742

Respondent-Appellant.

)

Appeal from the Iowa District Court for Carroll County, James C. Smith,
Judge.

Respondent-husband appeals from the child custody provisions of the decree
dissolving the parties' marriage. AFFIRMED.

Thomas H. Treinen, Battle Creek, for appellant.

James R. Van Dyke, Carroll, for appellee.

John A. Beltz, Glidden, for the parties' minor children.

Heard by Oxberger, C.J., Sackett, and Hayden, JJ.

OXBERGER, C.J.

The child custody provisions of the parties' divorce decree are the subject of this appeal. We reverse the trial court award of custody of the parties' two minor children to petitioner.

The petitioner below, Renee Olberding, and respondent, Mark Olberding were married three years at the time of the divorce. Two children were born, Wendy, now aged three, and April, aged two. Renee filed for divorce and was granted temporary custody of the children. Mark did not resist the temporary award of joint custody to the parties with physical custody to Renee until, according to him, he discovered that the children were being abused while in Renee's care. Mark asserts on appeal that the strong evidence of abuse shows he should be awarded custody of the children.

The allegations of abuse came to light during the couple's separation in 1982 and 1983. Carroll county social services personnel investigated the reports of abuse, and determined that abuse was founded in four of ten reported incidents. The report was made by child protective worker Ann Voge-Trullinger. In one incident there were four long scratches on Wendy's face noted on July 22, 1983. Bruises on the right cheek, thigh, and back were also noted. Both Renee and the children's daytime babysitter at first claimed the injuries were caused by April. The social worker testified the babysitter said, "The injuries happened at Renee's. . . she wasn't going to cover up for Renee." However, the babysitter later retracted some of her statements to the social worker.

A registered nurse observed the children at a baseball game in August 1983. The nurse said she saw that Wendy had been struck hard enough to leave a hand print of four fingers and a palm covering the girl's right cheek. She further testified that in her medical opinion, the mark could not have been caused by a child, but rather must have been the result of being hit by a teenager or adult.

According to the social worker, Renee denied knowledge of the hand mark on Wendy's face, but stated in court she thought April had hit Wendy. She also claimed April caused the scratches, although the social worker said a two-year-old's hand could not have made the marks.

The social worker also found Mark's mother, Ruth Olberding, and two sisters reported seeing Wendy with a black eye in June 1983. Ruth Olberding stated April told her, "Mommy hit her, and she was bad, and mommy hit her."

Wendy had problems with an ear infection in January 1982, and was seen by a Carroll physician Dr. Salazar. According to notes kept and records of the doctor, Renee told him she never filled one prescription for an antibiotic for the infection. In February 1982, Wendy was seen again for an ear infection and two prescriptions were apparently not given as directed. Another medical note in February showed Dr. Salazar discussed the recurring ear infections, but that the mother stated she would like to wait until summer to treat the infection when the child's cold might be gone. Wendy had been seen for a minor heart murmur in January 1982 by a specialist and was told to have the child rechecked in January 1983. According to Dr. Salazar's notes, he discussed the findings with Renee and indicated in his records, "patient's mother has little, if any, understanding of the findings or their significance." Dr. Salazar had also noted on January 14, 1982, that Wendy showed, "failure to thrive; growth curve shows fall off; patient's mother shows little or no concern and/or understanding. Patient's mother refused hospitalization for observation and nutritional habits." The follow-up check for the heart murmur in 1983 apparently was never made.

Renee denied that Wendy had even had a black eye, and told the social worker that Dr. Salazar's records must be wrong.

The court commented during testimony that it found credible the testimony of Mark's aunt, Judy Trestroet. She testified that Renee appeared to be a loving

and concerned mother. She also testified that in January 1983 Renee told her she had left the two girls in a car from approximately 11:00 p.m. to 3:00 a.m. outside a trailer while she visited a friend. The car was left running with the girls inside, since it was a cold night.

The social workers determined the incidents regarding the scratches on Wendy's face, the hand print on her face, the failure to provide medical care, and leaving the children in the car were "founded" incidences of abuse.

Renee says in her appeal that the social worker was biased, and based nearly all of the allegations in the report on statements made by Mark's mother. However, the record shows people other than Mark and his relatives provided evidence regarding the alleged abuse. The registered nurse reported the incident involving the hand mark, and Dr. Salazar's notes provide the basis for the allegation of denial of adequate medical care. Photographs show the extent of the scratches. There are also clear inconsistencies between Renee's denial that certain injuries existed, and reports of seeing the injuries by several people. Through the court's questioning the social worker pinpointed the injuries in question happened while the children were in the care of Renee.

Apparently, the evidence caused some concern for the court as well, since it ordered physical custody to be placed with Renee, but also ordered the Iowa Department of Human Services make monthly unannounced visits to Renee's residence and report any indications of threat to the well-being of the children.

Renee points out that Mark has pleaded guilty to a theft charge in 1979, prior to the marriage, and lost his license for being a habitual offender in 1978. He has also pleaded guilty to an OWI charge. Two contempt citations were filed against him for not paying child support. He says this occurred because he was working few hours and had little money at the time.

Renee testified she was the primary caretaker of the children during the time they were together. Both Renee, a cousin of Mark's, and Judy Testroet testified that, in their opinion, if Mark is given custody, it is his mother, Ruth,

and not Mark, who will be primarily responsible for raising the children. Mark denied this during the trial. She also claims Mark will be away from home for many days, but he testified that in the year prior to the trial his job caused him to be gone from home only seventeen days. Renee agrees, however, that Mark is a fit parent.

Whenever the charge of child abuse is made, we must act quickly and forcefully in the child's best interests. Yet, we must also exercise extreme care that the charge is not made and the person "convicted" on insufficient facts and in questionable circumstances. The consequences are far too severe. This court is not ignorant of the fact that during a heated battle for child custody in a divorce proceeding, when acrimony is sharp, accusations of child abuse can be used as a tool in attempts to sway the court.

When we look at the parenting skills of Renee, absent the child abuse allegations, we find a loving, concerned parent. The social worker who investigated the charges and others who have observed her with her children testify to a warm, affectionate relationship. Even Mark's relatives concede that Renee has been the primary caretaker of the two girls and the children appear to be well adjusted. The reported incidences appear to be isolated events.

In determining the placement of physical custody of the children, we are concerned with their best interests. In re Marriage of Castle, 312 N.W.2d 147, 149 (Iowa Ct. App. 1981). The factors considered in making such a determination are set out in In re Marriage of Winter, 223 N.W.2d 166-67 (Iowa 1974).

It is undeniable both parents love their children. Looking at the evidence as a whole, and giving weight to the trial court's decisions regarding the credibility of the witnesses, we determine the trial court decision should be upheld. We are

confident that if the children's well-being is threatened, the proper authorities will take the necessary legal procedures.

AFFIRMED.