IN THE COURT OF APPEALS OF IOWA

No. 6-265 / 95-1365

IN RE THE MARRIAGE OF KELLY JENKINS AND LESTER JENKINS

Upon the Petition of
KELLY JENKINS,

Petitioner-Appellee,

And Concerning
LESTER JENKINS,

Respondent-Appellant.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Robert C. Clem, Judge.

Lester Jenkins appeals the parties' dissolution of marriage decree. **AFFIRMED.**

R. Scott Rhinehart of Richard Rhinehart & Associates, Sioux City, for appellant.

Kelly Jenkins, pro se, Sloan, for appellee.

Considered by Sackett, C.J., and Habhab and Streit, JJ.

SACKETT, C.J.

The question in this appeal is which parent will make the better custodian. The trial court, finding the issue particularly close, resolved the issue in the mother's favor. We affirm.

Plaintiff-appellee Kelly Jenkins and respondent-appellant Lester Jenkins were married in 1988. They have two children from the marriage: Boe, born in January 1989, and Samantha, born in October 1991.

Kelly had one child, Janessa, prior to the marriage. Janessa is disabled. The Department of Human Services found Kelly had physically abused Janessa. Kelly received counseling and there have been no further allegations of abuse of Janessa by Kelly.

When the dissolution was filed, an ex parte order was entered awarding Kelly temporary custody and care of the children. Lester's visitation with Boe was to be in the presence of Kelly because Boe allegedly had complained Lester's sister put her hand down his pants and touched his penis. After investigation, the Department of Human Services found a basis for the charge and determined it was "founded" relying on the child's testimony. Lester's sister denied the allegations. No appeal was taken from the department's findings. The ex parte order was later modified to allow Lester visitation without Kelly's presence, but Lester was ordered not to allow his sister to be present during visitation.

A dissolution hearing and a hearing on Lester's application for rule to show cause why Kelly should not be held in contempt for failing to abide by a ruling on temporary visitation took place in May and June 1995. During the course of the dissolution hearing, Kelly made a report of sexual abuse against Lester alleging he had abused Samantha. The Department of Human Services investigated and found no basis for the complaint and termed it "unfounded." The trial court awarded the parties joint custody and Kelly primary physical care of the children. In its ruling on Lester's application to show cause, the court found Kelly in contempt and awarded Lester lost visitation time.

Lester appeals. He argues the court erred in awarding Kelly primary physical care. Specifically, Lester maintains the court did not give sufficient weight to evidence Kelly drinks and, at the time, was a poor care taker and physically abused her daughter Janessa. He further contends Kelly's failure to comply with visitation orders and her allegations he sexually abused Samantha show he should be the custodial parent.

We review de novo giving weight to the fact findings of the trial court, especially when considering the credibility of the witnesses. *In re Marriage of Love*, 511 N.W.2d 648 (Iowa App. 1993). We are not, however, bound by these determinations. *Id.* The question is where the children are more likely to be brought to a healthy physical, mental, and social maturity. *See In re Marriage of Collingwood*, 460 N.W.2d 486, 488 (Iowa App. 1988).

As did the trial court, we find the issues here extremely close. We are not able to determine from the record if Kelly's claim Lester sexually abused his daughter was made on misinformation or if it was, as Lester claims, an attempt by Kelly to gain an unfair advantage in the custody case. False allegations of deviant sexual behavior to gain an advantage in a custody case indicate lack of maturity and judgment on the part of the parent making the false allegations, and they weigh heavily against a parent making the allegations in a custody dispute.

Kelly has been the primary care taker. A home study of both parents by the Department of Human Services recommended Kelly receive physical care. There is little in the record concerning Lester's abilities as a parent. There is evidence he comes from a large family and has a good relationship with his own family and his parents, which inures to his benefit.

We have major concerns about Kelly's lack of cooperation with Lester's visitation. *See Marriage of Gonzales*, 373 N.W.2d 152, 154 (Iowa App. 1985). We expect Kelly will cooperate with visitation in the future.

The trial court observed the witnesses and made the credibility assessments. Giving the required deference to these credibility assessments, we affirm.

AFFIRMED.