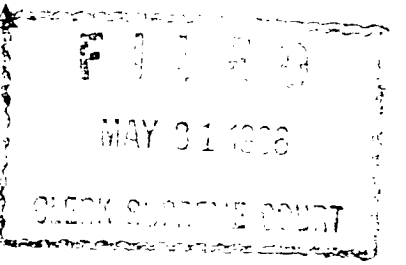
IN THE COURT OF APPEALS OF IOWA



No. 6-207 / 95-1457

IN RE THE MARRIAGE OF DEBORA LYNN GROVE AND TODD ALAN GROVE

Upon the Petition of
DEBORA LYNN GROVE,

Appellant,

And Concerning
TODD ALAN GROVE,

Appellee.

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Petitioner appeals from economic and child custody provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Michael J. Moon of Mowry, Irvine, Gianetto & Moon, Marshalltown, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ. Vogel, J., takes no part.

CADY, J.

This is an appeal from a decree entered by the district court awarding primary care of the parties three children to the father. On our de novo review, we modify the decree.

Todd and Debora were married in August 1990. They lived in a house next to Debora's parents outside St. Anthony, Iowa. They had three children, twins Cody and Levi, born February 16, 1991, and Austin, born September 4, 1993. Debora had custody of a daughter, Abby, from a prior relationship. The three boys are close to Abby.

Debora is a cosmetologist and worked during the marriage. She was also the primary caretaker of the children. Todd worked for a rental company in Ames, Iowa, earning $7.50 per hour.

Debora and Todd separated in June 1994, when Todd moved out of the marital home. Debora filed the petition for dissolution of marriage in October 1994, and obtained a no-contact order based on physical abuse by Todd. About the same time, Debora opened a hair salon with a male business associate who also moved into her house.

Todd drank excessively after the separation. He was convicted of OWI in February 1995, and lost his driver's license. Todd exercised visitation for a few hours each Wednesday and alternating Sundays. He did not exercise overnight visitation.

Todd lived with his mother and her boyfriend. He curbed his consumption of alcoholic beverages during the months prior to the dissolution trial in July 1995.

The district court awarded physical care of the children to Todd. It was critical of Debora's conduct in several ways, including sharing her home with her business partner "almost immediately" after the separation, "persistently" refusing Todd visitation, and sabotaging Todd's relationship with the children by, among other things, permitting the children to call her partner "daddy." Debora acknowledged a problem with the boys referring to her partner as "daddy," but denied encouraging this behavior. Debora was ordered to pay child support and maintain health and dental insurance on the children.

The district court also divided the marital property. It ordered Debora to pay debts totaling $9,333, and ordered Todd to pay debts of $3,818. Debora's debt total included debts associated with Abby and $5,000 in attorney fees.

Debora appeals. She claims the district court erred in awarding Todd primary physical care. She also asserts her support obligation was excessive and the division of property was unfair.

I. Primary Care

Numerous legal principles guide courts in determining the often difficult and arduous issue of child custody. First and foremost, is the best interest of the children. Iowa R. App. P. 14 (f)(15), *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). The other rules are more descriptive, and essentially help illuminate the best

interest standard. Nevertheless, the ultimate decision is fact-driven. Each case depends on its particular facts, and precedent, unlike most other areas of the law, has limited value to the decision-maker. *In re Marriage of Urban*, 359 N.W.2d 420, 423 (Iowa 1984).

In deciding the issue on appeal, appellate courts are often guided by the fact findings of the trial court. These findings are important because evidence is frequently in conflict, and the trial court is better positioned to resolve the conflict by seeing and hearing the witnesses. Consequently, weight is given to the findings of the trial court, especially when they involve credibility. Iowa R. App. P. 14 (f)(7). We are not, however, bound by them, but are required to make our own independent review of the evidence.

In this case, the trial court articulated two predominate reasons for awarding primary care to Todd. First, it was disturbed by the moral misconduct Debora displayed in allowing her male friend to move into the family home "almost immediately" after the separation. It also rejected Debora's testimony that her relationship with the friend was platonic. Secondly, the trial court was concerned by Debora's efforts to impair Todd's relationship with the children. The court felt Debora "persistently" denied Todd reasonable visitation of the children during the separation and encouraged to the children to refer to her roommate as "daddy."

We readily recognize moral misconduct of a parent to be a serious consideration in custody determinations. *In re Marriage of Hornung*, 480 N.W. 2d

91, 94 (Iowa App. 1991). A nonmarital sexual relationship can adversely impact the emotional and moral welfare of children. *Id.* However, we fail to find evidence to support the trial court's finding concerning the nature of Debora's relationship with the roommate. We cannot assume the existence of a sexual relationship based solely on evidence that two persons of the opposite sex share a house. Furthermore, the trial court was mistaken about the date of separation. The parties first separated in June. The roommate did not move in until after the dissolution petition was filed in October. Nevertheless, the live-in arrangement has not been beneficial to the children as exemplified by the confusion in referring to the roommate as "daddy."

The trial court also found Debora refused overnight and holiday visits between Todd and the children. Yet, the testimony to support this conclusion was limited to the brief, nonspecific testimony of Todd and testimony from Todd's mother that two requests for overnight visits were made shortly before the trial. On the other hand, Todd never made an application with the court for additional visitation during the pendency of the dissolution action, and admitted he wanted to wait until trial to get a "better view of it." Moreover, he made only one request for visitation through his attorney, every Wednesday and alternating Sundays, and Debora provided exactly what he requested.

Denial of reasonable visitation by a parent is a significant factor in determining the custodial arrangement. *See* Iowa Code § 598.41(1) (1995). However, the evidence in this case does not implicate this principle. In fact, Todd's failure to

enlarge his limited visitation schedule is more appropriately viewed adversely to his request for primary care.

In addition to Todd's complaisant attitude with the limited visitation schedule, Todd displayed irrational behavior during the late part of the marriage and frequently drank excessive amounts of alcoholic beverages. He has a history of violence, and has been convicted of operating while intoxicated on two occasions. Todd did not have a driver's license at the time of trial. He resided with his mother.

Debora is also burdened with adverse parenting characteristics. She has a temper, and established a household following the separation which has not been beneficial to the children. Notwithstanding, she was the primary caretaker of the children throughout the marriage. This role is not determitive in custody cases, but is important and is given careful consideration. *In re Marriage of Burkle*, 525 N.W.2d 439, 441-42; *In re Marriage of Fennell,* 485 N.W.2d 863, 865 (Iowa App. 1992). Debora also lives very close to her parents, who are supportive. This too is a factor to consider. *In re Marriage of Worthington,* 504 N.W.2d 147, 150 (Iowa App. 1993).

Finally, we must consider granting primary care of the children to Todd will result in the separation of the children from their half-sister. Siblings, including half siblings should be separated only for compelling reasons. *See In re Marrige of Quirk-Edwards*, 509 N.W.2d 476; *In re Marriage of Orte*, 389 N.W.2d 373. We fail to find

any compelling circumstances in this case, especially in light of the acknowledged close relationship between all the children.

On our careful de novo review of all the evidence, we are compelled to modify the decree entered by the district court. We grant primary care to Debora, with reasonable visitation rights to Todd. Todd shall have the same visitation rights granted by the district court to Debora.

II. Remaining Issues

We must next determine Todd's child support obligation. Todd's net monthly income, including regular overtime wages, is $1,180. Under the child support guidelines, his monthly support obligation should be $413. We modify the decree to impose a child support obligation on Todd of $413 each month, as well as $92 each month for medical insurance. The remaining terms of child support set forth in the decree applicable to Debora shall otherwise apply to Todd, except Debora shall continue to maintain health insurance for the children. We find the trial court equally divided the property and affirm the award.

AFFIRMED AS MODIFIED.

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

HUITINK, J. (dissenting)

I respectfully dissent. I would affirm the district court's decision awarding physical care to Todd.

The district court found Debra's living arrangements were detrimental to the children. This determination was based in large measure upon the district court's negative assessment of the sincerity and credibility of Debra's testimonial assertions. The district court was in a better position than we are to evaluate Debra's testimony and made a sound determination as to the parties' relative custodial ability. We should not interfere.

Moreover, there is abundant evidence that Debra does not appreciate the value of Todd's ongoing relationship with the children and that she has obstructed scheduled visitation. Debra's duty to maximize the children's contact with Todd is a fundamental obligation of a custodial parent. Iowa Code § 598.41(1). The district court wisely noted this flaw in Debra's custodial profile as an additional reason for awarding physical care to Todd. Although the majority cites several of Debra's redeeming parental attributes, these, in my view, are not sufficient to overcome these fundamental custodial deficiencies.