IN THE COURT OF APPEALS OF IOWA

No. 5-296 / 94-1684

FILED
AUG 17 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF PAULA JO GRAY AND ROBERT GRAY, JR.

Upon the Petition of
PAULA JO GRAY,

Petitioner-Appellant

And Concerning
ROBERT GRAY, JR.,

Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County, David L. Christensen, Judge.

Paula Jo Gray appeals the child custody provisions of the decree dissolving her marriage with Robert Gray, Jr. **AFFIRMED.**

Donna Schauer and T. Rae Hammans of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellant.

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellee.

Heard by Hayden, P.J., and Habhab, and Cady, JJ.

CADY, J.

Paula Jo Gray appeals from the child custody provisions of the decree dissolving her marriage with Robert Gray, Jr. The trial court granted Robert primary physical custody of the parties' child, Stacey Jo Gray. Upon our review, we affirm.

Paula and Robert were married on August 9, 1980. They had one child, Stacey, born December 14, 1987.

Paula has worked at Newton Manufacturing Company since 1980. Robert has worked at Grinnell Reinsurance Company as a physical damage appraiser for more than two years.

Paula filed a petition for dissolution of marriage on January 31, 1994. That day, she was met by Jasper County sheriff's deputies outside her attorney's office and involuntarily committed at the behest of her parents. She was released the following day with "no need for committal." Robert was awarded primary physical care of Stacey during the pendency of the dissolution action.

Paula was thirty-one years old and Robert was thirty-three at the time of the dissolution trial. At trial, Robert presented testimony concerning Paula's almost daily use of marijuana prior to the temporary custody hearing and her occasional use of "crank." He also introduced testimony that Paula was pregnant by her boyfriend, Billy Noah. Paula was also living with Billy. Robert's witnesses, including Paula's mother, testified Paula had grown more hateful in recent months and had used nasty language

in referring to Stacey. Robert admitted he had never seen Paula or Billy use drugs in front of Stacey.

Paula presented evidence that Robert also used drugs, although apparently less frequently than Paula. Paula also attempted to establish that Robert would not allow her visitation beyond that ordered by the court. Paula admitted she had failed to pay the temporary child support as ordered by the court.

On October 10, 1994, the district court entered its decree dissolving the Grays' marriage. The court awarded joint legal custody and gave primary physical care of Stacey to Robert with liberal visitation for Paula. The court noted its concern with Paula becoming pregnant by another man during the marriage and with her failure to pay child support.

The court ordered Paula to pay $300 per month child support and ordered a mandatory wage assignment to ensure payment. Paula was given the tax deductions for Stacey, assuming she was current on support. The court gave Robert the marital home subject to the mortgage and awarded Paula a cash settlement of $9150, which included a deduction for arrearages in child support. The court gave each party the personal property in his or her possession and divided the vehicles.

Paula appeals. She contends the district court placed inordinate weight on her pregnancy by Billy and failed to give adequate consideration to her role as primary caretaker throughout most of the marriage. She argues Robert failed to show she has

substance abuse or mental health problems and notes Robert also used drugs.

I. Scope of Review

Our review of this equity proceeding is de novo. Iowa R. App. 4. We have a duty to consider the entire record and adjudicate the parties' rights anew. *In re Marriage of Worthington*, 504 N.W.2d 147, 149 (Iowa App. 1993). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Primary Care

In child custody cases, our first and governing consideration is the best interest of the child. The factors we consider in awarding custody are set out in our statutes as well as our prior cases. *See* Iowa Code § 598.41(3) (1993); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983). These factors bear on the governing consideration of what will be in the child's long-term best interests. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). The critical issue in determining the best interests of the child is which parent will do better in raising the child to healthy, physical, mental, and social maturity. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). Gender is irrelevant, and neither party should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *Id.*

Paula asserts the only reason the trial court granted Robert primary custody was

because of the moral misconduct she displayed by entering into a permanent relationship with Billy prior to the divorce. After reviewing the record, we conclude this was not the sole reason for the court's decision. Moreover, we do not place emphasis on it. There was no evidence Paula's conduct adversely effected Stacey. *See In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa App. 1983). Nevertheless, moral misconduct is a factor to consider in custody determinations. *In re Marriage of Hornung*, 480 N.W.2d 91, 93 (Iowa App. 1991).

Paula correctly asserts her role as primary caretaker, prior to the separation, deserves careful consideration in this difficult custody decision. *See In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the parent who has been the primary caretaker of the child during the marriage will not necessarily be designated by the court to be primary caretaker at the time of the divorce. *Burkle*, 525 N.W.2d at 441. Each case must be resolved on its particular facts. *Id.*

In this case, we recognize Paula was Stacey's primary care provider for six years. This role included preparing and planning meals, providing transportation to and from school, arranging medical care, educating, disciplining, and spending time together.

We also understand the primary reason Robert was less involved in Stacey's daily activities was because his work schedule was less flexible than Paula's and he did autobody repair work in the evenings. After Robert received custody, following the temporary custody hearing, he changed his work schedule to spend more time with

Stacey. Additionally, Paula and her parents testified Robert was a good parent during the marriage and has continued to be sensitive to Stacey's needs since receiving custody. Paula's parents are also available to assist in Stacey's care.

The final factor to be considered in this case is the parties' drug use. The record indicated both parties used drugs during the marriage Paula, however, was a heavier user. Until the temporary custody hearing she smoked marijuana daily and occasionally used crank. The record indicated her use of crank during the last year coincided with angry outbursts. Billy also used drugs regularly, previously sold drugs, and sees nothing wrong with using marijuana. We believe these facts reflect negatively on the wholesomeness and stability of the environment Paula can provide for Stacey.

Considering all the evidence, we agree with the trial court that Stacey's best interests will be served by awarding primary care to Robert. We recognize the decision is very close in light of Paula's role as the primary caretaker and Robert's previous drug use. However, in these close cases we give weight to the trial court's findings. *Burkle*, 525 N.W.2d at 442; *In re Marriage of McDowell*, 244 N.W.2d 238, 239 (Iowa 1976). Moreover, Robert has demonstrated the ability to provide Stacey with a stable home environment. He has also adjusted his schedule to accommodate his expanded caretaking role.

We affirm the trial court. Costs are equally assessed to both parties.

AFFIRMED.