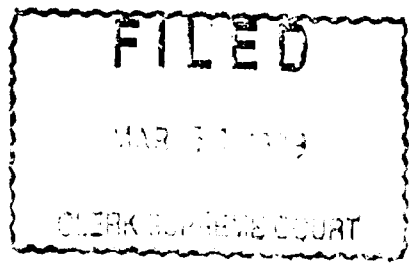
IN THE COURT OF APPEALS OF IOWA

No. 9-086 / 98-249
Filed March 31, 1999

IN RE THE MARRIAGE OF KATHY JANSSEN AND KEVIN JANSSEN



Upon the Petition of KATHY JANSSEN,

Petitioner-Appellant,

And Concerning KEVIN JANSSEN,

Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart Scoles, Judge.

Kathy Janssen appeals the dissolution decree awarding primary physical care of the parties' children to Kevin Janssen. **AFFIRMED.**

John G. Sorenson of Stanton & Sorenson, Clear Lake, for appellant.

Wayne Oltrogge, Clear Lake, for appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

PER CURIAM

Kathy Janssen appeals the dissolution decree awarding primary physical care of the parties' children to Kevin Janssen. We affirm.

Kathy and Kevin were married in October 1980. They have three children: Troy, born April 15, 1981; Michael, born September 28, 1983; and Adam, born July 10, 1988.

Kathy was born in May 1961. Following graduation from high school, she attended some classes at LaJames School of Cosmetology. In the year prior to the trial, Kathy was employed as a second shift saw operator at Cole Sewell in Clear Lake.

Kevin was born in December 1959. Kevin quit high school at age sixteen and apparently has not obtained any additional education. For almost five years prior to the trial, Kevin was employed as a salesman for J & W Distributing.

Kevin has a history of substance abuse and abusive behavior toward Kathy and reportedly has had physical altercations with Troy. Following an incident on August 2, 1996, during which Kevin broke Kathy's jaw, Kevin apparently pled guilty to domestic abuse assault and served two days in the county jail. In addition, Kevin was required to attend the Batterer's Education Program. Kevin also received outpatient counseling for alcohol abuse at the Prairie Ridge Addiction Treatment Services Center. It is undisputed Kevin has never physically abused the younger boys, Michael and Adam; however, they have observed his abuse of Kathy.

One week after she filed a petition for dissolution of marriage, Kathy invited her boyfriend, Shane Maben, another second shift worker at Cole Sewell, to move into the basement of the family home with her. Kevin, Kathy, and Shane lived in the family home from mid-October up to the time of trial. This living arrangement created enormous stress in the home. Consequently, Troy dropped out of school and moved out of the family home. There were also a number of verbal confrontations between Kevin, Kathy, and Shane, none of which became physical. Kathy testified she had called the police to the residence on three occasions since Shane moved in and had gone to the police station on a number of other occasions.

I. STANDARD OF REVIEW. Our review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings, but we do give them deference considering its opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

II. PRIMARY PHYSICAL CARE. Kathy contends the district court erred in awarding primary physical care of the parties' children to Kevin. We disagree.

The critical issue before us is the best interests of the children. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996). This must, of necessity, be the first and governing consideration in our discussion. *Id.* The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the

best interests of the children is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

In the case at bar, the district court faced a difficult decision; neither party is an attractive custodial parent. The district court thoroughly considered the evidence and concluded Kevin should have primary physical care of the children. We have fully reviewed the record, and we agree with and adopt the district court's careful assessment of the parties and the facts of this case:

> The court has serious doubts regarding the ability of either party to act as a competent custodial parent. While Kathy testified that the children are her main priority, her actions indicate otherwise. Kathy brought Shane into the home approximately one week after filing for divorce, without regard to the obvious effect that action would have on the boys. Either she was ignorant to the stress being felt by the boys, or she was indifferent to it. In either event, it does not speak well of her ability to act as a custodial parent.
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> . . . Even after Kevin moved back into the home, Kathy stubbornly refused to ask Shane to leave. As a consequence, there were a number of confrontations at the home during the early morning hours and the police were called on several occasions. Not surprisingly, Troy

apparently decided that he would rather live elsewhere and moved out. While Kathy conceded that Troy apparently left due to stress in the home, she still did not request Shane to leave and he remained at the residence at the time of the trial.

Since it is likely that Shane will be living with the children if custody is awarded to Kathy, the court believes that it is appropriate to consider Shane's parenting abilities. According to Michael, Shane came to Michael's school shortly after he moved in, removed him from class, and accused Michael of stealing Shane's cigarette lighter. The court believes that it was inappropriate for Shane to remove Michael from class for that purpose. Presumably, the issue could have been raised at home. The court also notes that Shane has "lost contact" with his youngest child (a dissolution of marriage is apparently pending) and testified that he did not even know the whereabouts of his oldest child, age six.

By the same token, however, the evidence supports a finding that Kevin has a history of violence and substance abuse. It can be argued that Kevin was provoked on August 2, 1996, when Kathy hit him in the head on several occasions as he drove back from Nora Springs. Kevin's reaction was out of proportion, however, resulting in Kathy suffering multiple fractures to her jaw.

Unfortunately, the incident on August 2, 1996, was not an isolated one. Kevin apparently assaulted Kathy periodically throughout the marriage. Generally, those episodes occurred after both parties had been drinking excessively. The evidence also indicated that Kevin had had physical altercations with Troy.

Kevin acknowledged that he was a "borderline" alcoholic and previously drank heavily. Although the court was not provided with any reports, Kevin apparently received outpatient counseling at Prairie Ridge following the incident on August 2, 1996. Kevin testified that he benefitted from the counseling and did not drink from August 2, 1996, until the petition for dissolution was filed in September of 1997. According to Kevin, he now drinks once or twice per week.

Kevin has also now completed the Batterer's Education Program. Kevin opined that it "helped a lot" and there was no evidence of any physical abuse since August 2, 1996. While Kevin has apparently engaged in verbal confrontations with Kathy and Shane, those incidents have not escalated into physical confrontations.

To Kathy's credit, she has taken a more active interest in the boys' education. As indicated above, Adam has some learning disabilities and Kathy has attended staffings at Adam's school to discuss his needs. In addition, Kathy makes sure that Adam takes the

Ritalin which was prescribed following his diagnosis with attention deficit disorder and hyperactivity. Kevin has not been proactive regarding Adam's problems or education and expressed a desire to take Adam off Ritalin, although Kevin would not appear to have any special knowledge in that regard.

Similarly, after Troy quit school, Kathy went to the school and met with the superintendent and Troy's counselors. While both parties testified they have encouraged Troy to return to school and he apparently intends to do so, Kathy appears to have made a greater effort in contacting the school to determine the problem and facilitate Troy's return.

It would appear, however, that Kevin's work schedule allows him a somewhat better opportunity to supervise the children. As noted above, Kathy leaves for work immediately after Adam returns home from school in the afternoon and she does not get home until the early morning hours. While Kathy testified that she could switch to the first shift, she has not made any effort to do so, despite the fact that the petition for dissolution of marriage has been pending for four months. If the children were truly Kathy's first priority, the court believes she would have made every effort to switch to the first shift so that she could be home in the evenings with the boys.

Kevin's work schedule is not, however, without problems of its own. Kevin apparently leaves for work at 7:00 a.m., which means that Adam would have to go to a day care provider for an hour or so prior to school. Adam is apparently home alone after school until Kevin gets home from work or Michael returns from school. The record would indicate that Kevin often leaves the children home alone in the evening while he is visiting friends.

According to Michael, both parties told him that it was necessary for him to "choose" between them. When speaking with the court, Michael was clearly reluctant to make negative comments about either parent. It was clear, however, that Michael disapproved of Shane residing in the family home. The court notes that Kevin had filed a certificate of completion, showing attendance at the Children in the Middle program, while Kathy has apparently failed to attend the program, notwithstanding the provisions of Iowa Code § 598.19A.

As the court indicated at the outset, both parties have substantial shortcomings as parents. Accordingly, the question of which party should have physical custody is a difficult one for the court. After considering all of the facts and circumstances, however, the court concludes that Kevin should receive primary physical care. Kathy's failure to take any action to make herself available in the evening to

> watch the children, and her insistence on having her boyfriend live in the house despite its adverse effect on the boys, demonstrates her unwillingness to put the children's best interests ahead of her own. While Kevin is not without fault, he has completed a substance abuse program and Batterer's Education Program and there is no evidence of excessive drinking or physical abuse since that time. Kevin's work schedule allows him to be available in the evenings to supervise the children.

This case would be easy to decide absent Kevin's domestic abuse history. We are concerned about that history and how it will affect Kevin's ability to properly raise the children. The district court had the opportunity to observe the parties firsthand and, with all the evidence at its disposal, decided Kevin would make the better primary care giver.

The district court properly acknowledged Kevin's prior history of abuse and noted he had attended the Batterer's Education Program and received outpatient alcohol counseling at Prairie Ridge. In addition, the district court noted Kevin attended the Children in the Middle Program while Kathy did not. The district court also noted the importance of the fact there has been no further domestic abuse on Kevin's part since August 2, 1996, notwithstanding the extreme pressures present within the residence.

Conversely, the district court was extremely troubled by the fact Kathy would ask her boyfriend to live with her in the basement of the family home while the divorce was pending. Her only explanation for this lack of judgment was that, "He didn't have any place to live." The district court correctly concluded that either "she was ignorant to the stress being felt by the boys or she was indifferent to it." We fully

agree with the district court's conclusion that in either event it affects her ability to be a proper custodial parent. The atmosphere created by the living arrangements of Kathy and Shane within the marital residence caused enormous stress to the boys and is not conducive to a healthy custodial environment.

The children obviously love both parents but disapprove of Shane. His actions have caused the children stress and embarrassment both within the home and at school. A child's expressed preference, while not controlling, is entitled to some consideration in matters of custody. *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981).

We have fully reviewed the facts of this case and agree with the custody determination of the district court. This decision will best ensure that the children are placed in the environment most likely to bring them to a healthy physical, mental, and social maturity. *Kunkel*, 555 N.W.2d at 253.

We specifically conclude the district court has given the proper consideration to the significance of domestic abuse in this case. Iowa Code § 598.41; *In re Marriage of Ford*, 563 N.W.2d 629, 632-33 (Iowa 1997).

AFFIRMED.

Mahan and Zimmer, JJ., concur; Streit, P.J., dissents.

STREIT, J. (dissenting)

I respectfully dissent. The able trial court in this case has attempted to find the least dysfunctional place for the children. The choice confronting the trial court, and this court, is the placement of the three children in the care of a mother having a relationship with a man who disrupted the family or a father who has wrecked the family with violent and drunken episodes. When confronted with this tough choice, the trial court performed the immense job of weighing the benefits and detriments of primary care with each parent and decided in favor of the father because of the mother's instability evidenced by her poor choices concerning her male friend. I would place primary physical care with the mother rather than in the instability of the father's household with the drinking and domestic violence. The mother has been the primary caregiver of these children. Primary physical care of the children should continue with the mother.