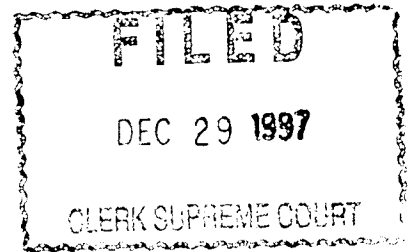


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IN THE COURT OF APPEALS OF IOWA

No. 7-484 / 96-2148
Filed December 29, 1997



**IN RE THE MARRIAGE OF CONNIE SUE LETT
AND DARRIN J. LETT**

Upon the Petition of
CONNIE SUE LETT,
Appellant,

And Concerning
DARRIN J. LETT,
Appellee,

Appeal from the Iowa District Court for Muscatine County, David H. Sivright,
Jr., Judge.

Connie appeals and Darrin cross-appeals the parties' dissolution of marriage
decree. **AFFIRMED AS MODIFIED.**

James W. Affeldt and Richard Q. Barrett of Elderkin & Pirnie, P.L.C., Cedar
Rapids, for appellant.

Theodore F. Sporer and Barry J. Boline of the Sporer Law Firm, P.C., Des
Moines, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

STREIT, P.J.

Connie Lett appeals the custody ruling of the district court awarding primary physical custody of the children to Darrin Lett. Our primary task is to determine how extramarital affairs, domestic abuse, and primary caregiver status should weigh on this custody decision. We modify the custody ruling and other provisions of the decree regarding the children. Darrin cross-appeals contending the trial court erred in awarding Connie alimony and in dividing the property and debts of the parties. We affirm on those issues.

I. Background & Facts.

Darrin and Connie were married in 1983. They have three children: Julia, born May 27, 1984; Justine, born July 12, 1986; and Jena, born February 10, 1992. Darrin is not the biological father of Jena, but is listed as her father on her birth certificate.

Connie, at the time of trial, was thirty-one years old. Darrin was thirty. Both are high school graduates. Connie has a sporadic working history which includes jobs as a factory worker, waitress, and sales cashier. At the time of the divorce she was unemployed. Darrin currently works at Occidental Chemical Company.

Both parties had extramarital affairs during the marriage and Connie's affairs resulted in the birth of Jena. There is evidence of domestic abuse by Darrin. Both parties claim they were the primary caregiver of the girls.

The court awarded primary physical custody of all three girls to Darrin. The court ordered Connie pay child support once she became employed; the amount to be

determined by a separate order at that time. Darrin was ordered to pay Connie \$200 per month alimony for thirty months. The court distributed the parties' marital assets and debts.

II. Standard of Review.

Our review is denovo. Iowa R. App. P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Primary Custody of the Three Girls.

Connie contends the court erred in awarding physical care of the children to Darrin. She argues the court did not properly consider Darrin's abusive behavior and placed too much emphasis on her "moral misconduct," when it was not shown to have an impact on the girls. Connie argues she was the children's primary care provider throughout the parties' marriage, is better able to meet the children's needs, has a better relationship with the children, and that Julia stated a preference to live with Connie.

The controlling consideration in child custody cases is always what is in the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). The decision requires us to select the custodial parent who can minister most effectively to the long-term best interests of the children and place them in an environment that

will foster healthy physical and emotional lives. *In Re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

A. Moral Misconduct. In its custody determination the trial court discussed, at length, Connie's extramarital affairs and sexual relationships before and after the separation of the parties. Darrin had extramarital relationships during the parties' separation as well. Moral misconduct via extramarital affairs has been recognized as a factor in determining which parent should serve as the primary caretaker of the children in a divorce. *Daniels*, 568 N.W.2d at 54. Extramarital affairs may be given greater weight when they impact the children. *See In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa App. 1983)(extramarital affair was given greater weight when the affair occurred in front of the children).

Although a legitimate factor of consideration, moral misconduct is not the only factor in a custody determination. *See Daniels*, at 57 (Sackett, J. dissenting, "no one negative behavior should be elevated to the point where it becomes the sole dispositive factor or it cleanses the other spouse of prior sins"). It is not the task of the judiciary to sort out the intricacies of extramarital affairs in its custodial decisions. There was nothing in the record stating Connie's affairs took place in front of the children or adversely affected them.

B. Domestic Abuse. There is evidence of domestic abuse by Darrin. Domestic abuse is a factor in determining the custodial parent. *Daniels*, 568 N.W.2d at 54. Evidence of domestic abuse creates a rebuttable presumption against awarding

custody to the abuser. See *In re Marriage of Ford*, 563 N.W.2d 558 (Iowa 1997). It does not, however, trump other statutory and common law factors. *Id.* Untreated or repeated battering is given considerable weight in determining the primary caretaker and in some circumstances may foreclose an award of primary care to a spouse who batters. *Daniels*, 568 N.W.2d at 558. Darrin has a short temper and has been physically and verbally abusive to the girls and Connie.

There are several allegations of violence in the record, some uncontested. Julia testified Darrin once tried to push her down the stairs, hit her for not putting a toy away, and yelled at her. She testified she was afraid of him. He also hit Justine. Darrin hit Connie, in front of the girls, causing bruises on her arms and face. In addressing this issue the trial court stated: “Darrin has had problems with drinking and anger management, and has been physically abusive of Connie.” Darrin conceded he assaulted Connie in 1990 and before in “stressful” situations.

Because of the “ravaging and long-term consequences [it] has on children, domestic abuse is not to be taken lightly or accepted.” *Id.* at 55. This fact weighs heavily upon our decision to modify the trial court’s custody award.

C. Primary Caregiver Before Divorce. Connie was the primary caregiver of the girls. The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated by the court to be primary caretaker at the time of the divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the role the primary caretaker has played in the lives of the children

is given consideration in custody disputes. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). Allowing a parent to continue as the primary caretaker after the divorce gives continuity to the lives of children. *Id.*

The trial court recognized Connie as the primary caregiver of the children. Connie performed nearly all of the household duties. She cooked, cleaned, did laundry, and arranged for medical care and child care for the girls. She took Julia to school and to her extracurricular activities. The girls were well-adjusted socially and academically with Connie as the primary caregiver.

Connie's role as primary caregiver weighs heavily upon our decision to award her custody. As a result of her role, she has developed stronger interpersonal relationships with the girls. The fact she has a stronger relationship with her girls than Darrin is evidenced by her daughter, Julia, a mature, bright twelve-year-old, stating a preference to live with Connie. Connie is better suited to meet the emotional and social needs of the girls. For all these reasons, it is in the best interests of the girls that Connie, the primary caretaker of the children before the divorce, be awarded primary physical care after the divorce.

D. Custody of Jena. Even though we decide Connie should be awarded the primary physical care of all three girls on other grounds, we address the custody of Jena, who is not the biological daughter of Darrin. It is presumed children born during a marriage are born of the marriage. *See In re Marriage of Bethards*, 526 N.W.2d 871 (Iowa App. 1994). The advent of blood testing has weakened this

presumption. *Id.* Although blood tests are not conclusive evidence of nonpaternity as a matter of law, *Petition of Bruce*, 522 N.W.2d 67, 70 (Iowa 1994), they are highly persuasive on the issue of nonpaternity. *Id.* (citing *In re Marriage of Schneckloth*, 320 N.W.2d 535, 538 (Iowa 1982)).

Neither party has brought a paternity action. The court, however, applied the criteria in sections 598.21(4A) and 600B.41A(3) to determine Connie had not met the burden to dispute Darrin's paternity of Jena. Both parties and the court acknowledge Jena is not the biological child of Darrin. The fact Jena is not the biological child of Darrin is an additional factor in our decision to award primary physical care of Jena to Connie.

We modify the order of the district court to order primary physical care of the children be with Connie. We revoke the trial court's award of joint legal custody of Jena and give sole legal custody of her to Connie. Darrin shall pay child support for Julia and Justine.¹ Darrin's net monthly income after the appropriate deductions are made is \$2917.87. Connie is able to find minimum-wage employment. We have attributed a minimum-wage forty-hour-per-week job to Connie in determining child support. This is a net wage of \$1138.21 per month. Under the child support guidelines, Darrin shall pay \$931 to Connie for the support of the two children. This amount shall be reduce to \$632 for one child. Darrin is entitled to claim the

¹ Darrin is not the biological father of Jena. The trial court rejected his argument he was Jena's equitable father. Thus, he is not obligated to pay child support for Jena. See *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995).

dependent income tax deductions for Julia and Justine if he is current on his support obligation at the end of the year. Darrin is ordered to maintain group medical, health, and hospital insurance through his employer for Julia and Justine. The parties shall equally pay the uninsured medical costs of the children. The personal items of the children which the district court ordered Connie transfer to Darrin on page five of its November 1996 decree shall stay in the possession of Connie for the girls' use.

It is in Jena's best interests to continue her relationship with her sisters and Darrin. Darrin shall have visitation with all three girls. The district court ordered Connie was entitled to liberal visitation.² The visitation provisions in the court's July 19, 1996 order will apply to Darrin rather than Connie.

IV. Rehabilitative Alimony.

Darrin cross-appeals contending the trial court erred in awarding Connie \$200 per month alimony for a period of two and one-half years. Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App.1995). Alimony is not an absolute right; an

² The court ordered:

Connie is entitled to liberal visitation, provided it shall not interfere with the children's normal schooling. When arranging visitation, the parties must be flexible concerning each child's participation in special events, school or church activities, and sports, and shall remain sensitive to the high need for each child to maintain social peer group activities. Connie must be kept fully informed of all such involvements, not only to allow coordination of visitation, but to ensure meaningful, continuing contact with the children, essential in joint legal custody cases. Both parties must provide the children a smoke-free environment at all times.

award depends upon the circumstances of each particular case. *Id.* Self-sufficiency is the goal of rehabilitative alimony. *See In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989). Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of re-education and retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. *Id.* at 63.

Connie and Darrin's marriage lasted thirteen years. Even though she has worked at various jobs during the marriage, she was a housewife at the time of the divorce and is currently unemployed. Rehabilitative alimony has been found to be appropriate when the spouse has been out of the job market. *In re Marriage of Francis*, 442 N.W.2d 59, 66 (Iowa 1989). The district court's award of alimony was appropriate under the circumstances. We affirm this issue.

We consider property division and alimony together in evaluating their individual sufficiency. *Miller*, 532 N.W.2d at 162. After de novo review of the property and debt division and taking into consideration the rehabilitative alimony award, we affirm the court's distribution of property and debts as equitable.

AFFIRMED AS MODIFIED.