IN THE COURT OF APPEALS OF IOWA

No. 4-127 / 93-1335

FILED
MAY 26 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GAIL RAYMOND KRUSE AND KELLY JO KRUSE

Upon the Petition of
GAIL RAYMOND KRUSE,

Petitioner-Appellant,

And Concerning
KELLY JO KRUSE,

Respondent-Appellee.

Appeal from the Iowa District Court for Montgomery County, James M. Richardson, Judge.

Gail appeals from the district court's order granting Kelly physical custody of the parties' two children. **AFFIRMED AS MODIFIED.**

Thomas E. Stamets of Stamets Law Office, Red Oak, for appellant.

Bruce E. Swanson of Swanson Law Firm, Red Oak, for appellee.

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

HABHAB, J.

This is an appeal by Gail Kruse from a district court order granting custody of both of the parties' two children to Kelly Kruse.

Gail and Kelly Kruse were divorced on August 26, 1991. Kelly was awarded primary care of the the parties' daughter, Emily, born November 15, 1989, in accordance with the parties' stipulation. Gail was awarded "liberal visitation." At the time the dissolution decree was entered, Kelly was pregnant with the parties' second child. Gail had moved to the state of Washington and was living with a girlfriend. The district court retained jurisdiction to determine custody and child support issues relating to the parties' unborn child.

Olivia was born October 23, 1991. Kelly called Gail and encouraged him to return to Iowa to be a part of his children's lives. In March 1992, Gail did return to Iowa and moved into Kelly's house. Kelly testified that this was to be a temporary arrangement until Gail could find a place of his own. Gail worked as an over-the-road trucker and lived at Kelly's house or his parent's house in Nebraska when he was not driving.

In October 1992, Kelly filed a petition for modification of the child support and visitation provisions of the dissolution decree. Gail then filed a petition to fix custody of Olivia and to modify the custody and support provisions of the decree with regard to Emily. The matters

were consolidated and tried to the district court for Montgomery County.

At the hearing, Gail testified that Kelly had developed an alcohol problem following the dissolution. She had also been prescribed prozac for depression. He testified that he was concerned for the children. Kelly's sister and a friend also testified that they had been concerned about Kelly's drinking, but both opined that part of Kelly's problem was Gail's intrusiveness into her life.

Kelly testified that Gail had been physically abusive to her in the past, including one assault when she was pregnant. Kelly also testified that she did not want Gail living at her house but allowed him to stay there to avoid being the villain in her children's eyes. She testified that she was depressed about Gail leaving her when she was pregnant. She admitted having abused alcohol and attempting suicide. However, she testified that she had sought counseling through an employee assistance program, was not drinking excessively and was often in communication with her counselor. She admits to still drinking occasionally. She testified that she took herself off prozac because she could not afford it and she did not like its side effects. She testified that she felt she was dealing with her problems as best she could. Kelly's child care provider testified that the children were always clean and well cared for when they arrived for the day and that Kelly was a concerned mother. Kelly's mother testified she

believed Kelly had gotten things under control and was doing well.

The district court found that Kelly had minor mental and alcohol problems which "arose from [Gail's] actions prior to and subsequent to the decree. The fact that [Gail] asserts himself not only in the children's lives but also [Kelly's] private life [has] resulted in a stressful atmosphere." Kelly was awarded custody of Olivia and the dissolution decree was modified to include a more definite visitation schedule and increased child support. Gail appeals.

Our review in this matter is de novo. Iowa R. App. P. 4. With regard to Olivia, the custody determination is an initial determination. The best interests of the child is the first and governing consideration. The critical issue in determining the best interests of the child 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).

With regard to Emily, Gail is seeking to modify the custody provision of the dissolution decree. "To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best

interests make it expedient to make the requested change." In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. Id.

This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

We first examine Kelly's use of alcohol and its subsequent affect on her parenting. We recognize that a parent's abuse of alcohol may interfere with the ability to effectively minister to a child's needs. In re Marriage of Harris, 499 N.W.2d 329, 331 (Iowa App. 1993); In re Marriage of Fite, 485 N.W.2d 662, 664 (Iowa App. 1992); In re Marriage of Le Grand, 495 N.W.2d 118, 120 (Iowa App. 1992).

Although there is no evidence the children have suffered physical harm while under Kelly's care, we are nevertheless, deeply disturbed by the active role of alcohol in Kelly's life. Kelly's excessive use of alcohol has adversely affected her ability to parent.

We next examine the evidence concerning Gail. Kelly claims Gail has been physically abusive to her in the past. A medical report dated April 8, 1991, supports Kelly's claim. In addition, two of Kelly's friends

testified that they have seen Gail attempt to choke Kelly when the children were present. Kelly's babysitter has also noticed bruises around Kelly's neck, which Kelly claimed were caused by Gail. Gail admits he has struck Kelly in a state of anger. In addition, Gail has been convicted twice of assault, once for striking a boyfriend of Kelly's, the other time for pushing a pregnant friend of Kelly's down some steps.

We next examine the recommendations of the psychologist and the psychiatrist who examined the parties in February and March of 1993. Neither of their findings are controlling, but we do give them weight. In re Marriage of Dawson, 214 N.W.2d 131, 133 (Iowa 1974); In re Marriage of Harris, 499 N.W.2d 329, 331 (Iowa App. 1993). Dr. Mark Diercks, a psychiatrist, opined that Kelly was probably suffering from a major affective disorder, which is either of the major depressive type or perhaps a bipolar type. He also stated that if she, in fact, did suffer from a major affective disorder, "it is conceivable that this would have a deleterious effect on her parenting ability." Ms. Barbara Schuett, a clinical psychologist, diagnosed Kelly as having a bipolar disorder. In addition she recommended Kelly have a chemical dependency evaluation. She also recommended a chemical dependency evaluation for Gail, because Gail had indicated he had abused alcohol in the past. Ms. Schuett stated, "Neither parent is without fault, however, considering Kelly's current problems,

placement of the girls with the biological dad is recommended."

In difficult custody decisions such as this, our preference is to follow the trial court. In doing so, we are not ignoring the importance of Gail's contact with his two daughters or the obvious love Gail has for them. We also strongly urge Kelly to refrain from consuming alcohol and to continue to seek counseling. We affirm the trial court's decision awarding primary physical care of the parties' two children to Kelly.

Gail also requests his summer visitation be changed from two two-week intervals to one four-week interval. We find this will encourage the relationship between Emily and Olivia. We therefore modify the decree accordingly.

Costs of this appeal are assessed to appellant.

AFFIRMED AS MODIFIED.