FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MILTON KAUFMAN,
Petitioner-Appellee,
vs.
DAWN MUSSELMAN,
Respondent-Appellant.

Filed April 8, 1983

3-24
3-68796

Appeal from Calhoun District Court - R. K. Richardson, Judge.

Respondent-mother appeals from the trial court's order granting custody of the parties' minor child to petitioner-father in this action brought under Iowa Code section 675.40 (custody of child born out of wedlock). AFFIRMED.

Wendy Geertz, Des Moines, Iowa, for respondent-appellant.

David Wollenzien, Manson, Iowa; and William C. Enke of Mitchell, Coleman, Perkins & Enke, Fort Dodge, Iowa, for petitioner-appellee.

Considered by Oxberger, C.J., Donielson, Snell, and Schlegel, JJ. Johnson, J., takes no part.

PER CURIAM

Respondent-mother appeals from the trial court's order granting custody of the parties' minor child to petitioner-father in this action brought under Iowa Code section 675.40 (custody of child born out of wedlock). She claims that the trial court employed impermissible factors in awarding custody to the father and that, in any event, the child's best interests require that custody be awarded to her. We affirm.

Petitioner Milton Kaufman and respondent Dawn Musselman began having an affair in February 1977, while each was married to another person. Michael, the subject of this custody battle, was born September 5, 1979. Acting on the advice of his attorney, Milton initially denied that he was Michael's father in order to win concessions on the amount of child support he would have to pay. Dawn then brought a paternity and support action against him pursuant to Iowa Code ch. 675. Milton then filed a petition seeking custody of Michael under Iowa Code section 675.40:

> The mother of a child born out of wedlock whose paternity has not been acknowledged and who has not been adopted has sole custody of the child unless the court orders otherwise. If a judgment of paternity is entered, the father may petition for rights of visitation or custody in an equity proceeding separate from any action to establish paternity.

He stipulated in Dawn's action that he was Michael's father and had in fact begun paying child support.

Much testimony was presented at the two-day trial concerning, among other things, the parties' parenting abilities, their drinking habits and promiscuous behavior and the problems which arose in trying to arrange visitation for Milton. The trial court awarded Milton custody of Michael based on its finding that: 1) Dawn had led a "promiscuous life;" 2) Dawn's record in raising her five other children was not good and "may well establish the pattern in which she will elect to raise Michael;" and 3) Dawn had not cooperated with Milton on visitation. She

brought this appeal. The custody order was stayed in an order signed by Justice LeGrand.

The criteria used in making a custody determination are the same whether the parents are married or not. Heyer v. Peterson, 307 N.W.2d 1, 7 (Iowa 1981). Thus, we review the trial court's order in light of the factors listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). As always in cases of this kind, our primary concern is the child's best interests. Iowa R. App. P. 14(f)(15).

Upon a thorough review of the record in this case in light of the factors referred to above, we are convinced that the trial court was justified in awarding custody of Michael to Milton. Contrary to Dawn's claim, the trial court did not base its decision solely to punish her for her "promiscuous" behavior. Rather, the court's order indicates a very careful consideration of the parties' relative circumstances, economic and otherwise, and parenting abilities of Milton and Dawn. It would serve no useful purpose to review here all of the testimony that was presented in this case. Instead, we conclude, as did the trial court, that Michael's best interests would be better served by giving custody to Milton.

We urge the parties to make a concerted effort to arrive at an agreeable visitation schedule for Dawn. Since Milton expressed his willingness to allow visitation if he was granted custody of Michael, we trust this should not present a major problem. The trial court's order is affirmed in all respects.

AFFIRMED.