IN THE COURT OF APPEALS OF IOWA

No. 1999-326 (9-579) / 98-1396
Filed January 26, 2000

IN RE THE MARRIAGE OF TIMON M. SHEA AND RHONDA SHEA

FILED
JAN 26 2000
CLERK SUPREME COURT

Upon the Petition of
TIMON M. SHEA,
Petitioner-Appellant,

And Concerning
RHONDA SHEA,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Timon Shea appeals from the decree dissolving his marriage to Rhonda Shea. He contends the district court erred in awarding primary physical care of the parties' children to Rhonda. **AFFIRMED.**

Frank Cosgrove, Sioux City, for appellant.

Rhonda Shea, Maple Grove, Minnesota, pro se, appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Petitioner Timon Shea appeals the district court's award of physical care of the parties' children to Rhonda Shea, respondent. We affirm.

Timon and Rhonda were married in Hastings, Minnesota on January 28, 1988. There are two children of this marriage, Sausha, born October 14, 1987, and Sonja, born July 19, 1989. Timon filed this petition for dissolution of marriage on November 20, 1997. After trial, the district court granted the parties joint legal custody. The court awarded physical care to Rhonda. The only issue on appeal is the trial court's award of physical care.

Timon argues the trial court made no findings as to credibility of the witness, nor did it seem to take into account testimony that depicted Rhonda as a person with low morals. Timon presented testimony of alleged extramarital affairs, a performance as a stripper, and interest in a lesbian relationship to demonstrate Rhonda was a person of low moral character.

We note at the outset that Timon's brief contains neither a discussion concerning the scope or standard of appellate review nor a statement of how the issue which is presented was preserved for review, both of which are required by Iowa R. App. P. 14(a)(5). In appropriate circumstances such a failure can lead to summary dismissal of an appeal. *See, e.g., Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974). However, because our review of a custody determination is de novo, Timon's omission does not substantially hinder our review and we will proceed to address the

merits of the single issue which is presented. We do suggest and request compliance with the Iowa Rules of Appellate Procedure in all cases.

We review a custody order de novo. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa 1998). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *Id.* The controlling consideration is the best interest of the children. *Id.* Iowa R. App. P. 14(f)(15). Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weigh to its findings, particularly with respect to credibility, but we are not bound by them. *In re Marriage of Murphy*, 592 N.W.2d 681, 683; Iowa R. App. P. 14(f)(7).

Sausha and Sonja's best interests are paramount in this decision, and the court's objective is to place them "in the environment most likely to bring [them] to healthy physical, mental, and social maturity." *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). The critical issue in determining the best interests of the children is which parent will do better in raising them; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996).

We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997) (citation omitted); *see* Iowa Code § 598.41 (1999). We give some factors greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts

of each case. *See Daniels*, 568 N.W.2d at 54; *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

Pursuant to Iowa Code section 598.41(3)(j) and prior case law, domestic abuse is a factor in determining the custodial parent. *See Daniels*, 568 N.W.2d at 54; *see also In re Marriage of Brainard*, 523 N.W.2d 611, 614-15 (Iowa App. 1994). Domestic abuse is, in every respect, dramatically opposed to a child's best interests. *Daniels*, 5687 N.W.2d at 55. There are tragic and long-term consequences of spousal abuse on children who witness the violence. *See Brainard*, 523 N.W.2d at 614-15. Children who grow up in a home plagued with battering can, in many significant ways, be scarred for life. *Daniels*, 568 N.W.2d at 55. Thus, spousal abuse reveals a serious character flaw in the batterer, and an equally serious flaw in parenting. *Id.* It also constitutes a crime. *See* Iowa Code § 708.2A.

Moral misconduct is also a factor to be accorded weight in a child custody determination; however, we have weighed it most heavily only in those cases where the misconduct occurred in the presence of the children. *See In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa App. 1983).

Neither parent has demonstrated model parenting. The trial court found both parents have had a drug and alcohol problem. While several factors weighed in each parent's favor, the trial court found the balance tipped in

favor of Rhonda. Rhonda testified that the relationship was stormy, including Timon's physical and mental abuse of her. Rhonda further testified that the oldest girl is afraid of Timon. The trial court found Rhonda, for the most part, had been the primary caretaker of the children, had provided most of their care, and had been a good mother who had taken good care of them.

The court found that Timon had a lot to give his children, including family values and a nice family home in which to raise the children, while Rhonda was living in a crowded home with her mother. Nonetheless, the trial court found, while calling it a close question, that placing the girls in the physical care of Rhonda would best serve the interests of the children.

The testimony indicated that Timon had, in the past, been abusive and violent in the presence of the children. He engaged in illegal drug use, and is unable to communicate with Rhonda about child visitation issues.

Similarly, there was much testimony about Rhonda's past and possible present drug and alcohol usage, attempts at extramarital affairs, including same-sex affairs, stripping, and her similar inability to communicate with Timon about visitation issues. At the time of trial the girls slept with her in the same bed in her mother's home.

Yet we should elevate no one negative behavior to the point where it becomes the sole dispositive factor or it cleanses the other spouse of prior sins. *See Daniels*, 568 N.W.2d at 57 (Sackett, P.J. dissenting). Making a custody assessment demands judges look at both the affirmative and

negative attributes of each parent and their plans for future care of the children. *Id.*

The trial judge looked at the negative attributes and behaviors and considered them adversely on each parent's ability to parent their children. He also considered the parties' positive attributes and behaviors and considered them favorably. He had the parties and witnesses before him. He made certain credibility, maturity, and stability assessments based on the evidence presented and observing the parents in the courtroom and concluded it was in the best interests of the children that responsibility for their physical care be placed with Rhonda, subject to liberal visitation with Timon. The facts support this conclusion. Giving deference to the trial court's finding upon our de novo review we agree and affirm.

AFFIRMED.