IN THE COURT OF APPEALS OF IOWA

No. 7-715 / 97-0978

000123

IN RE THE MARRIAGE OF ROBERT E. GILMORE AND KAROL J. GILMORE

Upon the Petition of
ROBERT E. GILMORE,

Petitioner-Appellee,

And Concerning
KAROL J. GILMORE,

Respondent-Appellant.

FILED
MAR 27 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Karol appeals the economic and custody provisions of the district court's dissolution of marriage decree. **AFFIRMED.**

J. E. Tobey III, Davenport, for appellant.

Steven A. Berger of Wehr, Berger, Lane & Stevens, Davenport, for appellee.

Considered by Cady, C.J., and Sackett and Mahan, JJ.

SACKETT, J.

Respondent-appellant Karol J. Gilmore challenges the economic and custody provisions of the decree dissolving her marriage to petitioner-appellee Robert E. Gilmore. We affirm.

Karol and Robert, married in 1991, are the parents of Elijah, born in 1993, and Collin, born in 1994. Robert is the father of boys from a prior marriage who were fourteen and sixteen years of age at the time of trial. The trial court granted physical care of Elijah and Collin to Robert and also awarded him the home the parties had occupied during the marriage.

Karol first contends she, not Robert, should be the primary custodian of Elijah and Collin. This is an original custody determination; consequently, the question is which parent offers the children the better opportunities. Our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The factors the court considers in deciding physical custody are enumerated in Iowa Code section 598.41(3); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983); and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue 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 Engler*, 503 N.W.2d 623, 625 (Iowa App. 1993) (dissent by Oxberger, C.J., and Schlegel, J.); *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). We do not award custody based on hours of service for past care. *Engler*, 503 N.W.2d at 625. We attempt to look to determine which parent will in the future provide an environment where the child is most likely to thrive. *Id.*

Neither parent is without flaws. Both have put recreational interests ahead of their children on occasions.

Robert has elected to establish another family before resolving the problems associated with this one. He currently lives with a girlfriend who is pregnant with his child. The girlfriend has brought a child of her own into the relationship. Karol contends this illustrates his lack of commitment to his current family unit and that his fathering a child when he already has four are evidence of his moral misconduct and irresponsibility. Karol's arguments are well taken. A parent who becomes involved in a new relationship before current problems are resolved shows signs of immaturity.

Karol had been awarded temporary physical care. On rehearing, she lost physical care because she had mixed anti-depressant drugs and alcohol. Karol testified at the custody hearing she had received treatment for alcohol abuse but she was not participating in any aftercare program. We share the trial court's concern

Karol's problems with alcohol abuse and depression have not been abated. We recognize Karol contends she has conquered these problems.

The trial court had the parties before it and was able to observe their demeanor and was in a better position than we are to evaluate testimony on this issue. *See In re Marriage of Forest*, 201 N.W.2d 728, 730 (Iowa 1972). We defer to the trial court's judgment and affirm the decision of the trial court made in awarding physical care.

Karol next complains the trial court's property division is not equitable. Both Karol and Robert had agreed the party granted primary physical care would reside with the children in the home the parties lived in during the marriage. Karol recognizes this agreement but contends there was equity in the home and she should have received a part of the equity.

Iowa is an equitable distribution state, meaning the partners to a marriage are entitled to a reasonable and equitable share of property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa App. 1995). The parties had net equities of less than $4000. These were divided about equally. There was equity in the house. Robert was assigned the major portion of the parties' debt. We find no inequity in the division.

We award no attorney fees. Costs on appeal are taxed to Karol.

AFFIRMED.