

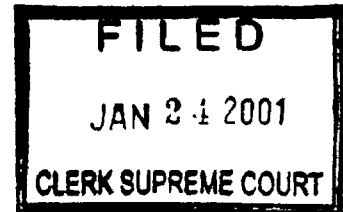
IN THE COURT OF APPEALS OF IOWA

No. 0-762 / 00-1068
Filed January 24, 2001

**IN RE THE MARRIAGE OF BRADLEY DAMON PRIMROSE
AND JODY MARIE PRIMROSE**

Upon the Petition of
BRADLEY DAMON PRIMROSE,
Petitioner-Appellant,

And Concerning
JODY MARIE PRIMROSE,
Respondent-Appellee.



Appeal from the Iowa District Court for Floyd County, Ralph F. McCartney,
Judge.

Bradley Primrose appeals from the decree dissolving his marriage to Jody Primrose. He contends the district court erred in awarding Jody primary physical care of the parties' minor child. **AFFIRMED.**

DeDra L. Schroeder of Schroeder Law Office, Charles City, for appellant.

Tasha R. Johnson, Legal Services Corporation, Sioux City, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

~~Petitioner~~ Bradley Damon Primrose appeals from the decree dissolving his marriage to Respondent Jody Marie Primrose. He contends the district court erred in awarding Jody physical care of the parties' minor child. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

Bradley and Jody were married on November 23, 1997. At the time of the dissolution trial Bradley and Jody were each twenty-four years of age. They had a child together, Kasey Marie, born August 28, 1997. The parties were also expecting a second child at the time of trial. Jody has another child, Cody Betz, from a prior relationship. Cody was born on October 10, 1994, and is described in the record as "developmentally delayed." For a period of approximately three years after Cody's birth he lived with Jody's parents while Jody completed high school and attended college. Bradley also has a child from another relationship. That child was approximately four or five weeks old at the time of trial.

At the time of their marriage the parties lived and worked in Mason City. Thereafter they moved to Rockford, Iowa, where they were purchasing a home. They lost the home due to financial difficulties and moved in with Bradley's parents in Rudd, Iowa. After Jody and Bradley were married they took Cody into their home. The parties were involved with the Iowa Department of Human Services on several occasions as a result of complaints of neglect or abuse of the minor children. Most of the complaints related to Cody's care. The parties did receive services from the department of human services to help with their parenting skills, even though there were no substantial findings by the

department of neglect or abuse of the children. The trial court did find that neither party had physically abused Kasey or Cody.

Bradley filed a dissolution petition on December 21, 1999. The district court entered a decree awarding Bradley and Jody joint legal custody of Kasey and placing physical care of Kasey with Jody, finding Kasey's best interests would be better served by such placement. The court based its determination on several factors, relying in part on its findings that Jody provided most of the care for Kasey during the bulk of the period the parties were together, and in part on the fact that it is preferable that siblings not be separated. The court further found and considered that Jody was maturing and working to improve her parenting and homemaking skills. The trial court awarded Bradley extensive visitation and ordered him to pay child support.

The sole issue on appeal is the court's physical care decision. Bradley contends the basis of the court's decision was flawed because there was insufficient evidence to show Jody was the primary caregiver and, in fact, the evidence showed the parties provided care for Kasey equally. Further, Bradley argues the court gave too much weight to the preference for not separating siblings since Cody and Kasey were only half-brother and sister and they had only lived together since approximately October of 1998.

II. STANDARD OF REVIEW

We review custody orders de novo. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa App. 1998); Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly

presented. *Williams*, 589 N.W.2d at 761. The controlling consideration is always the best interests of the child. *Id.*; Iowa R. App. P. 14(f)(15). The trial court had the opportunity to observe the demeanor of the witnesses, and thus we give weight to its findings, particularly with respect to witness credibility, but we are not bound by them. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999); Iowa R. App. P. 14(f)(7).

III. MERITS

Kasey's best interests are paramount in our decision, and the objective is to place her "in the environment most likely to bring her to healthy physical, mental, and social maturity." *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995). The critical issue in determining best interests 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 re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996). Prior cases have little precedential value with respect to custodial issues except to provide a framework for analysis, and our decision must be based on the particular facts and circumstances of the case before us. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992); *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa App. 1995).

There are numerous factors to be taken into account in determining which parent should serve as the long-term primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997); 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; *Will*, 489 N.W.2d at 397.

Although not controlling, due consideration is given in custody disputes to allowing the children to remain with the parent who has been the primary caregiver prior to the dissolution proceedings. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996); *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). "Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive." *In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa App. 1998) (citing *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App. 1993)).

There is also a presumption that siblings should not be separated. *Will*, 489 N.W.2d at 398; *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). However, this rule is not ironclad, and "circumstances may arise which demonstrate that separation may better promote long-range interests of children." *Id.* However, good and compelling reasons must exist for a departure from this rule. *Will*, 489 N.W.2d at 398. Our supreme court has held this general principle should also govern awards of physical care in cases of half siblings as well as others. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986); see also *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993); *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa App. 1994).

The trial court appropriately found that both Jody and Bradley love their daughter and wish to participate in her nurture and upbringing. However, it

appears from the record neither parent has demonstrated model parenting skills or behavior. The trial court found both parents had their respective strengths and weaknesses insofar as physical placement of a minor child is concerned. The court noted that Jody's use of profane language in referring to her children was regrettable while Bradley suffered from depression and has at times had a very bad temper. The court also considered the fact that both parties were lax in terms of good housekeeping skills, both have had financial as well as employment instability and difficulty. However, as stated above, the court did not find any evidence of physical abuse of either Cody or Kasey by either party.

After weighing both parties' respective strengths and weaknesses, the trial court determined the balance tipped in Jody's favor and found Kasey's best interests would be better served through placement with Jody. Upon our de novo review, we agree with the trial court.

As set forth above, the court primarily based its custody determination on the fact Jody provided the bulk of the care for Kasey during the parties' marriage and the preference that siblings not be separated. The court acknowledged that, to his credit, Bradley was working on his temper and depression issues through counseling, and his parents had been helpful to both parties. The court also found Jody's parents had been equally helpful in assisting her and that she was also maturing and working to improve her parenting and homemaking skills. Further, the trial court noted that at the time of trial Bradley remained living in his parents' residence and was not paying child support for either of his children,

while Jody had left her parents' home, was employed, and had established a residence of her own for herself, Cody and Kasey.

Bradley asserts there was insufficient evidence for the trial court to find Jody was Kasey's primary caregiver. The parties presented conflicting testimony supporting their opposing claims regarding who was the primary caregiver during their marriage. Thus, the trial court's determination that Jody was Kasey's primary caregiver during the bulk of the marriage was based on a determination of witness credibility. Basically the trial court had to determine which party, and which party's witnesses, were more believable on this issue.

The trial court made no explicit findings regarding which witnesses it found to be most credible. However, such a credibility finding is implicit in its finding that "[d]uring the bulk of the period the parties were together Jody provided most of the child care" and "Jody has provided the bulk of the care for Kasey." It was the trial judge who had the parties and witnesses before him and was able to observe the parties' demeanor in the courtroom firsthand. Therefore, the trial judge was in the better position to make this credibility determination than we are now. We give weight to the findings of the trial court, especially when they deal with the credibility of witnesses. Iowa R. App. P. 14(f)(7); *Murphy*, 592 N.W.2d at 683; *Crotty*, 584 N.W.2d at 717. Giving deference to the trial court's finding upon our de novo review, we also find that Jody provided the bulk of the care for Kasey during the majority of the parties' marriage.

The trial court considered the parties' attempts to better their respective situations for themselves and their children. We agree with its determination that

Kasey's best interests would be better served by being placed with Jody. After a brief period immediately following the separation when she lived with her parents, Jody moved out on her own with Kasey and Cody, obtained a steady job, and was apparently the sole provider for herself and her children as Bradley apparently paid no support. On the other hand, Bradley was still residing with his parents at the time of trial and was not paying support for either Kasey or his infant son who had been born four to five weeks before trial. Therefore, we conclude that as of the time of trial Jody was in the better position to administer most effectively to the long-term best interest of Kasey and place her in an environment that would foster a healthy physical and emotional life. See *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa App. 1998). We find, as the trial court found, that Jody has made efforts to improve her parenting and homemaking skills and give some consideration to these efforts.

Finally, as stated by the trial court, it is preferable that siblings, including half-siblings, not be separated unless it is clear that the separation would better promote the long-range interests of the children. See *Orte*, 389 N.W.2d at 374. We do not agree with Bradley's assertion that the trial court's recognition and consideration of this principle constitutes severing the bond between father and daughter in favor of a bond between half-siblings who have not grown-up together. At the time of trial Kasey and Cody had lived together continuously for over one and one-half years, almost two-thirds of Kasey's life. While the presumption that siblings, and half-siblings, should not be separated is not an ironclad rule, in making custody determinations courts must consider the

preference for keeping them together, and good and compelling reasons must exist to depart from this rule. See *Will*, 489 N.W.2d at 398. The trial court acknowledged Bradley's love for Kasey and his wish to participate in her upbringing and found that he should have extensive visitation with Kasey. The record does not demonstrate good and compelling reasons for us to depart from this general rule.

IV. CONCLUSION

Based upon our de novo review of the entire record while giving deference to the findings of the trial court with regard to the credibility of witnesses, we find that Jody was Kasey's primary caregiver during the majority of the parties marriage and that she was in a better position to most effectively administer to the long-term best interests of Kasey at the time of trial. Furthermore, we have long expressed a strong interest in keeping siblings, including half-siblings, together and find no good and compelling reasons in this case to warrant our departure from that general rule. We agree with the trial court's placement of Kasey's physical care with Jody and affirm.

AFFIRMED.