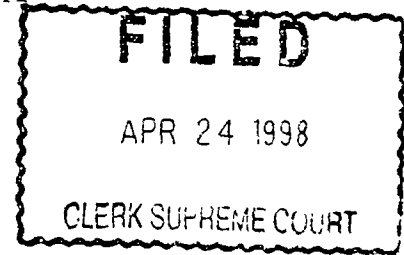


IN THE COURT OF APPEALS OF IOWA

No. 8-118 / 97-1467

Filed April 24, 1998



**IN RE THE MARRIAGE OF RACHELLE L.
BREYFOGLE AND RICHARD A. BREYFOGLE**

Upon the Petition of
RACHELLE L. BREYFOGLE,
Appellant,

And Concerning
RICHARD A. BREYFOGLE,
Appellee.

Appeal from the Iowa District Court for Butler County, Paul W. Riffel, Judge.

The petitioner appeals the child custody provisions of the parties' dissolution
decree. **AFFIRMED AS MODIFIED.**

Ronald J. Pepples, Parkersburg, for appellant.

Gary Papenheim, Parkersburg, for appellee.

Considered by Cady, C.J., and Huitink and Streit, JJ.

STREIT,J.

A mother appeals the award of primary physical care of the children to her ex-husband. Because the mother has the closer interpersonal relationship with the children, and the children should not be separated from their half-siblings, we affirm as modified and grant the mother primary physical custody of the three children.

I. Background & Factual Proceedings.

Richard and Rachelle Breyfogle were married in July 1988. Rachelle has two children from a previous marriage, Krissy and Katherine. Richard and Rachelle had three children: Jared, born February 2, 1989; Colby, born April 17, 1991; and Shannon, born April 23, 1992. Richard was forty-one years old at the time of trial and Rachelle was thirty-nine.

Rachelle is a high school graduate who has taken a number of night courses through a community college. She was employed as a secretary for fourteen years. From 1992 to 1996, Rachelle was employed in a number of part-time jobs. In 1996, she became employed in the personnel department at Presbyterian Village, a nursing home in Ackley, Iowa, earning \$8.25 per hour.

Richard has a bachelor's degree from the University of Northern Arizona. Richard has been a state inspector for the Grain Warehouse Bureau since 1986. He earns approximately \$31,956.

During the last half of the parties' marriage, their relationship deteriorated. Rachelle had an affair with another man. Rachelle filed for divorce in April 1996.

She was granted temporary custody of the children and remained in the family residence. The primary issue at trial was custody of the children. The trial court awarded primary physical custody of the children to Richard. Rachelle was granted liberal visitation and ordered to pay \$274 per month in child support. The court ordered the family residence sold to pay off the family indebtedness. Rachelle appeals the court's order regarding custody and child support.

II. Standard of Review.

Our review is de novo. Iowa R. App. P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Primary Physical Custody of the Children.

The controlling consideration in child custody cases is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). Both Rachelle and Richard are suitable primary physical caregivers. In this situation, where the parents cannot work jointly to raise their children because of their own differences, it is in the best interests of the children to have one primary physical caregiver. *See Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires us to select the custodial parent who can minister most effectively to the long-term best interests of

the children and place them in an environment that will foster healthy physical and emotional lives. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

A. Moral Misconduct. Richard argues Rachelle is self centered and places her own priorities above those of her children. He points to Rachelle's affair as evidence of this fact. Richard argues he is a better primary physical caregiver for the children because Rachelle had an extra-marital affair.

Moral misconduct via extramarital affairs is a factor in determining which parent should serve as the primary caretaker of the children in a divorce. *Daniels*, 568 N.W.2d at 54. Extramarital affairs may be given greater weight when they impact the children. *See In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa App. 1983)(extramarital affair was given greater weight when the affair occurred in front of the children).

Although a legitimate factor of consideration, Rachelle's affair is not the only factor in this custody determination. *See Daniels*, 568 N.W.2d at 57 (Sackett, J. dissenting, "no one negative behavior should be elevated to the point where it becomes the sole dispositive factor or it cleanses the other spouse of prior sins"). It is not the task of the judiciary to sort out the intricacies of extramarital affairs in its custodial decisions. Although the affair reflects poorly on Rachelle, there is nothing in the record showing Rachelle's affair took place in the children's presence or adversely impacted them. Her boyfriend never spent the night in the family home while the children were there. While Rachelle placed her own needs ahead of her

children's by engaging in such misconduct, this fact is outweighed by the evidence Rachelle was a good primary caretaker to the children prior to the divorce.

B. Primary Caregiver Before Divorce. Rachelle was the primary caregiver of the children prior to the divorce. The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated by the court to be primary caretaker at the time of the divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the role the primary caretaker has played in the lives of the children is given consideration in custody disputes. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). Allowing a parent to continue as the primary caretaker after the divorce gives continuity to the lives of children. *Id.*

The trial court recognized Rachelle as the primary caregiver of the children. Rachelle has been a very devoted mother. For years she worked only part-time jobs so she could spend time at home with her children. During this time, the children accompanied Rachelle every where she went. Rachelle is the person who spent time playing with the children and intellectually stimulating them. These daily hours of interaction between Rachelle and her children made her relationship with them stronger than Richard's. In addition to spending time with the children, Rachelle did all the meal planning, housecleaning, and grocery shopping. All these tasks were done with the children's involvement. While the record shows Richard sometimes

read stories to the children or bathed the children at night, it is Rachelle who has nurtured the children since birth.

Even when Rachelle began a full-time job, she arranged her schedule so she could care for and spend time with her children. She starts work at 9:30 a.m. She gets up around 6:00 a.m. to perform the household duties and feed and clothe the children before they go to school.

The record is replete with evidence of Rachelle's love for and bond with her children. She has the ability to treat each of her five children specially, appreciating each of them as individuals. Even Richard's witnesses describe Rachelle as a good mother. Because of Rachelle's stronger relationship with the children, she is better suited to meet their emotional and social needs. The children were healthy and well-adjusted socially and academically with Rachelle as their primary caregiver. She should continue in that role.

For all these reasons, it is in the best interests of the children for Rachelle, their primary caretaker, to be awarded primary physical care after the divorce.

C. *Separation of Siblings.* Another factor which weighs heavily upon our decision to award primary physical custody of the children to Rachelle is the fact that if Richard has primary physical custody, the children will be separated from their half-siblings, Krissy and Katherine. Katherine and Krissy have helped care for and have been close to their younger siblings since they were born.

Siblings should only be separated for good and compelling reasons. *In re Marriage of Winter*, 223 N.W.2d 165, 168 (Iowa 1974); *In re Marriage of Blume*, 473 N.W.2d 629, 631 (Iowa App. 1991). This general rule also applies to situations involving half-siblings. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993); *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa App. 1993). To depart from the general rule, it must appear the separation of the siblings would better promote the long-range interests of the children. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). This has not been shown here.

Richard has criticized Rachelle as a person and a parent. The record indicates, however, either party is capable of adequately caring for the children. As both parties are capable parents and placement in either home would provide a stable environment for the children, we cannot find good and compelling reasons to separate Jared, Colby, and Shannon from their half-siblings.

Because of all these reasons, we grant Rachelle primary physical custody of Jared, Colby, and Shannon. Richard is granted liberal visitation. The trial court's order stating the family residence be sold to pay off the parties' debts is affirmed.

This decision requires us to calculate Richard's child support obligation. Richard is ordered to pay \$645 child support per month for three children. When his obligation is for two children, Richard's support shall be \$553 per month. When his obligation is for one child, Richard's support shall be \$400 per month. Richard is entitled to claim Jared and Shannon in calculating his tax liability if he is current on

all his child support obligations at the end of the taxable year. Richard shall continue to maintain health and dental insurance for the children. Each party is ordered to pay their own attorney fees.

AFFIRMED AS MODIFIED.

Cady, C.J., concurs, Huitink, J., specially concurs.

HUITINK, J. (specially concurring)

I concur in the result only.