IN THE COURT OF APPEALS OF IOWA

No. 7-429 / 96-2215

000059

IN RE THE MARRIAGE OF AMY JO CHRISTOPHERSON and DUANE JOHN CHRISTOPHERSON

Upon the Petition of
AMY JO CHRISTOPHERSON,
Appellant,

And Concerning
DUANE JOHN CHRISTOPHERSON,
Appellee.

FILED
DEC 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dickinson County, Frank B. Nelson, Judge.

Petitioner appeals the custody provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED AND REMANDED.

Bradley Howe of Berg & Howe, Spencer, for appellant.

David A. Lester of Fitzgibbons Brothers, Estherville, for appellee.

Shannon L. Sandy of Sandy Law Firm, P.C., Spirit Lake, guardian ad litem for minor children.

Heard by Cady, C.J., and Huitink and Streit, JJ., Sackett, J., takes no part.

CADY, C.J.

Amy Christopherson appeals from a decree for dissolution of marriage entered by the district court. The principal issue we confront on our de novo review is to determine which parent should be given primary physical care of the parties two children. We modify the district court decision and grant primary physical care to Amy.

Amy and Duane Christopherson were married in 1992. Amy was 21 years old. Duane was 22 years of age. They cohabitated for several years prior to the marriage. Their relationship resulted in two children. Kayla was born April 10, 1990, and John was born January 11, 1994.

Amy and Duane separated in October 1995. Their relationship had grown very unstable and was plagued by physical violence, arguing, fighting, pursuit of separate activities and, after the separation, unfaithfulness. Duane possessed a violent temper, which was a prelude to several incidents of physical abuse. Some of the domestic abuse perpetrated by Duane occurred in the presence of the children. Duane frequently drank alcoholic beverages to excess.

Amy and Duane grew up in the Okoboji Lakes area and lived in Milford during most of the marriage. Amy moved to Spencer following the separation, into a second floor apartment in a business area. Duane remained in the marital home and assumed primary care of the children. He received temporary custody of the children following a brief hearing after the petition for dissolution of marriage was filed.

Amy was the primary caretaker of the children prior to the separation. Duane's parents, however, resided in Milford, and were very active in the lives of the children. They were particularly active in helping Duane care for the children following the separation. They are generous and understanding. Amy maintained a close relationship to Duane's parents during the marriage.

Shortly after the separation, Amy began a relationship with a man named Keith Strohman. Strohman lived in Spencer at the time, but moved to Maryville, Missouri several months later to pursue employment as a roofer. Strohman was married to a woman in Michigan at the time, and had two children from the marriage. He also lived with a woman prior to his relationship with Amy, and had a child from that relationship.

Strohman frequently consumed excessive amounts of alcoholic beverages and had a history of being physically abusive to women. He has been convicted of drunk driving and domestic assault. He also has a long history of driving violations, and lost his driving privileges in the past.

After Strohman moved to Missouri, Amy traveled to be with him nearly every weekend, including those weekends when she had custody of the children. Amy and the children would stay at Strohman's apartment.

Amy and Strohman have discussed marriage. Although Amy repeatedly denied any intentions of moving to Missouri after her divorce, she stayed in Missouri

for several months following the first divorce hearing and prior to a second hearing.[1] She also terminated her full-time employment in Spirit Lake following the initial hearing, yet took a part-time job at a bar near Spencer a few weeks prior to the second hearing.

Duane acknowledged his excessive drinking and violent temper during the course of the marriage. He testified, however, he has limited his consumption of alcoholic beverages since the separation and is working to control his anger and violent behavior. Just prior to the initial trial, Duane enrolled in a batterer education program. He attended two counseling sessions prior to the initial trial, but attended only one session during the three months following the initial trial. He was also involved in a bar fight following the first trial, and was involved in a physical altercation with a woman.

For the most part, Duane adequately cared for the children during the separation. However, he fell asleep one evening as he was preparing a meal, and a fire started in the kitchen. Duane had consumed alcoholic beverages at a bar before the incident. His girlfriend also lived in the house for a period of time. Kayla and John adjusted well following the separation, although Kayla often appeared withdrawn and quiet.

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[1] The trial was held before the district court on July 30 and July 31, 1996. On August 29, prior to a ruling by the district court, Amy asked the record to be opened to submit additional evidence concerning two new incidents of assault by Duane. On October 24, Duane also asked the record to be opened to present evidence that Amy had terminated her employment in Spirit Lake and moved to Missouri to live with Strohman. The court permitted the parties to present additional evidence at a hearing on November 7, 1996, and filed its final decree on November 20, 1996.

The district court awarded joint custody of the children, with primary care to Duane. It determined the children's need for stability could be better satisfied by Duane and his parents than by Amy's uncertain future. Amy appealed.

I. Primary Care

The first and governing consideration in deciding the issue of child custody in a dissolution of marriage is the best interest of the child. *See In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). This venerable doctrine is defined by considering a variety of factors or criteria established by statute and case law. *See In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996); *see* Iowa Code § 598.41 (1995). These factors include the characteristics and needs of the child, the characteristics of the parents, the capacity and interest of each parent to provide for the needs of the child, the interpersonal relationship between the child and each parent, the interpersonal relationship between the child and its siblings, the effect on the child of continuing or disrupting the existing custodial status, the nature of the proposed environment, and any other relevant considerations which impact the best interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974); *see* Unif. Marriage and Divorce Act § 402, 9A U.L.A. 561 (1987).

In considering these important factors, we recognize Duane's claim for primary care is built on the fundamental shaky premise that he changed as a person following the separation. Generally, a fairly reliable insight into the future performance of a parent can be gained from looking at the past performances of the parent. *See In re S.N.*, 500 N.W.2d 32, 34 (Iowa 1993). Notwithstanding, Duane asserted he was no

longer the irascible, and somewhat abusive, violent, self-centered, and alcoholic person he was during the marriage. Contrary to his conduct and character during the marriage, Duane testified at trial he, among other things, no longer frequents bars, does not pursue recreational activities separate from the children, controls his temper, and is devoted to his children. He also discontinued living with his girlfriend shortly before trial.

Although claims of recent change can properly be viewed with suspicion, the case offered a unique opportunity to follow the parties conduct after the initial trial proceeding. This opportunity reasonably revealed the changes claimed by Duane were essentially cosmetic. Within a brief time following the trial, Duane was involved in a violent bar fight with another man, accused of assaulting a former girlfriend, and participated in leaving a derogatory note on the windshield of Amy's car. He also had a second kitchen fire at his home. Moreover, following the trial, Duane attended only one session of the batterer's program he had enrolled in prior to trial. The sad, unescapable conclusion from this evidence is Duane, most likely, is the same person he was during the marriage. Fortunately, Duane's parents and family remain very supportive and helpful in the care of the children. In truth, their support, far and away, is the strongest aspect of Duane's claim for primary care.

Amy, likewise, failed to dispel the doubts revealed by the evidence at trial about her commitment to the children. Amy promptly quit her longstanding job and moved to Missouri to live with her boyfriend following the trial, contrary to her repeated assertions at trial she had no intentions of moving. *See Lovett v. Lovett,* 164

N.W.2d 793, 802-03 (Iowa 1969). Amy acknowledged at trial the importance of remaining in close proximity to the paternal grandparents so they could maintain their close and healthy relationship with the children. Amy's post-trial conduct revealed, among other things, misplaced priorities. With this backdrop, we must decide which custodial arrangement will better promote the best interests of the children.

The trial court granted primary care to Duane based, largely, on the stability available to the children through the generous help and commitment of Duane's parents. We agree the best interests of the children are fostered by placing them in an environment which includes the healthy support and influence of family members. *See In re Marriage of Guyer,* 238 N.W.2d 794, 796 (Iowa 1976). Yet, the home environment created by the custodial parent is of greater importance. *See In re Marriage of Carrico,* 284 N.W.2d 251, 254 (Iowa 1979). Apart from his parents, Duane's appeal as a custodial parent is diminished.

On the other hand, Amy was the primary caretaker of the children prior to the separation. While not controlling, this is an important consideration. *See In re Marriage of Roberts,* 545 N.W.2d 340, 343 (Iowa App. 1996). Amy performed the role adequately, and the children, especially Kayla, grew close to her.

The role of a primary caretaker during the marriage is important not only because it provides a known track record, but is often closely, associated with those factors which frequently lie at the heart of the best interest of the child standard. These factors include the physical and emotional care provided to the children by the parent during marriage and the nature of the relationship each parent has established

with the children. *See* Iowa Code § 598.41(3) (1995). The continuation of a healthy relationship between a child and the ultimate primary caretaker is compatible with the best interests of the child.

We acknowledge our concerns with granting primary care to Amy. At the same time, we have greater concerns in granting primary care to Duane. Our concerns about Amy, like those expressed by the district court, relate chiefly to the evidence which points to her desire to move to Missouri to live with her boyfriend.[2] Nevertheless, Amy testified she will not move.

Amy's conduct as a noncustodial parent following the separation would justify a finding that her future is uncertain and unstable. However, our task is to judge Amy, as well as Duane, in the role as a custodial parent. Amy repeatedly testified she would not move from the Milford area. Moreover, she confirmed, without reservation, the beneficial relationship between the children and the paternal grandparents, and acknowledged the importance of continuing the relationship. She testified the grandparents should have regular visitation and she would not object to specific terms of grandparent visitation. As a custodial parent, we do not contemplate Amy would take any action to unreasonably restrict the continuing relationship

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[2] Our concerns about Keith Strohman mostly relate to his past criminal conduct and his past failures as a parent. Duane called a woman he dated during the separation, Millie Stomm, as a witness at trial. Stomm and Strohman have a child together out of wedlock. Stomm testified one of her children reported seeing Strohman and Amy engaged in a sex act in Strohman's bedroom one weekend afternoon while Amy had visitation of Kayla and John. We give little weight to this testimony. Millie Stomm is the same person who accused Duane of assaulting her following the first trial. Duane presented testimony at the second trial that Stomm should not be believed and is a person who is known to get in a lot of trouble.

between the children and their paternal grandparents based on Amy's testimony. We contemplate Amy will obtain suitable housing in the lakes area to care for the children, as confirmed by her testimony. Amy's expressed intention to remain in the area is an important consideration in our decision to grant her primary care.

Considering all the factors which impact the best interests of the children in this case, we conclude primary care should be awarded to Amy. This places the primary responsibility for the care of the children into the hands of the parent who adequately served as the primary caretaker during the marriage, and permits the children to continue to maintain their close relationship with their mother. It is also compatible with the recommendation of the attorney for the children, who conducted an extensive investigation in the case. *See In re Marriage of Williams*, 303 N.W.2d 163 (Iowa 1981) (report of attorney for children is a factor to consider in deciding custody). Duane shall be given the same visitation awarded to Amy under the district court decree. Primary care shall transfer ten days after the issuance of the procedendo.

We also modify the child support provisions of the decree and remand the case to the district court to determine Duane's child support obligation. We observe Amy voiced no objection to court ordered grandparent visitation. We therefore further remand to the district court to establish regular grandparent visitation. We deny Duane's request for appellate attorney fees. Costs to Duane.

AFFIRMED AS MODIFIED AND REMANDED.

Streit, J., concurs; Huitink, J., dissents.

HUITINK, J. (dissenting)

I dissent. The assessments dispositive of this physical care dispute are those best left to the trial court's perspective. Additionally, I find that there is a greater probability of obtaining our statutory joint custodial objectives if Duane retains physical care.