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IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 7-707 / 97-0675
Filed February 25, 1998

IN RE THE MARRIAGE OF THOMAS DAVID KRUSE AND MARILYN J. KRUSE

Upon the Petition of
THOMAS DAVID KRUSE,
Appellee,

And Concerning
MARILYN J. KRUSE,
Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The respondent appeals the child custody provisions of the parties' dissolution decree. **AFFIRMED.**

Chad A. Kepros and Daniel L. Bray of Bray & Klockau, P.L.C., Iowa City, for appellant.

Robert L. Sudmeier of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

HUITINK, P.J.

Marilyn J. Kruse appeals the custodial provisions of the decree dissolving her marriage to Thomas David Kruse. We affirm.

I. Background Facts and Proceedings.

Marilyn Kruse, born April 24, 1966, and Thomas Kruse, born April 29, 1964, were married on April 22, 1989, in Dyersville. Marilyn and Thomas have one son together, Nicholas Ray, born May 13, 1995. Thomas has another child from a previous marriage, Ryan, who was twelve years old at the time of the court's decree. Thomas has had sole custody of Ryan since he was approximately two and one-half years old.

In its dissolution decree, entered on January 15, 1997, the district court awarded Marilyn and Thomas joint custody of Nicholas with primary physical care awarded to Thomas.

Marilyn appeals, arguing the district court erred in awarding Thomas physical care of Nicholas. Marilyn contends her personality, primary care experience, and flexible work schedule support an award of physical care to her.

II. Standard of Review.

We review de novo. Iowa R. App. P. 4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa

1983). We give weight to the district court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Physical Care Award.

The district court found both parties capable of providing primary care for Nicholas. In awarding physical care to Thomas, the court expressed concerns about Marilyn's volatile temperament and history of confrontations with Thomas and others. The court also cited Thomas' substantial experience as Ryan's primary care provider, the strong sibling bond between Nicholas and Ryan, and Thomas' strong familial support.

The critical issue is not which parent possesses the greater right to the children, rather the controlling consideration must be the children's best interests. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. The objective should always be to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the children, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the children, the relationship of each child with each parent, the nature of each proposed environment, and the affect of continuing or discharging an existing custodial status. *Id.*

There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Insofar as is reasonable and in the best interests of the children, the court should make an award of custody which will assure the children the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the children. *See* Iowa Code § 598.41(1)(1995). To effectuate that policy the court must consider the willingness of each party to allow the children access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

The record confirms the court's assessment of the parties' relevant character traits. We, like the district court, find Thomas' personality and temperament are well-suited to a joint custodial relationship. On the other hand, Marilyn has a substantial history of angry confrontations with Thomas and others. She has made unsubstantiated allegations of physical abuse against Thomas. There is also evidence Ryan was needlessly exposed to Marilyn's outbursts of incivility and verbal abuse of Thomas. Marilyn's temperament falls far short of the mature judgment and discretion essential to an award of physical care. Although Thomas is not without imperfection, he is the parent more likely to facilitate a constructive joint parenting relationship for the benefit of the children.

The extent and quality of Thomas' primary care experience with Ryan is also borne out by the record. Ryan's mother, Brenda Gray, and Brenda's parents testified Thomas is a good parent. There is unrefuted evidence Nicholas and Ryan have a close, loving relationship. The fact the boys are half-brothers does not detract from the importance of maintaining their sibling relationship. We find it is in Nicholas' best interests to remain with Ryan and Thomas.

The record also indicates Thomas has a supportive family, including six siblings and his mother, who live close by and who are involved in Nicholas' life. This support is essential to Nicholas' well-being. We accordingly affirm the district court's physical care award to Thomas.

The fact Marilyn was not awarded physical care does not imply Nicholas will be deprived of the benefit of her primary care experience. Marilyn, as joint custodian, has the right to continuing physical and emotional contact with Nicholas and is entitled to share the rights and responsibilities of raising him. These rights and responsibilities include matters such as decisions affecting Nicholas' legal status, medical care, education, extracurricular activities, and religious instruction. *See* Iowa Code § 598.41(5)(1995); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

IV. Motion for a New Trial.

After the dissolution decree was entered, Marilyn filed a motion for new trial based on the allegedly newly discovered testimony of Father Edward Petty. The district court denied Marilyn's motion, finding she did not establish Petty's testimony

was newly discovered or could not have been discovered prior to the conclusion of the trial. The court also found Petty's affidavit would not probably change the result of the trial.

We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

A motion for a new trial under Iowa Rule of Civil Procedure 244(g) will be granted upon a showing: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if a new trial is granted. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). Motions for a new trial based on newly discovered evidence are "closely scrutinized and granted sparingly." *Vanden Berg v. Wolfe*, 196 N.W.2d 420, 422 (Iowa 1972).

Marilyn contends Petty formed his opinions before trial but did not come forward because of his position in the clergy and because he assumed Marilyn would receive physical care of Nicholas.

We find the trial court did not abuse its discretion in denying Marilyn's motion for new trial. We agree with the district court Petty's testimony was not newly

discovered evidence. A diligent search could have discovered this evidence prior to the conclusion of the trial. Marilyn's justifications for not producing this evidence at trial are insufficient and do not warrant a new trial. Moreover, Petty's testimony is not likely to change the result of the trial. The district court considered evidence of Thomas' alleged abusive behavior and his alleged use of his children as "bargaining chips." Petty's testimony would merely be cumulative of this evidence. We affirm the district court on this issue.

V. Attorney Fees.

Thomas requests the court award him appellate attorney fees.

An award of attorney fees is not a matter of right, but rests with the court's discretion. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995). We consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996).

In other circumstances an award of appellate attorney fees would be appropriate. However, Marilyn lacks the resources to pay more than her own attorney fees. Consequently, we make no award of appellate attorney fees.

We have considered all of the contentions on appeal and affirm the district court in its entirety.

AFFIRMED.