IN THE COURT OF APPEALS OF IOWA

No. 6-109 / 95-1180

FILED
MAY 31 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF LISA MARIE HANSON AND THOMAS ALLEN HANSON

Upon the Petition of
LISA MARIE HANSON,

Appellant,

And Concerning
THOMAS ALLEN HANSON,

Appellee.

Appeal from the Iowa District Court for Webster County, William C. Ostlund, Judge.

Lisa Marie Hanson appeals the child custody and support provisions of the parties' dissolution decree **AFFIRMED AS MODIFIED.**

Jerry C. Estes of Estes Law Offices, Fort Dodge, for appellant.

Dan T McGrevey, Fort Dodge, for appellee.

Heard by Cady, P.J., Streit, J., and Peterson, S.J.,* but decided by Sackett, P.J., and Habhab, Cady, Huitink, and Streit, JJ. Vogel, J., takes no part.

*Senior judge from the first judicial district serving on this court by order of the Iowa Supreme Court.

STREIT, J.

Petitioner Lisa Hanson is a twenty-seven-year-old college graduate with a degree in agri-business management. She is in good health and is a salaried employee as a production technician for a local pet food manufacturer. Respondent Thomas Hanson is a twenty-nine-year-old college graduate with a degree in agriculture education. He is in good health and earns a modest income farming with his family. Lisa and Thomas were married in 1991. They have one son, Austin, born April 5, 1991. The Hansons separated in 1994. Lisa filed a petition for dissolution of marriage and sought a no-contact order alleging domestic abuse. Thomas acknowledged he assaulted Lisa at least four times. He admitted to sitting on Lisa, scratching her, grabbing her, bumping her, pushing her out a door, and throwing her into a snow drift. Lisa claims several additional episodes of violence by Thomas

The district court concluded both parties could adequately care for Austin. Although the court noted "a history of abuse upon the petitioner," the court found the "incidences were isolated and "responsive to the petitioner's infidelity." The court found Lisa "demonstrated a tendency for living in the 'fast track'" Despite the domestic abuse and Lisa's claim Thomas left marks on Austin's bottom, the court concluded Thomas would provide a "stable and secure environment for Austin." Thomas was awarded Austin's primary care Lisa was granted "reasonable visitation"

not limited to the visitation set out in the decree. Lisa was ordered to pay $450 per month in child support and was awarded the dependent tax exemption every other year.

I. Custody.

Our review in this matter is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. *Id.* 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).

In child custody cases the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration"--the court's determination of what will be in the long-term best interests of the child. *In re Marriage of Urban*, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child 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 Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). Lisa's urging that "the natural tie to motherhood" is a pertinent

consideration in determining the welfare of small children is misplaced and counterproductive.

Violent tendencies of a parent adversely impact on the fitness of the parent to be the primary caretaker of a child. *In re Brainard,* 523 N.W.2d 611, 615 (Iowa App. 1994) (citing *In re Snyder*, 241 N.W.2d 733, 734 (Iowa 1976)). Evidence of domestic abuse adversely reflects upon Thomas's ability to participate as the custodian of Austin. *Id.; see also In re Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995) (evidence of domestic abuse is a factor to consider in custody decisions); and, *In re Hornung*, 480 N.W.2d 91, 93 (Iowa App. 1991) (husband's violent behavior weighs against him in the custody decision). The effect of an abusive home on a child can be very severe. "Children raised in homes touched by domestic abuse are often left with deep scars, revealed in the form of increased anxiety, insecurity and a greater likelihood for later problems in interpersonal relationships . . . . [C]hildren who stand as observers to domestic abuse may develop a low self-esteem and achieve less academic success. *Brainard*, 523 N.W.2d at 615

We conclude from our de novo review of the record the district court incorrectly awarded physical care of Austin to Thomas It is in Austin's best interests for physical care be given to Lisa. Although we give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, the effect of Tom's prior

physical abuse on the issue of custody is not a credibility issue; rather, it is an issue of the weight given to the evidence.

The district court found both parents could adequately care for the child. We agree both parents have generally shown devotion toward their child. *See Brainard*, 523 N.W.2d at 614. Both possess characteristics which would make them suitable custodians. *See id.* In making its custody determination, the district court did not give great weight to the incidences of violence believing they were isolated and provoked by Lisa's infidelity. We give greater weight to the physical abuse inflicted upon Lisa by Thomas and his attempt to minimize the abuse. The incidences of abuse were not isolated. Thomas admitted to at least four incidences where he physically abused Lisa, and Lisa has alleged many more instances Violence, even if provoked by infidelity, is inexcusable. Thomas makes no assertion his violent actions were the result of defending himself. Thomas sought to justify the conduct during his testimony at trial. *See In re Snyder*, 241 N W 2d 733, 734 (Iowa 1976).

Upon the whole record, with deference to the position of the district judge to assess the demeanor and credibility of the witnesses, the child's long-range best interests would be better served in the primary custody of Lisa rather than Thomas. *See In re Knight*, 507 N W 2d 728, 731 (Iowa App 1993) (citing *Snyder*, 241 N.W.2d at 734). Austin's future is at greater risk if he were to remain in his father's custody than if he were in his mother's *See Snyder*, 241 N.W.2d at 734. Thomas's character flaws

present a greater threat to Austin's well-being than those of Lisa. *See id.* His meanness, aggressiveness, and tendency to violence expose Austin to more danger than Lisa's moral misconduct. *See id.* We reverse the decision of the district court on the issue of primary care. Joint legal custody of Austin is awarded to the parties with primary physical care placed with Lisa. Lisa may not permanently remove Austin from the state without six months written notice to Thomas.

II. Visitation.

Thomas is allowed visitation at all reasonable times, as may be agreed by the parties. In the event the parties disagree, Thomas's visitation shall be:

a. Every-other weekend from 6 p.m. on Friday to 6 p.m. Sunday.
b. Three nonconsecutive periods each summer, upon 30 days written notice to Lisa.
c. Every Father's Day from 9 a.m. to 6 p.m., regardless of the week-end visitation schedule Lisa is allowed visitation on each Mother's Day, regardless of the week-end visitation schedule.
d Alternating holidays: New Year's Day, Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christmas Eve, Christmas Day, and the child's birthday from 9 a.m. to 6 p.m , commencing on Memorial Day, 1996

III. Support.

Thomas shall pay child support to Lisa for Austin in the amount of $271 per month on the first day of each month until the child graduates from high school or reaches eighteen years, whichever last occurs. This amount is based upon Thomas's projected gross income of $19,688 ($1173 net monthly), Lisa's projected gross income of $28,800 ($1780 net monthly), and the child support guidelines. Thomas shall

maintain medical insurance for Austin as long as he is obligated to pay child support. Each parent shall pay one-half of medical, dental, and eye expenses not covered by insurance. Thomas shall be allowed the dependency deduction for tax purposes every other year commencing for tax year 1996, if he is current with all his support obligations at the end of the year. Lisa shall execute the appropriate tax declarations to allow Thomas to claim the child for tax purposes.

IV. Appellate Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). We order each party to pay his or her own appellate attorney fees Costs are taxed equally to the parties.

V. Other Matters.

The other matters decided by the district court are affirmed.

AFFIRMED AS MODIFIED.

Habhab and Cady, JJ., concur. Sackett, P.J., and Huitink, J., dissent.

SACKETT, P.J. (dissenting)

I dissent. I would affirm the trial court.

Custody decisions are not easy. Generally, parents who seek custody or physical care of their children in a dissolution are decent people like the parties here who love their children and want the opportunity to have the more significant place in raising them. We look at the whole of each parent and assess where the child will have better care. No parent comes without strong points; and no parent comes without flaws. Unfortunately, too often a parent involved in a custody case seeks to dwell on the inadequacies of the other rather than to advance why he or she will do the better job.

In recent years we have taken more note of domestic abuse. Significant legislation has been passed directed at working to correct domestic abuse. As courts we have been educated in the problems abuse causes. Domestic abuse is a broad term covering a multitude of behaviors The term has been used to define verbal and emotional trauma and physical confrontations from a slap to a murder. It is not a gender issue. Either spouse can be the abuser. Because men frequently have more physical strength than women, their physical abuse generally tends to be more severe.

The majority states the violent tendencies of a parent adversely impact on the fitness of a parent. With this I strongly agree. I personally do not believe in physical confrontations for any purpose.

There are many definitions of violence, from a push to a life-threatening or life-taking action. Additionally, many other factors besides tendencies to some form of violent behavior weigh on a parent's ability to adequately care for a child. There are factors that impact on their fitness and factors that can have a detrimental impact on the child's life. For example, parents can be verbally cruel, emotionally disarranged, or abusers of alcohol and drugs; they can engage in adulterous behavior, cheat, steal, or lie. They can be inattentive to their child. Parents can put their needs ahead of their child's needs. They can degrade the other parent and other members of the child's biological family.

Only if all behaviors are considered will we make wise custody decisions. We must be certain we do not put undue emphasis on isolated instances of fault and deprive a child of custody with the parent whose flaws are least likely to be detrimental to his or her development.

We must look to the strong points of a parent and what a parent has done for affirmative parenting rather than a litany of sins.

The trial judge, as am I and as is the majority, is concerned about the instances of Tom's physical assaults on Lisa. The trial judge's findings show he considered each instance, disapproved of each, and fully considered them together with other evidence in awarding Tom custody. The trial judge said:

> The record reflects, and in several instances is uncontradicted by either of the parties, a history of domestic abuse upon Lisa. July of 1992 is the first acknowledged occurrence. Tom returned home after

a night with the boys and confronted Lisa with his knowledge that she was being unfaithful and had a relationship with another man. Tom acknowledged that he sat on Lisa and did assault her. In August of 1992 another incident occurred in the presence of witnesses at the Iowa State Fair, which to the court's belief fell short of a physical assault on Lisa, but had the definite potential. In this instance Lisa was dancing suggestively and sitting on the lap of a Blake Neeley, all of which was exacerbated by the fact that both parties were drinking. Tom acknowledged having grabbed Lisa's coat when she was on the ground, but observers testified that Tom did not strike Lisa. In fact, the squabble culminated in Tom being struck in the face by a bystander who was concerned for Lisa's welfare. Tom acknowledged throwing Lisa in a snow drift in February of 1994. Lisa contends that she suffered severe lacerations, bruising and swelling to the eye and face. This incident was not reported to anyone else as testified in court. There appears to be somewhat questionable corroboration as to the extent of her injuries. Tom stated that this incident was exaggerated in that he only desired to cool her off after her absence from the home for three days. In July of 1994, an apparent argument took place after Lisa showed up at the county fair intoxicated and informed Tom of her intention to file for a divorce. Exhibits were introduced indicating that Tom may have grabbed Lisa around the neck. Instances alleged by Lisa were to have occurred in the fall of 1993 when she came home after having been out with the girls and also another after the filing of the petition, when she was thrown off the front porch, attempting to retrieve some of her personal belongings.

The court should point out that Tom has acknowledged several but not all of the incidents of assault. The credibility of Lisa is somewhat questioned by this court due to the lack of corroboration and some inconsistency in statements. She testified that she had "mistakenly" signed an affidavit that an arrest warrant had been signed which she admits was untrue, in an attempt to get a restraining order. In defense of his actions, Tom contends that these incidences were isolated and that they were all the result of provocation due to her infidelity. The temporary custody order signed by Judge Wilke, which appears consistent with the evidence presented at trial, found that while acknowledging that he lost his temper on two separate occasions toward Lisa, he claims that "he was subjected to extreme provocation by Lisa's actions, i.e., the allegations that she was caught in bed with another man and Tom's personal observation that Lisa was flirting with the man at the Iowa State Fair."

> The Court in reviewing the record before it concludes that the custody of Austin would be best served by placing him with his father, Tom Hanson. The court neither condones nor makes any attempt to excuse the previous assaultive behavior on behalf of Tom. The court would make several observations in that regard. One, the court does believe that the incidences were isolated. There appears to be nothing in Tom's past history that would indicate that he is a combative nor a violent person. Further, while the court from a legal standpoint can say that there is no provocation sufficient to result in abusive behavior, Tom's behavior appears to be consistently responsive to Lisa's infidelity. If the court were to believe that this would be a continuing problem or one that would impact upon Austin, its decision would obviously be different. The court believes that Lisa has demonstrated a tendency for living in the "fast track", and has no reason to believe that this might not continue. Further, in doing so, Lisa has on occasion placed Austin secondary to her own desires. The court can find no evidence that Tom has done so as it relates to Austin. The court would further state that the candidness of Lisa is questioned in this matter.
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> The evidence would support the fact that Tom is a responsible, productive person within the community and offers a stable and secure environment for Austin. For these reasons, the parties shall share joint legal custody of Austin, with Tom being the primary physical custodian.

The trial court has made findings on the issue of credibility, on which we have given him deference

Lisa's lack of credibility and her decision to engage in a relationship with another man and leave the marriage has had an adverse effect on Austin. Her failure to leave Austin with attentive caretakers has had an adverse effect on him. The trial court has challenged Lisa's credibility. Unfortunately, we are seeing men and women reporting abuses that did not happen because they feel they will gain an advantage in the system. Lack of candor is a serious flaw, as is an attempt to misuse the justice system.

Thomas has been more attentive to his child's need. He is trained as a teacher. He has put his child's needs first.

The trial judge has carefully assessed all of these issues. I would affirm with one modification. I would order Tom attend a course or class in the area of domestic abuse.

Huitink, J., joins this dissent.