IN THE COURT OF APPEALS OF IOWA

No. 1999-154 (9-370) / 98-1991
Filed October 15, 1999

JENNIFER LYNN CARSON,

Appellant,

vs.

JEFFREY MICHAEL HORKHEIMER,

Appellee.

FILED
OCT 15 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Buchanan County, James C. Bauch, Judge.

The appellant appeals from a district court order awarding primary physical care of the parties' minor children to the appellee. **AFFIRMED.**

Jeffrey M. Ireland of Eells & Sovern Law Offices, P.L.C., Cedar Rapids, for appellant.

James T. Peters, Independence, for appellee.

Heard by Streit, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Jennifer Lynn Carson appeals from a district court order awarding primary physical care of the parties' two minor children to their father. She contends the court erred in awarding primary care to Jeffrey Michael Horkheimer and in denying her post-trial motions. After a de novo review, we affirm.

I. Background Facts and Proceedings. Jennifer Carson and Jeffrey Horkheimer are the unmarried parents of two children, Cole Horkheimer, born in February, 1992, and Jordan Horkheimer, born in June, 1994.

Jennifer and Jeffrey began living together in 1989. Jennifer became pregnant with their first child in 1991 while they lived in Hazleton, Iowa. Before the child was born, Jeffrey was offered a job with a tow boat company in Kentucky and moved there. Jennifer lived with her mother in Hazleton until shortly after the baby, Cole, was born and then moved to Kentucky to be with Jeffrey in February or March of 1992. Jeffrey continued employment with the tow-boat company during their entire stay in Kentucky. Jennifer did not seek employment.

After a few months, Jennifer moved back to Iowa with Cole and again stayed with her parents in Hazleton. Jennifer obtained employment at Iowa Ham and later moved into her own apartment. She also began a new relationship with a coworker.

During the summer of 1992, Jennifer returned with Cole to Kentucky and resumed cohabitation with Jeffrey. Jennifer's and Jeffrey's second son, Jordan, was born in June, 1994. In October of 1994, Jennifer returned to Iowa with the children and started working at Triangle Plastics. Jeffrey also left Kentucky and returned to

Iowa. He obtained employment at Transco. The couple resided with Jeffrey's parents for a short time and Jennifer then moved in with her mother.

In approximately April of 1995, Jeffrey completed work on a mobile home and he and Jennifer moved into it with their two children. They resided together there until their final separation in October of 1995. Initially, Jennifer moved out of the mobile home and returned to her mother's residence with Cole. Jordan remained with Jeffrey until the parties worked out a shared placement agreement which resulted in the children spending equal time with each party.

In May 1997, Jennifer filed this action to establish primary care, visitation and child support. Following trial in April 1998, the district court awarded Jeffrey primary physical care of the children. Jennifer was awarded liberal visitation and ordered to pay child support. After the district court entered its decree, Jennifer filed motions for a new trial, enlargement of findings and conclusions, and to substitute judgment. She argued new evidence required a different outcome. The court granted Jennifer's motion to amend the judgment concerning transportation of the children, medical expenses and insurance, but denied all other motions.

Jennifer appeals. She contends the trial court erred in its decision to grant Jeffrey primary physical care of the parties two boys. She also argues the trial court incorrectly denied her post-trial motions.

II. Standard of Review. Our review in this matter is de novo. *See* Iowa R. App. P. 4; *see also 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 first hand the demeanor of the witnesses when testifying. *Id.; see also In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). The controlling consideration in child custody cases is always the best interest of the children. *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa App. 1998). These criteria govern custody decisions, regardless of whether the parents are dissolving their marriage or are unwed. *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa App. 1994).

We review rulings on post-trial motions for errors at law. *Lovick v. Wil-Rich*, 588 N.W.2d 688, 692 (Iowa 1999). We do not disturb the trial court's ruling on new trial motions unless there has been a clear abuse of discretion. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995).

III. Primary Physical Care of the Boys. We concede this is a close case. Both parents are suitable caretakers for the boys. Although Jennifer and Jeffrey do not communicate very well with one another, both deeply love their children and have done a reasonably good job of providing for the boys' health and welfare.

Nevertheless, we agree with the trial court's conclusion it is in the boys' long-term best interests to place primary physical care with their father. Jeffrey has done a good job of caring for the boys when they have been with him. When the parties lived in Kentucky, Jennifer did not work and assumed much of the daily care. However, despite the demands of his job, Jeffrey helped when he was home. During the last year of the parties' relationship when they again lived in Iowa, Jennifer worked a shift four days a week with hours from 6:00 p.m. to 6:00 a.m. Jeffrey took

care of the boys in the evening after work, preparing dinner, having play time, and putting them to bed. He shared responsibilities of taking the boys to the sitter and to the doctor. He has actively participated in all facets of their lives, including observing their activities even when they are in Jennifer's care. When Jeffrey has the children, they are his primary focus. He has adjusted his work and relationships to make sure their needs are addressed.

We find no serious deficiencies with Jennifer's ability to parent. However, Jennifer has not shown much stability in residence and has occasionally exhibited poor judgment in her relationships with others. She has also been more likely to put her personal interests before those of the children. The record reveals she is quick-tempered, inclined to scream at the boys, and use foul language in their presence if they have acted inappropriately. She has not been as effective a disciplinarian as Jeffrey.

Based on our de novo review, we agree with the trial court's conclusion the boys' best interests are served by awarding Jeffrey primary physical care. We believe he will provide the most stable home environment while insuring the children have maximum contact with their mother.

IV. Post-Trial Motions. Jennifer contends the trial court erred in denying her motions for a new trial and to modify or substitute judgment. These motions centered on allegedly newly discovered evidence concerning testimony about abortions and Jeffrey not getting married as he had anticipated at trial. Jennifer contends affidavits

submitted with her motions call into question the credibility of testimony given by several of Jeffrey's witnesses.

We have carefully examined all the evidence de novo, including the affidavits attached to the post-trial motions. We conclude the trial court did not abuse its discretion in denying her motions. Some of the disputed testimony was given by Janet Gibbs, long-time friend of Jennifer. The trial court found her to be very credible. Ms. Gibbs testified Jennifer had told her that she (Jennifer) had several abortions. Gibbs did not claim personal knowledge of abortions. Jennifer argues this testimony was prejudicial and false. As part of her post-trial motions, Jennifer provided medical records from several medical facilities in support of her denial that she ever had an abortion. Under the circumstances presented, we find no prejudice. The trial court expressly stated it did not rely on the disputed information about abortions, nor do we. The trial court made express findings about Gibbs' overall credibility and we find no error in its reliance on her testimony on other issues affecting custody.

As for the 'newly discovered evidence' that Jeffrey did not get married as anticipated, this fact is unimportant to our conclusion regarding primary physical custody. A party seeking a new trial on the ground of newly discovered evidence must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of 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*, 537

N.W.2d at 762; *Tullis v. Merrill,* 584 N.W.2d 236, 242 (Iowa 1998) (applying same standard to a petition to vacate judgment based on newly discovered evidence). The trial court found the fiancee, Tiffany Robbins, credible. The fact that she and Jeffrey did not marry does not affect Jeffrey's capability as a father. She had a relationship with Jeffrey for at least a year and had extensive personal knowledge of Jeffrey's ability to take care of the boys and his relationship with them. Even if this evidence is properly characterized as newly discovered, it would not change the result if a new trial were granted. There is ample evidence in favor of Jeffrey to outweigh the fact that he has not married. We find no error on the part of the trial court in denying the post-trial motions.

The trial court's decree is affirmed.

AFFIRMED.