IN THE COURT OF APPEALS OF IOWA

No. 0-533 / 99-1767
Filed October 25, 2000

IN RE THE MARRIAGE OF DENNY L. THOMPSON AND TRACY L. THOMPSON

Upon the Petition of
DENNY L. THOMPSON,
Petitioner-Appellant,

And Concerning
TRACY L. THOMPSON,
Respondent-Appellee.

FILED
OCT 2 5 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Webster County, Joel E. Swanson, Judge.

On appeal from the entry of an order granting the respondent primary physical care of the parties' children, petitioner contends the interests of the children warrant that he be granted primary physical care. We agree. **REVERSED AND REMANDED.**

William H. Habhab, Fort Dodge, for appellant.

Joseph J. Straub of Winkel & Straub, Algona, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

Petitioner-Appellant Denny L. Thompson appeals from an order-granting primary physical care of his children to their mother Respondent-Appellee Tracy L. Thompson. We reverse and remand.

Denny and Tracy were divorced in 1993. At the time of the dissolution the district court approved an agreement of the parties that they be granted joint legal custody of their children, Joseph, born in 1990, and Dakota, born in 1991. The approved agreement further provided, "The Court shall retain jurisdiction to determine the issues of physical custody and child support upon application by either party."[1]

At the time of the dissolution the children were living with Denny's sister, Karen Guilliland, who was receiving no support from either of the parties or the State. The parties agreed that Karen be appointed guardian because neither parent was able to assume custodial care at that time. Tracy was charged with felony forgery, theft and possession of marijuana with intent to deliver in two counties. Denny, charged with seventeen counts of burglary, and was in prison. Ultimately Tracy would spend time in in-patient drug treatment and in a halfway house correctional facility. Denny would serve a sixteen-month prison sentence.

The children lived with Karen in Burt, Iowa, for five years. Tracy was in Maryland during most of 1996. In the summer of 1997 the children lived with Denny, his girlfriend and his daughter, Danielle, in Fort Dodge, Iowa. In June of 1998 Karen returned the children to Denny. On June 19, 1999, a year after

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[1] Temporary provisions with an order for later review, while permissible, should be employed with caution in order to reduce the chance of trauma which attends a subsequent transplant of the child. *Betzel v. Betzel*, 163 N.W.2d 551, 554 (Iowa 1968); *Shipley v. Shipley*, 182 N.W.2d 125, 127 (Iowa 1970).

Denny assumed custody, Tracy filed a petition asking that she be awarded primary physical care of the children and that Denny be required to pay child support.

The matter came on for trial and on October 7, 1999 the district court made its decision. The court determined the matter was not a modification of a decree, therefore it was not necessary for Tracy to show a substantial change of circumstances. The court found there was limited testimony and little for it to consider as to the children's interest. Finding Tracy passed through a phase of her life filled with crime and addiction, the court found she now had a stable environment, full-time employment, and the desire to provide for her sons.

The court found Denny has full-time employment but continues to have alcohol related offenses. The court also found Denny had closer contact with his two sons because his sister was guardian.

The court then found "that Tracy Thompson should be allowed the opportunity to be a mother to her sons and to provide physical and emotional support for them," and awarded her primary physical care.

Denny contends that he is the better parent. After his incarceration he was in more frequent contact with the children. He is gainfully employed and is living in a four-bedroom house. At the time of the hearing the children had been in his custodial care over a year. Tracy has not paid him any child support.

The dissolution decree was over six years old and the children had been in their father's care for a year before the custody issues were presented to the district court. The district court treated this as an original custody determination.

We need first determine if this is a modification or an initial custody

determination. Our appellate courts have looked with disfavor upon decrees allowing future review of child custody issues without the necessity of a showing of a change in circumstances. *See In re Marriage of Schlenker*, 300 N.W.2d 164, 165-66 (Iowa 1981); *In re Fenchel*, 268 N.W.2d 207, 209 (Iowa 1978); *In re Marriage of Stom*, 226 N.W.2d 797, 799 (Iowa 1975); *Shipley v. Shipley*, 182 N.W.2d 125, 127 (Iowa 1970); *Betzel v. Betzel*, 163 N.W.2d 551, 555 (Iowa 1968); *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa App.1997); *In re Marriage of Hoag*, 380 N.W.2d 8, 9 (Iowa App.1985). Although stopping short of completely forbidding the practice, the Iowa Supreme Court has discouraged retention of jurisdiction to modify dissolution decrees without a showing of change of circumstances. *Schlenker*, 300 N.W.2d at 165. Trial courts should make final disposition of cases on circumstances then existing. *Id.* There may be exceptional cases allowing a departure from this rule, but our courts have been unable to foresee any such circumstances allowing a court to issue its decree piecemeal. *Id.* Only when a decree provides for later trial court review without the necessity of showing change of circumstances will the court say this was the trial court's intent. *See id.* Even if the trial court did intend such a departure from the normal standard of review, we will not allow the provision unless there are facts justifying the departure. *In re Marriage of Vandergaast*, 573 N.W.2d 601, 603 (Iowa App. 1997). *See also Hoag*, 380 N.W.2d at 9.

The decree here provided no language allowing review without showing a change of circumstances. However, we are not dealing with review of the original placement. Therefore we basically agree with the district court that this is reviewed as an original custody determination. However, it would not be in the

children's interest to fail to give consideration to the fact the children were under their father's care for more than a year and their mother, allegedly able, did not seek their custodial care several years before she did.

In reviewing an original custody award the controlling consideration in determining custody is the interest of the child. Iowa R. App. P. 14(f)(15). In deciding this question, we review the record de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. *See In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). There is no inference favoring one party as opposed to the other in deciding which one should have custody. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long-range interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The critical issue is determining 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 an original custody proceeding. *Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995); *See also In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App.1985).

Tracy went to community college. There is no evidence she has continued her drug use although by her own testimony she continues to use alcohol despite having suffered from drug addiction and being treated for it. She has been gainfully employed at the same job for a year and a half. She admittedly had limited contact with the children for four years. Tracy has a two-bedroom apartment where she lives with a female with whom she testified she has a romantic relationship. Tracy felt Karen took good care of the children and

had their best interests at heart. Tracy quit a job where her wages were garnished for child support and had made no financial contributions to the children in the approximately two years prior to the hearing.

Tracy contends Denny prevented her from seeing the children, but admitted she had seen the children more than ten times in the year prior to the hearing and was and is able to telephone and write to the children and have them for two weeks summer visitation. Denny's initial refusal to allow visitation was due to his misconception that because Tracy was not paying child support she could not see the children. Once he was advised that legally this was not the case he was reasonable in allowing her contact and visitation with the children.

The children's school records and report cards from the year the children were in Denny's care are in the record. The boys both had excellent attendance records, and both got high marks in spelling. Joseph's teachers said, "Joey comes to school ready to learn. He is developing some bad habits and needs to focus on listening and following directions." "Joey completed all 3 of his required book reports." "Joey is enthusiastic and cooperative and does his best in art!" "Occasional reminders to work quietly," "energetic participant in music classroom activities." "Good skills, works well with others."

Dakota has behavior problems. In January of 1999 he was assessed for "Attention-Deficit/Hyperactivity Disorder" by a social worker with Arrowhead AEA 5. The report indicated the worker met with Dakota's teacher, and Denny and all agreed Dakota tended not to get work completed and was fidgety. Dakota was determined to have Attention-Deficit/Hyperactivity Disorder, Combined Type (314.01) that was between mild and moderate. The worker also felt Dakota

would benefit from three to four weeks of a stimulant medication such as Ritalin. Apparently he was given medication, and at the end of the year the teacher noted his work habits and classroom behavior had greatly improved as well as his behavior at recesses and at lunch. Denny in this case showed he cooperated with his child's teacher and sought help with a difficult problem. We make no finding as to whether Ritalin should have been given Dakota.

The school records show Denny is prompt and constant in seeing that the children attend school, he is in contact with their teachers and was cooperative with the AEA in handling Dakota's problem. The fact spelling grades are excellent and papers are turned in by both of the boys shows they receive help with homework at home. In contrast, we have no evidence as to Tracy's performance as a parent. In the two weeks she had them for summer vacation she left them with a childcare provider and she testified the time she spent with them was used for going to the zoo and other such activities.

As did the district court, we consider the fact Denny for the second time has been picked up for driving under the influence, a factor against his obtaining custody. We also look with disfavor at the fact Tracy, who was treated as a drug addict, continues to consume alcohol.

While Tracy advances she asked for the children just after Denny took them, she did nothing to go forward with her claim for a year. The children have found stability in both Karen's home and Denny's home. The school records are the most reliable and telling evidence of the care the children receive in Denny's home. The record is void of how they will fare in Tracy's home. While we agree with the district court Tracy has made progress in her life, that alone does not

show her to be the better parent. While it would be nice to give her an opportunity to parent, the children are better served with their father, who has shown his ability to be an adequate parent and has been substantially more involved in his children's life since the parties' dissolution. Additionally, we note by remaining in their father's custody the children will have frequent contact with their half-sister with whom they have bonded. They also will have frequent contact with their maternal grandparents who live in Fort Dodge. We reverse the district court and find Denny should have primary physical care. We remand to the district court to fix Tracy's responsibility for child support and to establish her visitation.

REVERSED AND REMANDED.