IN THE COURT OF APPEALS OF IOWA

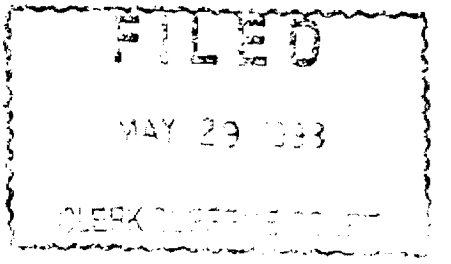
No. 8-148 / 97-0619

UPON THE PETITION OF
MICHAEL L. WITTE,

Petitioner-Appellant,

AND CONCERNING
CYNTHIA J. RIOS,

Respondent-Appellee.



Appeal from the Iowa District Court for Johnson County, William L. Thomas, Judge.

Michael Witte appeals from a district court order awarding Cynthia Rios primary physical care of their daughter. **AFFIRMED.**

Constance Peschang Stannard, Iowa City, for appellant.

Davis L. Foster, until withdrawal, and then James K. Kringlen of Legal Services Corporation, Iowa City, for appellee.

Heard by Cady, C.J., and Sackett and Streit, JJ.

SACKETT, J.

This is an appeal from a decree awarding primary care of Destinee Witte, born April 1, 1995, to her birth mother, appellee Cynthia Rios. Her birth father, appellant Michael Witte, contends he, not Cynthia, is the better custodian. We affirm.

Michael and Cynthia never married. Michael, twenty-eight at the time of trial, has another child, Ryan Witte, born to Michael and his deceased wife. Ryan was six years old and in Michael's sole care and custody. Cynthia, thirty-five at the time of trial, is the mother of Tiffany, thirteen, and Dominique, nine. These children are currently in her custody.

Michael's deceased wife had engaged Cynthia for child care for Ryan. Michael had briefly met Cynthia before his wife died. Following his wife's death, Michael and Cynthia ultimately moved in with each other. A major reason for their later separation was Cynthia's problem with Ryan.

The question is which parent has shown they have the better ability to minister more effectively to the child's long-range interests. *See In re Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995). The objective is to grant physical care to the parent where the child is more likely to have a healthy physical, mental, and social environment. *See Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988). The controlling consideration in determining custody is the interest of the child. *Purscell*, 544 N.W.2d at 468; 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 decide each case on its own facts to determine 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. *See In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). The criteria governing custody decisions is the same regardless of whether the parties are dissolving their marriage or are unwed. *Lambert*, 418 N.W.2d at 42.

Michael contends he is the better parent. He contends Cynthia has a poor work history and financial history. Michael further contends Cynthia has little support from her extended family. He advances three of Cynthia's family members testified for him and told of drinking with Cynthia and using marijuana and crank.

Michael further contends Cynthia utilized a domestic abuse petition to obtain an ex parte custody award. He complains Cynthia smokes in her children's presence, as well as consumes alcohol when caring for other children. Michael advances

Cynthia takes pills and has had to call parents to pick up their children because she suffers anxiety attacks. He contends she mistreated Ryan during the months they lived together, and he brought forth witnesses who testified to her mistreatment of Ryan.

Cynthia contends her daughters are good students, outgoing, and liked by their peers. She advances Ryan, who suffers from the loss of his mother, has emotional and behavioral problems. She argues Ryan has a discipline problem at school, threatened to kill a fellow student, and showed a weapon. Cynthia contends Ryan's problems would make it more difficult for Michael to care for their daughter.

Each parent has strengths and weaknesses. The trial court had the benefit of observing the witnesses. We find no valid reason to disagree with the custodial care award and affirm on this issue.

Michael contends the trial time incorrectly limited his witnesses. Cynthia contends Michael failed to preserve error on this contention. We agree. The trial court allocated a certain time period for this trial and divided it between Michael and Cynthia. Neither objected to the proposed allocation of time and acquiesced in the trial court's procedure. We agree error was not preserved.

Michael's next contention is he was limited in cross-examining witnesses. He contends the trial court erred in telling him his time was up when he sought to cross-examine one of Cynthia's witnesses.

Ordinarily, the scope of cross-examination is within the trial court's discretion. *Avery v. Harms Implement Co.*, 270 N.W.2d 646, 649 (Iowa 1978). We reverse only for an abuse of discretion, and then only if it appears prejudice resulted. *Id.* The question is: (1) was restricting the cross-examination such as to constitute an abuse of discretion; and (2) if so, was it prejudicial? *Id.*

While the scope of cross-examination is discretionary, the right to do so is absolute. *Id.* at 650. It is a right essential to a fair trial. *Id.*; *Thomas v. State Bd. of Parole*, 220 N.W.2d 874, 878 (Iowa 1974); *Wheatley v. Heideman*, 251 Iowa 695, 710, 102 N.W.2d 343, 353 (1960); *Dioptron Co. v. Dimmitt*, 245 Iowa 450, 455, 62 N.W.2d 749, 751-52 (1954). Only after a party has been afforded an opportunity for full and fair cross-examination may the trial court limit its scope. *Avery*, 270 N.W.2d at 650; *Pickerell v. Griffith*, 238 Iowa 1151, 1164, 29 N.W.2d 588, 595 (1947).

Cross-examination is limited to matters testified to in chief. *Uhlenhopp v. Steege*, 233 Iowa 368, 372, 7 N.W.2d 195, 197 (1942). This does not mean counsel is restricted to a categorical review of those matters testified to on direct examination. It may extend to any subject within the fair purview of direct examination. *State v. Monroe*, 236 N.W.2d 24, 29 (Iowa 1975); *State v. Jensen*, 189 N.W.2d 919, 924 (Iowa 1971). Cross-examination may be used to rebut not only the direct testimony but the presumptions or inferences which such testimony reasonably raises. *Wheatley*, 251 Iowa at 710, 102 N.W.2d at 353; *Dioptron*, 245 Iowa at 456, 62 N.W.2d at 752.

Michael had not objected to the time limits imposed even before the trial commenced. The trial judge, while telling Michael his time was up, stated if cross-examination were needed, it would be allowed. No further requests were made. There was no abuse of discretion. After having given consideration to Michael's arguments, we affirm.

AFFIRMED.