IN THE COURT OF APPEALS OF IOWA

No. 6-193 / 05-1248
Filed July 26, 2006

IN RE THE MARRIAGE OF CHRISTOPHER LEE AND TAWNYA SUE LEE

Upon the Petition of
CHRISTOHER LEE,
Petitioner-Appellee,

And Concerning
TAWNYA SUE LEE,
Respondent-Appellant.

Appeal from the Iowa District Court for Madison County, Paul R. Huscher, Judge.

Tawnya Sue Lee appeals that portion of the decree dissolving her marriage naming Christopher Lee primary custodian of the parties' two children. **AFFIRMED.**

Ryan Genest, Des Moines, for appellant.

Bob Siddens of Siddens Law Office, Des Moines, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

Tawnya Sue Lee appeals challenging the custody provisions of the decree dissolving her marriage to Christopher Glen Lee. The district court awarded primary physical care of the parties' two daughters to Christopher, finding, among other things, that Tawnya (1) had been physically abusive to Christopher, (2) lacked credibility, and (3) demonstrated an unwillingness to allow Christopher in the children's lives. Tawnya challenges many of these findings and contends she should be the custodial parent because she has been the primary caregiver and she will more effectively minister to the children's needs. We affirm.

Scope of Review.

We review de novo. Iowa R. App. P. 6.4. 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). The question is always which parent will do the better job of raising the children. *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App. 1991). We look to the factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(6)(*g*). Yet, we are not bound by these determinations. *Id*. The interests of these children are the primary consideration. *See In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa Ct. App. 1988). We give consideration to each parent's role in child-raising prior to a separation in fixing primary physical care. *See In re Marriage of Love*, 511 N.W.2d 648, 650

(Iowa Ct. App. 1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. *In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa Ct. App. 1998).

The parties were married in the spring of 2001. Tawnya had a daughter, Megan, from a prior relationship, who Christopher adopted. Tawnya and Christopher subsequently had a daughter, Molly. At the time of trial Megan was nine, Molly was two, Tawnya was thirty-five, and Christopher was twenty-eight.

Christopher is employed doing commercial refrigeration work. Tawnya was a housekeeper at an apartment complex at the time of marriage. She terminated this employment upon becoming pregnant with Molly. At the time of the dissolution she was attending school with hopes of becoming a dental assistant.[1]

This marriage was far from harmonious. There have been charges and counter charges of domestic abuse. In her appellate brief Tawnya makes a number of allegations against Christopher which she contends support her position that she is the better parent and the children's interests are better served in her custody than in Christopher's. We discuss these allegations below.

Findings that Tawnya Committed Domestic Abuse.

The district court found and the record supports the fact there were a series of physical encounters between the parties during the marriage and that both parties had been physically assaultive. After making this finding the district

[1] Her child support was fixed at seventy-five dollars a month.

court specifically found it was Tawnya who damaged doors, woke Christopher to engage in fighting, bit him to the point of drawing blood, struck him with a piece of steel, and confronted him with a shotgun. The court noted Tawnya was the only one charged with the criminal offense of domestic abuse assault and while the case was dismissed when the State's request for a continuance was denied, the court noted this was not a determination on the merits of the case.

Tawnya challenges the finding that she was the more violent. She points out that an order of protection was entered ordering Christopher from committing further acts of abuse or threats of abuse and prohibiting him from contacting Tawnya.

However, the order was entered after an ex parte hearing on Tawnya's petition. It later was amended and without finding there was domestic abuse, the court said that neither party should contact the other party. The order did provide the parties could have contact through a third party to exchange information about the children and further provided the parties may communicate on matters related to the health of the children and jointly attend medical appointments and treatments and the like without violating the no-contact order.

Tawnya also contends Christopher's evidence was not of the kind which would justify a finding she was guilty of domestic abuse. She admits there were confrontations but correctly contends they happened several years prior to the dissolution hearing. She also challenges the credibility findings made by the trial court contending that the court incorrectly found Christopher's testimony more credible in determining fault when domestic abuse occurred.

Unwillingness of Tawnya to Include Christopher in the Children's Lives.

The district court found Tawnya was not willing to include Christopher in the children's lives. Tawnya does not argue this finding by the district court is in error and we do not find that it is. Rather Tawnya contends she has always complied with court orders providing for Christopher's visitation, and Christopher has not filed any contempt actions seeking her compliance.

Christopher points out that after she filed the petition for a protection order and the matter came on for hearing, she made certain allegations about his sexual behavior.[2] He notes that while she received custody he was given only supervised visits. He agreed to be evaluated by Dr. Craig B. Rypma for a risk assessment as to his sexual behavior. After Dr. Rypma evaluated Christopher he was to provide a report to the attorneys for both parties. It was agreed that if Dr. Rypma determined it was unnecessary for Christopher's visits to be supervised then supervised visits could be stopped. Christopher claims he got a favorable report from Rypma but that Tawnya insisted the supervised visits continue.

The evaluation took place. Dr. Rypma reported Christopher was within normal limits and had developed sexual interests and behaviors along a course that would be expected. Rypma found Christopher's sexual adjustment to be within normal limits and that Christopher was functioning within a normal range and there was no evidence that he was currently experiencing a paraphilia or that his sexual behavior was in any manner deviant. The evaluation was completed

[2] This concern apparently was fueled by pictures of nude women she found in the garage.

in September of 2004, yet Christopher was still having only supervised visits at the time of trial in July of 2005.[3] However, Christopher did not challenge Tawnya's refusal to comply with the spirit of the agreement until the time of trial.

Tawnya's attitude towards Christopher's relationship with his daughters is clear from her own testimony. She testified she does not want him to have anything to do with the children until they are eighteen and even after what she refers to as "the custody battle" she does not want to have anything to do with him, not even on medical or speech issues concerning the children.

Not only did she refuse to allow him unsupervised visits with the children after Dr. Rypma's report, but she also prevented him from attending a consultation with a professional concerning Molly's hearing despite the fact the protection order specifically provided both parents could attend such appointments.

Christopher wrote three letters to Tawnya and/or her attorney on the subject of him wanting to put together a plan so Megan could get needed math help, expressing his concern about the professional counselor for Megan that Tawnya had chosen without his input or consent, and providing Tawnya with information concerning the number of counseling sessions that his health insurance policy covered. The letters were straightforward and reasonable and focused on Megan's education and treatment issues on which the parties should have been making joint decisions. Rather than Tawnya attempting to discuss the issues in a reasonable way her attorney wrote a letter to Christopher's attorney with a copy to Tawnya stating:

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[3] Christopher willingly paid $140 for supervision of a four hour visit.

> Please find attached to this letter yet another letter that your client has written to Ms. Lee. By this letter I am putting both of you on notice that as far as I'm concerned your client's actions at this point amount [to] harassment of my client and will not be tolerated any further. If Mr. Lee sends one more letter I will not hesitate to file an Application For Rule to Show Cause and ask that he be incarcerated. Please advise him that your non-committal approach does not give him the right to continue to harass Ms. Lee and seek to interfere with counseling[4] simply because it does not suit his own selfish, self centered purposes.

The Iowa courts do not tolerate hostility exhibited by one parent to the other. In *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994), we addressed a situation where parents sought to put the other parent in an unfavorable light and considered it a factor in modifying a custody award. Other cases have addressed similar complaints under other circumstances. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Leyda*, 355 N.W.2d 862, 865-67 (Iowa 1984); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659-60 (Iowa Ct. App. 1991).

Custody award was to punish Tawnya and it was not in the children's best interest.

Tawnya also argues that the district court order punished her in asking for what she believes were reasonable protections for her daughters. She contends counselors had told her Megan was fearful of Christopher and she said Megan exhibited fear when she had visits with her father. She further contends she reasonably believed Christopher might sexually abuse the children.

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[4] The counselor Christopher was questioning was chosen only by Tawnya. She rejected another counselor and chose this one because she wanted a counselor who would help her with her custody fight. The district court gave little or no weight to the opinions this counselor advanced at trial.

Social workers from Generations Incorporated, including Yuett Williams, a protective social worker for fourteen years, supervised over 100 hours of visits between Christopher and the girls. Notes made by the visitation supervisors and Williams's testimony contradict Tawnya's position that the children were afraid of their father. Williams testified the children were glad to be with Christopher and he exhibited a good relationship with both of the children. There also is evidence that would indicate Tawyna attempted to turn Megan against Christopher.

Other Challenges.

Tawnya also contends the district court should not have discounted the testimony of a counselor who had met with Megan at Tawnya's request. The counselor testified it was never his purpose to promote reunification between Megan and Christopher. The district court noted the counselor had animosity against Christopher, made no effort to corroborate statements made to him, and did not consider the visitation supervisor's reports. The court gave the counselor's testimony and recommendations little weight. In choosing the counselor Tawnya sought one who would help her in her custody fight and she did not seek Christopher's input even though the protective order provided she should have consulted him about decisions such as these.

Megan's grades and attendance were problematic during the time she was in her mother's care. Tawnya blames these problems on the fact that Christopher had visitation during this period. We find nothing in the record that would support Tawnya's contention.

The district court determined Christopher was more truthful and credible than was Tawnya. The court noted the evidence supported Christopher's claim

Tawnya repeatedly invented new claims as time went on and she admitted a number of earlier statements were untruthful. The district court discounted a number of serious complaints Tawnya first made against Christopher at trial but failed to mention during a two-hour deposition.

After our review of the record giving the required deference to the credibility findings made by the district court we affirm.

We award no appellate attorney fees. Costs on appeal are taxed to Tawnya.

AFFIRMED.