

IN THE COURT OF APPEALS OF IOWA

No. 8-898 / 08-0924
Filed February 4, 2009

IN RE THE MARRIAGE OF JAMES BRIAN THRAEN AND CYNTHIA MARIE THRAEN

Upon the Petition of
JAMES BRIAN THRAEN,
Petitioner-Appellant,

And Concerning
CYNTHIA MARIE THRAEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Shelby County, Gordon C. Abel,
Judge.

A father appeals from the child custody provisions of the parties' decree of
dissolution of marriage. **REVERSED AND REMANDED.**

J.C. Salvo and Bryan D. Swain of Salvo, Deren, Schenck & Lauterbach,
P.C., Harlan, for appellant.

Michael Winter, Council Bluffs, for appellee.

Heard by Sackett, C.J., and Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

SACKETT, C.J.

The only issue raised by James Thraen in his appeal from a decree dissolving his marriage to Cynthia Thraen is that he, not Cynthia, should have received primary physical care of the parties' two sons. We reverse and remand.

SCOPE OF REVIEW.

We review dissolution cases de novo.¹ *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses. *Sullins*, 715 N.W.2d at 247. Precedent is of little value as our determination must depend on the facts of the particular case. *Fennelly*, 737 N.W.2d at 100; *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

PROCEEDINGS AND FACTS.

James was born in 1966 and Cynthia in 1971. They married in March of 1993 and their sons were born in September of 1995 and December of 1997. Prior to their separation, the parties had been living in Shelby County. Both parties were employed in demanding, full-time jobs. They both were away from the home a number of hours a day. James was a shop foreman for Robinson Implement in Irwin, and he generally worked overtime during planting and harvest season. Cynthia worked as business office manager at the Manning Regional Healthcare Center. The children were in the Irwin-Kirkman-Manilla school that they had attended since kindergarten. Both parents were involved

¹ Though the district court did rule on several objections, this is not sufficient to change it to a proceeding at law, as it was filed in equity.

with the children's day-to-day care. They shared parenting and neither could be considered the primary care parent. James got the boys on the bus in the morning. Cynthia testified it was she who generally took the children to the doctor, signed them up for Sunday school, did the shopping for the family, and planned family trips. James testified he went hunting with the boys and coached or helped with the coaching of their baseball teams. The testimony was that they both were good parents and were involved in their children's lives. Both parties recognized that the other parent was a good parent and that the children needed time with each of them. James was willing to continue the shared physical care if Cynthia would see that the children were transported to the Irwin-Kirkman-Manilla school. He wanted primary physical care if the court did not find shared physical care appropriate. Both parties indicated there were some problems with the shared care but they appeared to make it work. James felt they were communicating with reference to the children's needs, while Cynthia criticized James for being uncooperative about a child's birthday and some of the children's clothing.

In April of 2007, Cynthia started staying out late and there were times when she did not come home for several days, not telling James or the children where she was. James was there to care for the children during these times. At trial Cynthia offered various reasons for her absences including the fact that she was taking further education from Phoenix University and was involved with seminars on penile implants. However, when questioned about these absences she seemed less than forthright in explaining her absences.

In May of 2007 Cynthia met a twenty-seven-year-old man, Rafael Speed. In June of 2007 she left the family home, going to her father's and taking the boys with her, although she returned them to James the next evening because she had a meeting or engagement. The parties subsequently arrived at a shared care arrangement that was confirmed by court order on September 4, 2007. The agreement provided they divide the children's time between them equally and that the children remain in the same school district. At the time of the dissolution hearing the children were still attending the Irwin-Kirkman-Manilla Schools where they wanted to stay. They rode the bus to school when they were in their father's home. Cynthia, who lived in four different places, made various arrangements to get the children to school when they were in her care, either driving the children herself or assigning the responsibility to friends or relatives, including Cynthia's sister. James complained about Cynthia's sister, who has a history of a series of boyfriends and not caring for her own children, transporting the children. Cynthia was of the opinion that the sister had straightened out her life and was a satisfactory person to transport the boys.

In August of 2007 Cynthia was fired from her position at Manning Healthcare. The reasons she gave for her firing were not entirely clear. On August 27, 2007, James filed the petition for dissolution of marriage that led to this appeal. The matter was heard on December 27, 2007. The district court entered its decree on May 12, 2008. It divided certain property and debts and awarded the parties joint legal custody of the children and provided Cynthia have primary physical care. Only the custody award is being challenged.

The district court awarded Cynthia primary physical care. Unfortunately in arriving at its decision the court made few factual and credibility findings and gave us little insight as to the reasons for its decision.

Cynthia found a new job working for Catholic Charities in Omaha in December of 2007. James remained in the family home and continued with his job at Robinson Implement. His employer testified at trial that James was an excellent and dedicated employee who was very involved with his children. He said that James had talked to him about the need to take time off if the children needed him; James's employer was amenable to this.

Cynthia established a close relationship with Raphael after she left the family home. She quickly introduced him to her children and included him in her life. He spent nights in her home while the children were residing with her. She testified when he did that one of them slept on the couch and the other slept in her bed. She admitted that introducing her children to a new boyfriend shortly after her separation from James was contrary to advice given at the Children in the Middle course that both she and James attended.

Raphael testified briefly at trial. He is nine years younger than Cynthia. He is a diesel mechanic. He testified he lives in his parents' home but spends as much time as he can with Cynthia, including overnights. By his own admission he let the older boy drive a car on a county road for about a mile and a half. He had a possession of alcohol charge as a high school student. He also had a possession of marijuana conviction. He claims the charge was the result of a pipe with residue being found during a search of his vehicle. He contended that

the pipe was dropped there by a friend who was a passenger. His future plans are to move in with Cynthia. The record provides little other information about him. They apparently met because of a misrouted text message.

PRIMARY PHYSICAL CARE.

In deciding primary physical care the question is always which parent will do the better job of raising the children. *In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa Ct. App. 1998); *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App. 1991). We consider, in awarding custody, those factors enumerated in Iowa Code section 598.41 (2007). *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We also look to the factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The interests of these children are the primary consideration. *Crotty*, 584 N.W.2d at 717. We give consideration to each parent's role in child-raising prior to a separation. 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 Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). Each custody

decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). The critical issue is determining which parent will do a better job 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. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003); see *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985).

Cynthia has been a good mother, although in the months before the parties' separation she clearly put her own wishes and desires ahead of those of her children. She left home overnight without advising James and the children where she was going. She was quick to bring Raphael into her life. Raphael considers their relationship to be a long-term commitment.

When a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the children becomes a significant factor in a custody dispute. *Decker*, 666 N.W.2d at 179. There are two reasons for this: (1) because of the place the companion will have in the child or children's lives, and (2) not less significantly, because the type of relationship the parent has sought to establish and the manner he or she has established it is an indication of where that parent's priority for his or her children is in his or her life. *Id.* Raphael testified at trial, but the district court made no specific findings about his truthfulness or maturity. There is scant information about him in the record.

James has been a good father. It is clear he did not want the marriage to end. He was supportive of Cynthia and her wish to obtain additional education, and he recognized that when she was working for the Health Center she had an

important job. He wanted to save the marriage and has been complimentary of Cynthia.

The district court found that each witness called was faithful to the party calling that witness as to which parent deserved primary physical care of the boys. However this finding is flawed as a long-time friend of Cynthia, who has two boys the ages of the children at issue here and was called as a witness by Cynthia, when asked if she had a recommendation to make to the court as to which parent should have custody, she said she could not make a choice. She said that both parties were good parents and she would trust her boys with either party.

While both parties have been good parents and neither has had primary care of the children, we do not consider this a close case. Cynthia in the last months of the parties' life together acted irresponsibly in regard to the children's interests. She elected to be away from home evenings and weekends without explanation. She gave little concern to the children's interests in announcing the separation, taking the children from the home and then returning them to their father's care because she had something else to do.²

She ignored the advice of experts in also immediately including her boyfriend in the children's lives and bringing him into her home. She put her needs for a new relationship over the needs of her children. James, on the other hand, has not. We reverse the award of primary physical care and name James

² While an immediate removal may be necessary if a spouse engages in abusive behavior, that did not exist here.

as the primary physical custodian. We remand to the district court to fix Cynthia's visitation and child support obligation.

We deny both parties' applications for appellate attorney fees. Costs on appeal are taxed to Cynthia.

REVERSED AND REMANDED.