IN THE COURT OF APPEALS OF IOWA

No. 2-521 / 12-0296
Filed July 25, 2012

IN RE THE MARRIAGE OF NOEL ANN NASS AND CLINT LEWIS NASS

Upon the Petition of
NOEL ANN NASS,
Petitioner-Appellee,

And Concerning
CLINT LEWIS NASS,
Respondent-Appellant.

Appeal from the Iowa District Court for Bremer County, Christopher Foy, Judge.

A father appeals the physical care provision of the parties' dissolution decree. **AFFIRMED.**

Teresa A. Rastede of Dunakey & Klatt, P.C., Waterloo, for appellant.

Lana L. Luhring of Laird & Luhring, Waverly, for appellee.

Considered by Potterfield, P.J., and Mullins, J., and Schechtman, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SCHECHTMAN, S.J.

I. Background Facts and Proceedings.

Clint and Noel Nass met at a fundraiser in the spring of 2004 when she was eighteen years old and a senior in high school at Fredericksburg, Iowa. Clint was twenty-six years old. Each was an avid horse owner and rider. After graduation, Noel enrolled at Iowa State University while continuing to date Clint. Noel had a penchant for animals, having worked part-time for a veterinarian for over ten years. She graduated from Iowa State with a bachelor's degree in animal science in June 2006.[1]

Clint and Noel were married on September 17, 2005. As an assignment in a business management course in college, Noel completed a proposed plan for a new business, a pet store. She opted to use that plan to start her own pet store in Horton, specializing in exotic animals.[2] The store was eventually moved to Waverly.

In November 2006, Noel gave birth to a son, born prematurely, who after six days died from a heart defect. The couple had another son who was born prematurely the following year; their daughter followed in December 2008. Both were healthy children and are now four and three years old, respectively.

Clint, now thirty-four years old, has an associate degree from Hawkeye Community College in tool and die-making. He has been employed by John Deere as a welder in Waterloo since 1997. Though he had worked two of the

[1] Noel took courses at a community college while still attending high school, obtaining about two years of college credit before her enrollment at Iowa State.

[2] Noel used her share of a wrongful death settlement from her father's estate to fund the opening of the pet store.

three shifts offered at John Deere, he preferred the third shift (10:30 p.m. to 7:00 a.m.), which he chose to work at the time of trial.

The devastating 2008 Cedar River flood destroyed the couple's pet store as well as their home, a double-wide trailer north of Waverly. They resided for a few months in a small garage (showering outside with a hose) with the son, then nine months old, and later moved to a home on an acreage. Noel resorted to working part-time jobs, giving riding lessons to local children, serving as a study hall monitor for the local high school, as well as being a substitute mail carrier and clerk for the post office in Denver, Iowa.

The couple separated in the fall of 2009. With the two children, Noel moved to a friend's residence, then to an apartment in Waverly. Eventually, Noel and the children moved to an acreage near her hometown of Fredericksburg that could accommodate all her animals. Subsequently, she learned of an opportunity with the Iowa City post office, where she now works four days each week with a promising future. She lives with the children in an apartment in Hills, Iowa, which is several minutes south of Iowa City.

The petition for dissolution was filed in February 2010. On July 22nd of that year, the parties entered into a joint physical care arrangement, with Noel having the children four days one week and Clint having them for four days the following week. Clint provided $400 monthly child support. Trial was set for January 2011, but was continued to June 9, 2011. Both parties requested physical care of the children. The trial in June lasted three days. The trial court filed its decree six months later on December 22, 2011. The children were

placed in the parties' joint legal custody and in Noel's physical care, with liberal visitation for Clint.

II. Analysis.

On our de novo review, *see* Iowa R. App. P. 6.907, the trial court's placement of physical care of the children with Noel is affirmed; she, quite simply, can minister more effectively to the long-range best interests of the children. *See In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). We have considered the relevant factors in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974), and conclude that those factors point to Noel as the parent to be awarded the awesome responsibility for the children's physical care.

The parties separated four short years after their marriage, when the children were the tender ages of two and nine months. Clint's time with them was limited due to his work schedule, as well as his choices of how to spend his idle hours. The role of the primary caregiver is critical to children's development, and we should give careful consideration to permit the children to remain with that parent. *See In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). It is abundantly clear that Noel has been the primary caregiver, not only performing all the challenging chores around the home for the children, but also providing for their every day welfare. Her efforts were most commendable, accomplished after the loss of the parties' first child, complicated by the sudden flooding and devastation of the couple's home and business, and followed by living in temporary, cramped quarters, absent any significant acknowledgement of her contributions by her husband. Clint did assume some parenting

responsibilities, but primarily after the parties' stipulation for temporary shared care until the time of trial. His quality time with the children was substantially reduced by his choice to work the third shift at John Deere. This required continual intervention by his mother to tend to the children during a wealth of their waking hours. Noel, despite Clint's refusal to converse directly with her, has demonstrated her acceptance of the importance of providing quality time for the children with their father. We need to consider which parent will encourage the most contact by the noncustodial parent with the children. *See In re Marriage of Shanklin*, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992). Noel has cooperated with Clint under trying circumstances, including agreeing to a joint physical care arrangement as a temporary approach.[3]

Each party spent a significant amount of trial time in attacking the character of the other and pointing out some asserted flaws, few of which were persuasive or pertained to their parenting skills. The trial court got it right when it concluded:

> As it assessed the credibility of the parties, the Court found Noel to be more believable than Clint, particularly with respect to matters directly relating to the children and their respective roles in rearing the children. The demeanor of Clint on the witness stand caused the Court to question the truth of his testimony regarding the contributions each party made to caring for the children and the unflattering allegations he made against Noel. When the parties were together, Noel was the primary caregiver for the children. . . . Each party presented a fair amount of testimony regarding alleged character flaws of the other. . . . Much of this testimony had little relevance to the respective parenting abilities of the parties.

[3] This was not reciprocal, as Noel allowed Clint ten unscheduled days when John Deere was shut down, but he refused her request for a similar period when she was off work and he was scheduled to work. A visitation request for Mother's Day was not even responded to by Clint.

We give a considerable sum of deference to the trial court's determination of credibility, or lack thereof, as the court has a firsthand opportunity to hear and observe the witnesses. *See In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). Though we decide the issues anew, the district court's factual findings are given weight, particularly regarding credibility. *See In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

The court found the children to be "healthy and happy," concluding that both Noel and Clint "are capable and competent parents."[4] Yet the court did determine that Clint's sustained interest in his children did not arise until after the separation and even then was continually diluted by his other, selfish interests.

On appeal, Clint cites Noel's multiple moves as evidence of her instability and argues that awarding her physical care rewards her for her move two hours away to Hills, practically eliminating any chance for joint physical care. Noel stayed for a short time with acquaintances while looking for a residence. An acceptable place was difficult to locate as she had a mini-menagerie, with domestic animals and a parrot. Noel finally was able to secure a place in Fredericksburg on an acreage, where she could pasture her horses. She later moved to an apartment in Hills in order to improve her ability to secure a full-time position with the Iowa City postal services, while still searching for an acreage to accommodate her desire to live in the country with her children and to facilitate

[4] Our prior focus on the ability of the parents to foster a relationship with the other becomes all the more important when each is capable of fulfilling the primary role. *See In re Marriage of Kleist*, 538 N.W.2d 273, 277 (Iowa 1995). We again observe that in the temporary custodial period preceding the trial, Noel was cooperative with Clint, while he was often unresponsive.

their common equine interests. Clint's reliance on these facts is misplaced as the move promoted her full-time employment opportunity.

Another alleged instance by Clint was Noel filing a physical abuse complaint with the Iowa Department of Human Services in April 2010, when the then two-year-old son suffered a series of seizures after a fall while fishing with Clint. Though abuse was not confirmed, considering the remarks of the child as to its cause, its severity, and the lack of any history of prior seizures, any participation in the investigation by Noel appears to have been from maternal concern and devoid of any devious intent. Lastly, Clint perceives that the trial court placed undue emphasis on the racial, gender, and ethnic prejudices of Clint, allegedly carbon-copied from his father. We fail to see that those facts, denied by Clint at trial, played any major part in the court's ruling.

Not unlike the trial court, we resist any effort to decorate this ruling with the plethora of alleged faults assigned by one party to the other, as the majority of those faults had little to do with the parties' parenting roles. Suffice it to say, after looking at the exhaustive record, that Noel will best create an environment that will address and cultivate the children's physical, mental, and social health. *See In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999). She is a seasoned parent, willing to accommodate generous visitation by Clint and to respect his parental role. Physical placement of the children with her is warranted and affirmed.

III. Appellate Attorney Fees.

Noel requests an award of appellate attorney fees. We believe that is appropriate as Clint's income is three times more than Noel's, as well as considering Noel's obligation to defend the trial court's decision on appeal. *See In re Marriage of Bonnette*, 492 N.W.2d 717, 723 (Iowa Ct. App. 1992). We accordingly award appellate attorney fees in the sum of $1500 to Noel.

AFFIRMED.