IN THE COURT OF APPEALS OF IOWA

No. 7-224 / 06-0195
Filed July 12, 2007

IN RE THE MARRIAGE OF YEHOSHUA ZELIG ARONOW AND RISE CAROL ARONOW

Upon the Petition of
YEHOSHUA ZELIG ARONOW,
Petitioner-Appellee,

And Concerning
RISE CAROL ARONOW, n/k/a RIVKAH CHAYAH ARONOW,
Respondent-Appellant.

Appeal from the Iowa District Court for Allamakee County, John Bauercamper, Judge.

A mother appeals the physical care portion of a dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

Barry S. Kaplan and Melissa A. Nine of Kaplan & Frese, L.L.P., Marshalltown, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

A mother appeals the physical care portion of a dissolution decree. We affirm as modified and remand.

I. Background Facts and Proceedings

Rivkah and Zelig Aronow married in 1980 and had eight children. The children are: Ahron, Zalmie, and Bassie, all adults at the time of trial, and Tzemach, born in 1989; Chavah, born in 1991; Levi and Sholom, born in 1995; and Yisroel, born in 1996. The family practiced the Hasidic Lubavitcher faith. Zelig was an ordained rabbi in that faith.

The family moved from Canada to Postville, Iowa, after Zelig was offered a position as a ritual slaughterer at a kosher meat processing facility. Zelig, who also had training and experience as a computer systems analyst, later began working for the company in that capacity. Rivkah primarily cared for the children.

The marriage deteriorated. In 2005, Rivkah moved to New York, taking with her the three youngest boys, Levi, Sholom and Yisroel. The two girls, Bassie and Chavah, who were attending a boarding school in Chicago, later joined them.

Both Rivkah and Zelig filed several petitions in New York and in Iowa. Most were resolved or dismissed. What remained was a dissolution action in Iowa. That action proceeded to trial and judgment. Based on the recommendations of a custody evaluator and guardian ad litem, the district court split physical care of the minor children, placing Tzemach, Levi, Sholom, and Yisroel with Zelig and placing Chavah with Rivkah. Only Rivkah has appealed.

II. Physical Care

Rivkah contends the district court acted inequitably in granting Zelig physical care of the four minor boys. She maintains (A) "the custody evaluation was wrong and the court should reject its recommendations," (B) "the guardian ad litem was wrong and the court should reject her recommendations" (C) "placing the children in Zelig's primary physical care is not [in] their best interests," (D) "placing the children with Rivkah would serve their best interests," (E) "the district court wrongly preferred a place over a person," and (F) "the district court wrongly split the siblings' custody." As will become apparent, we find it unnecessary to separately address the last two arguments.

A. Custody Evaluation

The district court ordered the family to undergo a custody evaluation. Psychologist David McEchron met twice with Zelig, the first time for approximately two hours and the second time for between thirty minutes and an hour. He met Rivkah once for approximately two hours. McEchron also met with all five minor children individually, and informally observed the three youngest children with their father. He did not observe any of the children with their mother.

Social worker Ann McDonald was part of the custody evaluation team. She individually met with Zelig, Rivkah, and the five children. In addition, she observed the youngest three children with both parents.

McDonald and McEchron prepared a report recommending that Zelig receive physical care of all five minor children. This recommendation was qualified. The evaluators "strongly encourage[d]" the court to (1) consider

placing Chavah in a Chicago boarding school and ordering her to divide her school breaks equally between the parents, (2) order Tzemach brought home from a boarding school in France and be given the opportunity to attend a religious school equidistant from each parent or be allowed to attend a secular school and divide his school breaks between the parents, (3) order Zelig to arrange a work schedule that would allow him to "assume the *primary* parenting responsibilities for his remaining children," (emphasis in original) (4) order Zelig to schedule therapy sessions for the children to address grief issues relating to the breakup of the family as they knew it, (5) order Zelig to "find appropriate tutors for his children," (6) order liberal visitation and summer visitation of between five to seven weeks, (7) order utilization of e-mail to discuss logistics relating to the children, and (8) order the parents "to put their issues aside so they may better parent their children together."

Rivkah first maintains that the evaluators lacked an explanation for their recommendation. This contention is refuted by their detailed written assessments of the parents' backgrounds, views of custody, plans for the future, and psychological test results, as well as the children's personalities, preferences, and interactions with the parents. Additionally, both evaluators supplemented their written recommendations with trial testimony.

McEchron testified that "[t]he children love both [parents]." With respect to the manner in which the children had been raised by the parents, he stated:

> They have different approaches to life and to parenting probably. And they have wonderful kids. There is a balance that has been achieved there that is really nice to see in terms of the outcome. But now we are going to destroy that balance. These kids would all live better if they were able to maintain that balance.

Ultimately, McEchron recommended Zelig as the physical caretaker based on his belief that Rivkah was less attentive to the children's educational needs than Zelig. Similarly, McDonald testified, "The issue that struck me most was putting the children in so many different schools. I was very concerned with their – the deficit in their educational background, given their ages and where they should be educationally." She continued,

> Mrs. Aronow was primarily responsible for the kids. She was a primary caretaker for a very long time with them. It appeared that she was also the person that was primarily focused on their educations and seeing to it that it was done.

These statements by the evaluators bring us to Rivkah's second challenge to the custody evaluators' recommendation. She maintains "obvious contradictions in their findings and conclusions undermine, if not refute, the custody evaluation." We agree that the evaluators' statements concerning Rivkah's post-separation role in the children's education are inconsistent with the record. That record reveals the following facts relating to the minor children's schooling in 2005.

1. Levi, Sholom, and Yisroel. In January 2005, the three youngest boys told Rivkah that one of the teachers at the Postville yeshiva sexually abused them. This revelation was not the first of its kind. Years earlier, Rivkah discovered that one of her now adult sons was molested by "an older boy who was under the wing of the people who" ran the school. She did not report the incident for fear of jeopardizing her husband's position in Postville. Instead, she took the son to Montreal for counseling.

On learning that her three youngest sons were also abused, Rivkah immediately removed them from the Postville yeshiva for three to four weeks. Zelig was told of the abuse two weeks after Rivkah learned of it. He stated he looked into it; the children told Rivkah that Zelig insisted they would need to return to the yeshiva.

At the beginning of February 2005, while Zelig was away on business, Rivkah took the three boys to Chicago and, from there, to New York. She did not notify Zelig, a fact we will address later. In New York, Rivkah immediately enrolled the three children in a yeshiva. She stated the twins were in school "[e]very single day" until mid-June 2005. At that point, Zelig traveled to New York, picked them up from school, and brought them back to Postville, without immediately notifying Rivkah and with the knowledge that Rivkah was about to serve him with a New York court's protective order.

The twins were returned to New York in September 2005, pursuant to an Iowa temporary custody order. At that point, officials at the New York yeshiva that the children had previously attended expressed concern about re-enrolling them, given the pending legal proceedings. In addition, Rivkah testified "the children had been so traumatized" that "they were hesitant to start over again in a new school." Despite this hesitance, Rivkah enrolled the twins in a new school and made an effort to take them to school on a daily basis, if only for an hour or two. They began attending full-time in December 2005. Meanwhile, the school began tutoring sessions for them. Special education programs were also available. In addition, Rivkah, who had training and experience as a teacher and

had home-schooled her daughters for a period of time, stated she "supplemented their education daily all through the years."

These additional services were necessary because, according to Rivkah, the twins were "over a year behind because of the lack of education in Postville." This testimony on the adequacy of the Postville education is supported by the testimony of a liaison officer between the Postville yeshiva and the Postville public school. Although class sizes were small for the eighty-one students[1] at the yeshiva, she explained that grade levels were combined and students with special needs did not always get the services they required.[2] She also testified that the physical facility was lacking, as was the supervision at the facility. Her assessment concerning the level of supervision is supported by the disclosures of sexual abuse by four of the Aronow children.[3]

We turn to Yisroel's school experiences. In May and June of 2005, Rivkah noticed that he was having suicidal thoughts. She took him to a medical center. According to Rivkah, staff advised her to "keep him home for awhile, because he was distrusting of adults" and was fearful his father would come and take him home. When the new school year began, he returned to school and, according to a medical report, was "doing well with individual therapy."

We are convinced Rivkah had compelling reasons for removing the three youngest children from schools in 2005. The first removal in Postville was to

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[1] There were also an additional thirty "older high school students" that she did not follow.

[2] She stated Iowa public schools were generally not as accommodating of special needs as the Chicago and Maryland school systems she had worked with previously, and she stated the Hasidic yeshiva even fell below this lower threshold.

[3] It should be noted that the liaison officer's husband did not get along with Zelig. However, the liaison officer's position and prior experience with other states' schools afforded her an independent basis for her testimony.

protect them from claimed sex abuse by a teacher; the teacher was later removed and sent to New York for counseling. The second removal, involving the twins, was in fact not a removal but a period of transition into a different New York yeshiva, precipitated by Zelig's decision to pull the twins out of the first yeshiva. The third temporary removal, involving Yisroel, was based on his emotional reactions to the traumatic events in his life and was in response to a therapist's recommendation.

2. Chavah. Postville did not have a high school yeshiva for girls. Therefore, Chavah went to a yeshiva in Montreal for less than a year and then joined her sister Bassie at a Chicago boarding school run by Zelig's sister. After Rivkah moved to New York, Chavah and Bassie continued at the Chicago boarding school. During the 2005 Passover holiday, they moved to New York. That fall, Chavah enrolled in a New York school where, according to her mother, she was "thriving." There was no indication that her academic performance suffered as a result of her early exit from the Chicago boarding school.

3. Tzemach. Tzemach, who was at a boarding school in France, remained there. The custody evaluators, who met with him in Postville while he was on a holiday visit, stated he expressed a distaste for the boarding school. However, at the time of trial, his mother stated he was doing "very well" there and had acclimatized "himself to the rigorous schedule." There was no indication that Rivkah interfered with his schooling, as the decision to send him to Paris was made before the parents separated. As for Tzemach's future plans, Rivkah testified that he was considering a move to Israel in the ensuing year.

We conclude the facts do not support the custody evaluators' determination that Rivkah undermined the minor children's education. To the contrary, the evidence establishes that Rivkah was keenly attuned to their educational needs as well as their emotional and physical needs. For this reason, we discount the custody evaluators' reliance on education as a basis for their recommendation. *Nicolou v. Clements*, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994) (stating experts' final conclusions not binding on trier of fact or appellate courts); *In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993) (stating evaluators' recommendations not controlling and may be given the weight deemed appropriate). As this was the only articulated basis for David McEchron's physical care recommendation, we discount his recommendation.

B. Guardian Ad Litem Report

An attorney was appointed to represent the children's interests. After an investigation of the homes and schools in Postville and New York, she recommended the split physical care arrangement that was adopted by the district court.

On appeal, Rivkah asks us to discount her recommendations concerning physical care of the four minor boys. She cites several reasons, two of which we find persuasive: (1) her reliance on rural/urban distinctions and (2) her focus on Rivkah's role in the minor children's education.

1. Rural/Urban Distinctions. In her assessment of Rivkah, the guardian ad litem listed under "weaknesses" the "high crime rates" in the Brooklyn neighborhood, relative to the crime rates in Postville. She stated "[t]he children do not have the physical freedom that is available to them in Postville."

Our court has stated, "[w]e do not award custody by determining whether a rural or urban Iowa upbringing is more advantageous to a child." *In re Marriage of Engler,* 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). The same can be said of a comparison between a large urban out-of-state setting and a small rural Iowa community. We recognize, however, that a child's living conditions are relevant to a physical care determination. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996) (stating court should consider the nature of each proposed environment in making a physical care determination).

In this case, there was scant, if any, evidence that the crime rate in Brooklyn and, specifically, in the Crown Heights neighborhood where Rivkah lived, jeopardized the family's security. To the contrary, the record reveals that the girls walked to their school in the mornings without incident and Rivkah generally walked the boys to their school. While Zelig points out that the teacher identified by the three children as their abuser moved to the same neighborhood in New York, the record contains no evidence that he had any contact with the children after he moved there. Notably, the claimed inappropriate contacts all occurred in Postville, the town characterized by the guardian ad litem as a "safe, quiet community where people often don't lock their cars and homes, and children visit their friends without adult accompaniment."

We recognize that the guardian ad litem's statements concerning Postville were also based on the three youngest boys' familiarity and comfort with the

town.[4] However, the twins were only ten years old at the time of trial and Yisroel was only eight. Although mature for their ages, we conclude their preferences for Postville were not controlling. *In re Marriage of Thielges*, 623 N.W.2d 232, 239 (Iowa Ct. App. 2000).

We discount the guardian ad litem's reliance on the relative crime rates of the Crown Heights neighborhood and Postville.

2. Education. The guardian ad litem also characterized as a weakness attributable to Rivkah the children's educational deficits. She stated,

> The children's education has suffered as a result of Rivkah's move to New York. She was only recently able to get the twins to regularly attend school. Neither Chavah nor Basya finished the 2004-2005 school year. In addition, when she and the children moved to Montréal, Canada, Chavah and Basya's education suffered because they do not speak French and school was conducted in French.

As summarized above, the record does not support a finding that Rivkah neglected the children's education.

To the extent the guardian ad litem's recommendation was based on rural/urban distinctions and on Rivkah's post-separation role in the children's education, we discount her recommendation.

C. Physical Care with Zelig – Best Interests

Rivkah next suggests the children's best interests were not served by the district court's decision to grant Zelig physical care of the four minor boys. She

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[4] The social worker who performed the custody evaluation made similar statements. When asked why she was recommending Zelig as the physical caretaker, she responded:

> for consistency and also for the – they seem to like it better there than living in the city, and the individual interviews with the boys, they talk very fondly of Postville and not that they weren't fond of Brooklyn, but they were more comfortable in Postville.

cites his lack of experience as physical caretaker, his controlling personality, his abuse of alcohol, and his apparent indifference to the children's sexual abuse allegations.

Zelig concedes he was not the primary caretaker of the children during the marriage. Turning to the assertion that Zelig had a controlling personality, the evidence is mixed. Rivkah testified to several examples of such behavior, some of them conceded by Zelig. However, David McEchron concluded from psychological testing that Zelig was "certainly . . . not an angry, hostile personality." Similarly, while Zelig admitted to consuming alcohol, McEchron concluded he scored "well within the normal range" on a scale measuring proneness to addiction and alcohol abuse. Finally, with respect to the sex abuse allegations, there was evidence that Zelig was more troubled by, than indifferent to, the allegations against an apparent colleague. Sifting through this conflicting evidence, we are not convinced that any of it is dispositive on the physical care question. Both parents had faults. None of those faults precluded them from adequately parenting the children.

D. Physical Care with Rivkah – Best Interests

As the Iowa Supreme Court recently reiterated, the governing consideration in physical care determinations is the children's best interests. *In re Marriage of Hansen*, ___ N.W.2d ___, ___ (Iowa 2007). Rivkah maintains these best interests would have been better served if the district court had granted her physical care of the children. She points to the fact that she served as the children's primary caretaker throughout the marriage.

This factor has been deemed important. *Id.* ("We continue to believe that stability and continuity of caregiving are important factors that must be considered in custody and care decisions."); *id.* ("[T]he successful caregiving by one spouse in the past is a strong predictor that future care of the children will be of the same quality."); *Id.* (awarding mother physical care after considering several factors, including her role as primary caretaker). Recently, the court suggested this concept encompasses an "approximation rule." *Id.* This rule provides "that the caregiving of parents in the post-divorce world should be in rough proportion to that which predated the dissolution." *Id.* In sum, the court stated the factors of continuity, stability, and approximation subsumed within the primary caretaking role are entitled to "considerable weight." *Id*.

There is no question that Rivkah was the parent who afforded the children continuity and stability during the marriage and the parent who provided most of the daily care. After the family moved to Postville, Rivkah did not earn wages. She maintained the home, provided breakfast, made lunches, cared for the children when they returned from school and, in addition, volunteered in the community and entertained up to fifty members of the Hasidic Lubavitcher community on weekends.

Zelig was the sole wage-earner. He also was active as a rabbi. With respect to child-rearing functions, he generally took the children to school, helped with dinners, cared for the younger children when Rikvah was engaged in community activities and the older children were unavailable, and assisted with schoolwork as necessary. While he was a loving father, he did not provide the level of daily care that Rivkah did.

We recognize that a person's role as primary caretaker does not guarantee the person physical care of the children. *Id.* For example, a primary caretaker who cannot properly care for the children due to substance abuse, may not be granted physical care. *Id.* This type of factor was not present here. With the exception of the educational issue summarized above, no one, including Zelig, suggested that Rivkah's daily care of the children was inadequate or inappropriate. We turn to other factors cited by Zelig that, he contends, support the district court's physical care decision.

First, he maintains Rivkah did not support the children's relationship with him. This is true, but the same can be said of Zelig. For example, Rivkah failed to inform Zelig of the youngest boys' whereabouts after she moved to New York, but Zelig did the same thing when he took the twins from their New York yeshiva and brought them to Iowa. Similarly, Zelig accused Rivkah of denying him telephone contact with the children, but Rivkah testified that she only spoke to the twins five times in the three months after they were taken from the New York yeshiva. By the time of trial, a temporary custody order was in place and it appeared most of these issues had worked themselves out.[5]

Second, Zelig suggests that Rivkah actively alienated some of the children from him. At the time of trial, three of the eight children were estranged from Zelig and all three sided with Rivkah in the custody dispute. The guardian ad litem listed this as a weakness attributable to Rivkah. We concur with this assessment. At the same time, it is important to note that two of the alienated

[5] Zelig asserted he was denied visitation up to twenty times. Rivkah acknowledged some problems with visitation but questioned the number of missed visits and noted that some of the problems were due to a lack of sufficient notice.

children were adults who were fully capable of making their own choices. The third was sixteen-year-old Chavah. Chavah's alienation is troubling given the close relationship she shared with her father before the parents separated. Nonetheless, Chavah was old enough to express her wishes and was adamant that she wanted nothing to do with her father. *Thielges*, 623 N.W.2d at 239.

While we do not condone Rivkah's role in alienating three of her children from their father, the record suggests that she at least came to recognize the importance of facilitating contact between the youngest three children and Zelig. For example, the custody evaluators found that these children shared a close bond with both parents. In addition, a psychologist retained by Zelig to perform an evaluation of the twins and their relationship with the parents testified that Levi saw both parents as "equal or nearly equal." He stated that Sholom "did not want to voice a preference as to where to live; however, the test results indicate a slightly stronger bonding with the mother." These evaluations, performed during a period of extreme parental acrimony, suggest that Rivkah did not compromise the strong relationship the three boys had with their father.

We conclude the five minor children's best interests would be served by granting Rivkah physical care. We base our conclusion on the factors of continuity, stability, and approximation encompassed within the primary caretaking role, the absence of evidence that Rivkah was an inadequate daily caregiver, the absence of evidence supporting the education or urban/rural distinctions on which the evaluators and guardian ad litem relied, and Rivkah's recognition, albeit belated, that she needed to foster the relationship between Zelig and the younger children.

III. Appellate Attorney Fees

Rivkah requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rather rests within the appellate court's discretion. *In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). We order Zelig to pay Rivkah $2500 in appellate attorney fees.

IV. Disposition

We modify the dissolution decree to grant Rivkah Aronow physical care of Tzemach, Chavah, Levi, Sholom, and Yisroel. We remand for consideration of visitation and child support issues in light of this opinion. Costs of appeal are assessed to appellee.

AFFIRMED AS MODIFIED AND REMANDED.