

IN THE COURT OF APPEALS OF IOWA

No. 7-549 / 06-1803
Filed October 24, 2007

MICHELLE BOARD,
Plaintiff-Appellant,

vs.

JASON SURRETT,
Defendant-Appellee.

Appeal from the Iowa District Court for Webster County, William C. Ostlund, Judge.

Michelle Board appeals a physical care ruling in favor of Jason Surratt and the district court's allocation of the tax dependency exemption. **AFFIRMED.**

Marcy Lundberg of Blake Parker Law Office, Fort Dodge, for appellant.

D. Raymond Walton of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

Michelle Board appeals a physical care ruling in favor of Jason Surratt. She also challenges the district court's allocation of the tax dependency exemption. We affirm.

I. Background Facts and Proceedings

Michelle Board and Jason Surratt are the parents of Geoffrey Surratt, born in 2001. When Geoffrey was several months old, the parents separated. They agreed to exchange the child every two weeks.

For the next three years, the parents generally adhered to a joint physical care arrangement. There were times when Jason kept Geoffrey for more than two weeks. On one occasion in late 2005, Jason assumed physical care of Geoffrey and retained physical care for several months.

In early 2006, Michelle petitioned for physical care of the child. The parents agreed to revert to the two-week joint physical care arrangement they began with, and the district court entered a temporary custody order confirming that agreement. Jason filed a counterclaim seeking physical care of Geoffrey.

Following trial, the district court granted Jason physical care of Geoffrey, ordered Michelle to pay child support, and gave Jason the dependency exemption. This appeal followed.

II. Physical Care

“Determining what custodial arrangement will best serve the long-range interest of a child frequently becomes a matter of choosing the least detrimental available alternative” *In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). That is the case here.

Both parents have turbulent pasts. When Michelle was sixteen, she moved from her mother's house to a group home, then went to a youth shelter, and then ran away for five months until she and Jason moved in together. When Jason was eighteen, he was convicted of five counts of third-degree burglary. He was incarcerated, released to a halfway house, and fled that facility after violating program rules. Jason eventually turned himself in and completed a violators' program. Both parents regularly used marijuana.

The district court considered this history, stating,

As is obvious, both of these parents demonstrated immature, irresponsible and unlawful behavior in the past. In most instances, the past is a significant indicator as to future behavior. Certainly there is not enough track record to predict that either Jason or Michelle have learned from their past errors.

We agree with the court's assessment and, specifically, the suggestion that neither parent learned from past errors.

Beginning with Jason, the record is replete with evidence of his continued unlawful behavior in the form of marijuana use. Jason freely admitted his usage, as recently as one-and-a-half weeks prior to trial. He testified he smokes in a "social setting," when he is "out partying with . . . friends," and that "[if] [s]omebody has a joint, you know, I have no problem with smoking it."

Similarly, Michelle admitted to marijuana use up to once a week until May 2005. Later that summer, she was stopped for driving with a breath alcohol content of .181. She was arrested for operating a motor vehicle while intoxicated and pled guilty to the charge. In the fall of that year, Michelle was arrested again for driving with a suspended license. She pled guilty to that charge.

Faced with this evidence of unlawful behavior by both parents, the district court turned to other factors relevant to physical care determinations. The court determined (1) Jason's living environment was more stable than Michelle's, (2) Jason had "significant family support in the area," and (3) Jason was "most likely to encourage and nurture a continuing relationship with Michelle." We turn to these additional factors.

1. Environment. A court is to consider "[t]he nature of each proposed environment, including its stability and wholesomeness." *Winter*, 223 N.W.2d at 166.

As noted, both parents regularly used illegal drugs after Geoffrey's birth. However, both vehemently denied exposing Geoffrey to this use. The Department of Human Services investigated the parents on separate complaints involving allegations of drug use. On the complaint directed at Michelle, the Department accepted her explanation that an odor emanating from her home came from incense rather than marijuana. On the complaint directed at Jason, the Department tested Geoffrey's hair to determine whether he was exposed to marijuana. The test was negative. We conclude this aspect of the parents' living environment is essentially in equipoise.

Both parents moved numerous times in the years preceding trial. However, Jason had been living in the same house for two years prior to trial, whereas Michelle had only lived in the same home for four months prior to trial.

Both parents were involved in new relationships. Jason had been exclusively dating a woman for approximately two years. The record reveals that she was a positive influence on Geoffrey. In contrast, Michelle lived with three

men after separating from Jason. One was physically abusive. In 2005, Michelle began a fourth relationship. She had another child with this man and was engaged to him at the time of trial. When Michelle's mother was asked about the engagement, she testified, "it's fast."

Considering these various aspects of the parents' living environments, we agree with the district court that, on balance, they favor Jason as the physical caretaker.

2. Family Support. Jason's family lived in the same town he did and his mother and sister assisted with Geoffrey's care. Michelle initially did not live close to her mother but, approximately fifteen months before trial, she moved to the same town. Michelle's mother testified on her behalf. She stated that, despite their rocky relationship during Michelle's teens, they now got along well. As both Jason and Michelle cultivated and maintained a relationship with their families, we conclude this factor does not favor either party.

3. Fostering Relationship with Other Parent. Finally, we examine who can best support the other's relationship with the child. *In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988) (stating one parent's attempt to isolate and alienate a child from the other parent is a factor to be given weight in custody determinations). Both parents initially fell short on this factor. Jason unilaterally assumed physical care of Geoffrey on more than one occasion, and Michelle's mother testified Michelle intended to do the same thing in late 2005. These problems appeared to resolve themselves after the parties stipulated to a temporary custody order.

To the extent the record leaves some doubt as to which parent will better foster a relationship with the other, we resolve that doubt in favor of Jason. We do so in light of the district court's finding that Jason was credible. See *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (stating district court's credibility determinations warrant close attention because the district court "is greatly helped in making a wise decision about the parties by listening to them and watching them in person") (quoting *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974)). While noting his shortcomings, the court stated it was "struck by Jason's honesty and sincerity."

This credibility finding tips the scales in favor of Jason, but only marginally so, given Jason's cavalier attitude toward his illegal drug use. In light of his attitude, the district court ordered a copy of its ruling delivered to the Department of Human Services, together with a request that the Department conduct unannounced drug tests of Jason at least two times in the ensuing twelve months. We fully concur in this aspect of the court's ruling.¹

III. Dependency Exemption

Having affirmed the district court's decision to assign Jason as the physical caretaker, we also affirm the court's decision to award him the dependency exemption. Iowa Ct. R. 9.6(4).

AFFIRMED.

¹ Michelle also requests reversal based on the bond between Geoffrey and her new child. Although the record contains evidence of this bond, this factor would not change the outcome, given the children's ages and the countervailing factors cited above. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992) (stating presumption that siblings should not be separated is not "ironclad").