

IN THE COURT OF APPEALS OF IOWA

No. 8-129 / 07-1265
Filed May 14, 2008

DANNY A. GILGE,
Petitioner-Appellant,

vs.

CHERI WESTPHAL,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon,
Judge.

A father appeals a district court order granting the mother physical care of
the parties' child. **AFFIRMED AS MODIFIED; REMANDED WITH
INSTRUCTIONS.**

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

Erin Broadston of Mowry Law Firm, Marshalltown, for appellee.

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

HUITINK, J.

Danny Gilge appeals a district court order granting Cheri Westphal physical care of the parties' child. We modify the district court's decision and remand with instructions.

I. Background Facts and Prior Proceedings

Danny and Cheri are the parents of Cooper, who was born in June 2004. Danny was forty-two years old at the time of trial and had an eighteen-year-old daughter from a previous relationship. Cheri was thirty-seven years old at the time of trial and had two other daughters, ages ten and seventeen, from previous relationships. Cooper was conceived during a very brief relationship between Danny and Cheri. At the time, Danny was married and Cheri was a single parent raising two children. When Danny and Cheri first met, Cheri was addicted to methamphetamines and had been using drugs since she was eighteen years old.

Danny had virtually no contact with Cooper for the first six months of Cooper's life. Danny states he did not have a relationship with Cooper because his wife did not want him to have contact with a child that was born from an affair with another woman. Danny and his wife separated and were eventually divorced. Danny began to have contact with Cooper when he was seven or eight months old. Cheri allowed Danny as much time as he wanted to spend with Cooper.

Cheri continued to abuse methamphetamines and marijuana after Cooper was born. In August 2005 Cheri's oldest daughter told her grandmother that she refused to go home because Cheri was abusing drugs. Cheri's mother contacted the Iowa Department of Human Services (DHS). A DHS caseworker came to

Cheri's house to assess the situation. Cheri told the investigator she had a drug problem. Cheri agreed to send all three children to live with her mother while she participated in drug treatment. Cheri's mother had problems caring for all of the children, so Cooper spent most of his nights with Danny.

After four to six weeks of treatment, Cheri resumed care of her children. Cheri participated in follow-up drug treatment programs and voluntary family counseling. DHS remained involved and helped provide Cheri with these services.

At some point, Cheri injured her back. Her doctor prescribed her oxycodone for the pain. Cheri became addicted to the pain medication. Cheri told her family counselor and the DHS caseworker she had become addicted to the oxycodone and, in November 2006, voluntarily agreed to enter an in-patient treatment program. The DHS caseworker filed a child in need of assistance (CINA) petition when Cheri entered treatment. Danny then filed the present petition for custody of Cooper.

The children were placed with Cheri's mother with a set visitation schedule for Danny. Cheri successfully completed the in-patient treatment program and began to exercise visitation with her children. The children were returned to her care in February 2007.

On July 5, 2007, the court held a hearing on Danny's petition for custody. Danny requested the court divide Cooper's physical care equally between the parents. Alternatively, he asked that Cooper be placed in his physical care. Both parents and a counselor who provided family-centered counseling and services for Cheri testified at the hearing. The court learned Cooper was still under DHS

protective supervision and that Cheri was still required to provide random drug screenings.

The district court entered an order granting both parties legal custody of Cooper. The court went on to grant Cheri physical care and control of Cooper, subject to the right of reasonable and liberal visitation by Danny.

Danny now appeals, claiming the court erred when it did not grant him “primary” physical care or grant both parties joint physical care. Danny claims the court erred in placing Cooper with “a known drug abuser who has a criminal record” and that Cheri lacks a “stable, consistent lifestyle necessary to raise Cooper into a healthy, content and well-adjusted adult.”

Cheri resists and also requests that we grant her an award for appellate attorney fees.

II. Standard of Review

Our review in equity cases is de novo. Iowa R. App. P. 6.4. We are not bound by the trial court’s findings of facts, but we give them deference because the trial court had a firsthand opportunity to view the demeanor of the parties and evaluate them as custodians. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998).

III. Merits

The best interests of the child dominates our consideration in child custody cases. *In re Marriage of Brainerd*, 523 N.W.2d 611, 614 (Iowa Ct. App. 1994). The critical issue in determining the best interests of the child is which parent will do better in raising the child into a healthy, content, and well-adjusted

young adult. See *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App. 1991).

In awarding physical care of Cooper, the district court emphasized the importance of the relationship between Cooper, Cheri, and his two half-sisters. The court noted Cheri “has single-handedly raised Cooper and has done a good job through adversity” and that

Cheri seems to be genuinely interested in doing what is in the long-term best interests of Cooper. She has put his needs before hers in the past and there is no reason to believe that she will not do so in the future. . . . She has a support base that includes DHS, her mother, and Cooper’s older sisters.

We are not persuaded by the court’s reasons for placing Cooper in Cheri’s care. The record does not establish Cheri “single-handedly raised Cooper.” Cheri’s mother assumed the role of caring for all three children for extended periods of time while Cheri participated in two separate in-patient drug treatment programs. Danny also stepped in and assumed a caretaker role while Cheri was in in-patient treatment. Also, because Cheri abused controlled substances during most of Cooper’s life, Cheri’s older daughter provided much of Cooper’s care. Accordingly, we give little weight to Cheri’s previous role as primary caretaker. See *In re Marriage of Wilhelm*, 491 N.W.2d 171, 172 (Iowa Ct. App. 1992) (noting a mother’s role as primary caretaker does not assure that she will be awarded physical care).

We also find Cheri did not put Cooper’s needs before her own in the past. Cheri abused methamphetamines and marijuana during the first fourteen months of Cooper’s life. She only sought treatment when she was confronted by a DHS caseworker. After she completed treatment for her methamphetamine addiction,

she began to abuse prescription pain medication. These behaviors are not the characteristics of a parent who puts her child's needs above her own.

"In determining what is in the best interests of the child we can look to a parent's past performance because it may be indicative of the quality of the future care that parent is capable of providing." *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992). Cheri's past performance paints a bleak picture of the quality of care Cooper might receive if he were to remain in her care. Cheri admits she used drugs at least once a week, and sometimes daily, for more than sixteen years. She candidly admits she was not the "best mom" she could be and her children's home life "wasn't the way it should be." She stored drug paraphernalia in her bedroom and used drugs in the family home. In August 2005 the Iowa Department of Human Services issued a founded report for denial of critical care of her children. Also, even though she did not have a valid driver's license, she repeatedly drove with her children in the car. Her present attitude toward drug usage is also troubling. When asked whether her daughter's boyfriend uses marijuana, she downplayed the question by stating "most people have tried marijuana."

Danny, on the other hand, does not have a criminal record and has never abused illegal substances. He also has a long and stable employment history and has successfully raised one daughter to the age of maturity. Danny is also current on his child support obligations for Cooper, and there is nothing in the record to suggest he would provide anything less than excellent care for his son.

We applaud Cheri's honesty about her drug addictions and recent success in maintaining her sobriety and maintaining employment. However, we cannot

ignore the circumstances of this short period of sobriety. Cheri has only remained sober since Cooper was adjudicated a child in need of assistance. Also, there is nothing in the record to suggest that she participates in voluntary, ongoing treatment programs to help prevent a future relapse. Because of the significant dangers and hazards associated with leaving a child in the custody of a chronic drug abuser, *see, e.g., State v. Petithory*, 702 N.W.2d 854, 858 (Iowa 2005); *In re J.K.*, 495 N.W.2d 108, 113 (Iowa 1993) (finding that “parents [who] have severe chronic substance abuse problems” “clearly” presented a danger to their children), we choose not to place Cooper with a parent who has been unable to demonstrate she can maintain her sobriety when she is not under the direct supervision of the Iowa Department of Human Services.

Upon our de novo review of the record, we conclude Danny can best minister to Cooper’s needs. Accordingly, we modify the district court’s decision and place Cooper in Danny’s physical care. We recognize this will separate Cooper from his two half-sisters, but we are confident this placement is in Cooper’s best interests because Danny will provide Cooper with a safe and stable environment. On remand, the district court shall establish Cheri’s child support obligation and visitation privileges.¹ We decline to award Cheri any appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED; REMANDED WITH INSTRUCTIONS.

¹ In light of Cheri’s past drug use, we also find a joint physical care arrangement is not appropriate in this case. We do not disturb the court’s decision to award both parties joint legal custody.