

IN THE COURT OF APPEALS OF IOWA

No. 8-290 / 07-1807
Filed October 1, 2008

**IN RE THE MARRIAGE OF SARAH SNELLING
AND JEFFREY SNELLING**

**Upon the Petition of
SARAH SNELLING,**
Petitioner-Appellee,

**And Concerning
JEFFREY SNELLING,**
Respondent-Appellant.

Appeal from the Iowa District Court for Jefferson County, Annette Scieszinski, Judge.

Jeffrey Snelling appeals from the district court's award of physical care of the parties' two children to Sarah Snelling. **AFFIRMED.**

Allan C. Orsborn of Orsborn, Milani & Mitchell, L.L.P., Ottumwa, for appellant.

John A. Morrissey of Morrissey Law Offices, Fairfield, for appellee.

Heard by Sackett, C.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Jeffrey (Jeff) and Sarah Snelling married on April 17, 2001, and separated in July 2006. They resided during their marriage in a mobile home in rural Fairfield on property adjacent to the home of Jeff's mother. Sarah and Jeff have two children: Paul, born on January 23, 2002, and Elizabeth, born on October 10, 2004. Sarah also has an older child from a previous marriage, Crystal, born on March 16, 1997. Sarah has sole custody of Crystal, who was a part of Sarah and Jeff's household from the time she was four years old.

Sarah filed her petition for dissolution of marriage on July 31, 2006, requesting physical care and custody of the two children. She left the marital home with the children, Crystal, Paul, and Elizabeth, and moved into her mother's house in Keosauqua. Sarah's home is an apartment in the front portion of the home of her mother and step-father, Linda and Raymond Hemm. It is divided from her parents' portion of the house by a wall with a locking door. Sarah plans to move to her own residence once Elizabeth is in school and the children do not require daycare.

Sarah is a Certified Nurse's Assistant (CNA) and also has an Associate's Degree in business. She has worked as a CNA throughout the marriage, most recently at the Good Samaritan Society Home in Van Buren County. Throughout the marriage, Sarah always worked at least full-time, and sometimes up to sixty to 80 hours per week. Beginning in 2004, after Elizabeth's birth and the beginning of a period of underemployment for Jeff, Sarah bore most of the financial responsibility for the family. However, after the parties' separation,

Sarah rearranged her schedule so that she now works from 6:00 a.m. to 2:30 p.m. five days per week and does not anticipate increasing those hours in the future.

Sarah uses an out-of-home daycare provider, and Sarah believes that interaction with people outside of the home helps to foster her children's socialization. Sarah has integrated the children in the community. She has enrolled Paul in the Head Start program, and both children are involved in regular church activities. Sarah has been actively involved as a girl scout leader for Crystal's troop

Sarah's mother, Linda, is often available for childcare, and she has a close relationship with the children. Linda married Raymond Hemm approximately eight years ago. Raymond has three adult sons who are on the sex offender registry. Two of these sons, Jim and Orville, live in the Keosauqua area.¹ Jim has been to the Hemm household on occasion to help move something heavy. He does not drive and does not come over on his own. Orville comes by the Hemm household as needed to mow the lawn, generally once every other week. He stops by without warning, but he is not allowed in the house if the children are there. The lawn takes roughly twenty minutes to mow, and the children are supervised at all times when Orville is on the property. Both Sarah and Linda acknowledge the seriousness of the situation and insist that they have taken the necessary steps to ensure that none of Raymond's sons have unsupervised contact with Crystal, Paul, or Elizabeth.

¹ The third son lives out of town and is not an issue in this case.

Jeff has a GED and earned a degree in auto body repair from Indian Hills Community College. He has been employed for over twelve years at the Nelson Company, where he worked in a supervisory position until 2004. When that position was no longer available, Jeff began to work fewer hours, and sometimes none at all. At the time of trial, he was working part-time. He predicted at trial that he will begin to work full-time again after the child custody dispute is over. He expects to work from 7:00 a.m. to 3:00 p.m.

Jeff continues to reside in the marital home adjacent to the home of his mother, Esther Elizabeth Snelling (Liz). Liz is available to care for the children when Jeff is at work, and she has a close relationship with the children.

Both parents are in fairly in good health. Jeff has high blood pressure that he treats through medication. Sarah has been treated for depression and has managed the disease successfully for the past ten years. She currently takes Effexor and counsels periodically, most recently with Doug Buttikofer in April and May of 2007. Dr. Buttikofer's letter to counsel reports that he had no reason to believe that Sarah "could not provide a balanced home environment as the custodial parent of her children."

Crystal has a strong bond with both Paul and Elizabeth, and as their big sister, she serves as a positive role model. Crystal shared a close relationship with Jeff during the parties' marriage, but she has seen him very little since the separation. Jeff is given credit for potty training Crystal, when, at age four, she was still in diapers. He has invited Crystal to come spend the afternoon with Paul and Elizabeth at his house, indicating that he appreciates the important role that Crystal plays in Paul and Elizabeth's lives.

Paul is a challenged and challenging child. At the time of trial, he was five years old and not yet potty trained. His speech is delayed and difficult to understand. Paul's behavior is disruptive. In the past, Jeff and Sarah have disagreed about Paul's needs and the best way to meet those needs. Since Sarah filed her petition, both parents have sought help for Paul from different professionals, though they continue to disagree on the value of the various resources.

Elizabeth is a bubbly and active toddler. She appears to be healthy for her age, and she is well-disciplined. At times, Elizabeth has shown bruising in various places, most notably on her hips and a large bruise near her eye. Jeff claims that these injuries always happen when Sarah is caring for Elizabeth. Sarah responds that the injuries are natural for a playful child. During the pendency of the dissolution, a report was filed with the Iowa Department of Human Services (DHS) alleging that Sarah was denying the children critical care. After investigating the incident, the DHS determined that this report was unfounded and that Elizabeth was safe at Sarah's home.

Jeff and Sarah agreed to an independent custody study by John Cardenzana. Cardenzana's report did not advocate strongly for either parent and indicated that both parents had a strong bond with the children. Cardenzana did find that Sarah was more proactive in searching for solutions to Paul's educational delays and meeting his needs. It was his opinion that Sarah is the parent "who appears better able to meet Paul's special education and social needs."

Jeff arranged for Paul to begin counseling with a licensed social worker, Pat Franje, in September of 2006. Franje recognized that both parents have a strong bond with their children and believed that it would be in the best interests of the children to stay in the home that they have always known, regardless of which parent lives there.

The parties agree that Jeff was the primary caretaker for the children since Elizabeth was born in 2004 until their separation in 2006. Jeff lost his supervisory position at The Nelson Company in 2004 and willingly accepted a larger share of the day-to-day care of the children and primary responsibility for Crystal, Paul, and Elizabeth. At the same time, Sarah accepted a larger share of the financial responsibilities and worked long hours away from her family. Sarah testified that she wished she could have spent more time with her children but was compelled to work more hours to provide for the family financially after Jeff was laid off. Jeff testified that Sarah was disinterested in the children. He said he wished that he could work more, but Sarah's work schedule didn't allow it. Several of Jeff's family members testified that Sarah sometimes asked them to watch the children so that she could sleep. They testified that Sarah even missed holidays with the children because she was sleeping.

The district court found that Paul and Elizabeth are bonded to both parents. The court found that both parents could provide and care for the children, but awarded Sarah physical care of the children, subject to Jeff's reasonable and liberal visitation privileges. Jeff appeals that decision.

II. Standard of Review

Because this is an action in equity, our review is de novo. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). We give weight to the district court's findings of fact, but we are not bound by them. *Id.* at 278. The best interests of the children is the first and governing consideration. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). "The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interests of the children." *In re Marriage of Bowen*, 219 N.W.2d 683, 687-88 (Iowa 1974).

Stability and continuity of caregiving are important factors to consider when one spouse has successfully cared for children, but a parent's prior role as primary caregiver during the marriage does not necessarily render that parent the primary caregiver after the marriage. *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). Gender is irrelevant in custody considerations. *In re Marriage of Wessel*, 520 N.W.2d 308, 310 (Iowa Ct. App. 1994).

We have considered the following relevant factors among those outlined by Iowa Code section 598.41(3) (2007) and the Iowa Supreme Court in *In re Marriage of Winter*: the characteristics of each child, including age, maturity, mental and physical health; the emotional, social, moral, material, and educational needs of the child; the characteristics of each parent, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child; the interpersonal relationship between the child and each

parent; the interpersonal relationship between the child and its siblings; the effect on the child of continuing or disrupting an existing custodial status; and the nature of each proposed environment, including its stability and wholesomeness. *In re Marriage of Winter*, 223 N.W.2d 165, 166-167 (Iowa 1974).

III. Merits

The parents have been sharing physical care of the children since an August 28, 2006 temporary custody order provided for the two children to rotate between their parents' homes on a weekly basis. Neither parent wants this arrangement to continue. Both parents want to provide day-to-day care for their children and appear to be capable of doing so. Both parents genuinely love the children. Both have the help of extended family members. We must determine which parent will more effectively foster the long-range interests of Paul and Elizabeth.

A. Stability

Jeff's residence in the home where the children were living before the parties separated may provide a certain degree of continuity to the children. However, Jeff's household seems to provide little plan or ritual, and, by Jeff's admission, the children spend a lot of time at his home on the computer and watching television. Although the Snelling's family physician, Dr. Miller, suggested that Jeff employ a more structured schedule to help with Paul's behavioral issues, there is no evidence that Jeff made any changes. Paul's attendance at preschool is sporadic when he is in his father's care. Jeff never took Paul to the Tuesday reading group that had been recommended for him.

The record reflects that Sarah provides a more stable home environment for her children. She enforces a regular mealtime where everyone eats as a family. The children have a bedtime to ensure they get ample sleep. Sarah's new schedule at work allows her to have time to spend with her children, but she has arranged for daycare when she must be at work. She strictly limits the children's computer and television time.

At Sarah's house, the children spend time with their half-sister, Crystal, who has been a part of their lives since they were born. Crystal is a positive influence on Paul and Elizabeth, and the children all share a bond with one another, according to the district court. "Changes in custody which separate siblings are discouraged under Iowa law." *In re Marriage of Hunt*, 476 N.W.2d 99, 102 (Iowa Ct. App. 1991). This principle applies to half siblings as well and should be considered in determining the best interests of the children. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). Franje's notes from counseling sessions report that Crystal helps and plays with Paul. It is important that Paul and Elizabeth be allowed to maintain their close relationship with Crystal.

Sarah has involved Paul and Elizabeth in regular educational and social activities to help them adjust to the behavioral expectations of school. She takes the children to church with her on the Sundays when she has their care. She enrolled Paul in Head Start and ensured his regular attendance. Paul also attended a monthly get-together for the children at Head Start. Paul and Elizabeth benefit from interaction with other children at their daycare.

The supreme court recently stated “[w]e continue to believe that stability and continuity of caregiving are important factors that must be considered in custody and care decisions.” *Hansen*, 733 N.W.2d 683, 696 (Iowa 2007). We agree with the supreme court that “preservation of the greatest amount of stability possible is a desirable goal,” especially considering the number of professionals that have commented on Paul’s need for stability. *Marriage of Hansen*, 733 N.W.2d at 696-97. We acknowledge the importance of Jeff’s role as the pre-separation primary caregiver and consider this as an important factor weighing in Jeff’s favor. *Id.* at 697. However, we find that other factors that must be considered weigh more strongly in Sarah’s favor, demonstrating that giving Sarah physical care and custody of the children is in their best interests. Overall, we find that Sarah provides a more stable and predictable home environment than Jeff.

B. Paul’s Needs

Both parents now acknowledge that Paul has special needs. However, the parents’ opinions diverge greatly as to the most effective way to help Paul. We agree with Cardenzana that Sarah is the more proactive parent in addressing Paul’s needs.

Paul has struggled with the uncertainty, and perhaps the temporary shared care arrangement, between his parents. Malinda Allen, who did a psychological evaluation of Paul at the Center for Disabilities and Development, found that family circumstances were a contributing factor in Paul’s inappropriate and regressive behavior. Peggy Stokes, who evaluated Paul from a social services perspective at the Center for Disabilities and Development, noted the

instability of Paul's home life due to his parents' differing opinions. The ResCare report on Paul indicates a diagnosis of adjustment disorder, which custody evaluator Cardenzana suspected was due to the uncertainty in his life. We believe that it is essential to Paul's progress that he be placed in a stable environment where he receives professional help for his special needs.

Sarah testified that she was concerned early about Paul's speech, but that Jeff did not want to seek treatment. Jeff testified that he was not trying to avoid treatment, but he simply did not want to put Paul through the stress of being tested for autism or mental retardation when Jeff believed that Paul should not be labeled with any particular disabilities. Jeff did not demonstrate any efforts to seek care for Paul, even after Dr. Miller recommended the AEA (area education agency) as a resource if Paul did not progress. Jeff and his mother referred to Paul's difficult-to-understand speech as "Dutchy," and Jeff characterized Sarah's approach to Paul's needs as a "witch hunt."

The district court noted Sarah's efforts to identify Paul's needs. Almost immediately after filing her petition for dissolution of the marriage, Sarah had Paul participate in a Brigance Preschool screening, which allowed an AEA committee to evaluate whether Paul needed help. She also took him to the University of Iowa Children's Hospital and the Center for Disabilities and Development in order to address some of Paul's behavioral issues. Jeff took Paul to begin counseling with Pat Franje but seems to have used the counseling sessions as an opportunity to disparage Sarah rather than to help Paul. Jeff reported to Franje that Paul's relationship with his mother was "non-existent."

We find that, while Jeff ultimately participated in attempting to find help for Paul, it was Sarah who made the initial efforts to diagnose and treat Paul.

In addition, Dr. Linda Cooper-Brown at the University of Iowa Children's Hospital hypothesized that Paul's inappropriate behavior occurred because Paul got desired outcomes or social reinforcement. We believe this is a reference to what custody evaluator Cardenzana referred to as Paul's ability to manipulate Jeff. Jeff admitted to urinating out the door of the family's trailer home, making him a poor role model for Paul, who is struggling with potty training. Jeff follows Franje's suggestion that Paul not be pressured to use the toilet, but be allowed to potty train at his own pace. Sarah agrees with Cooper-Brown that Paul should be encouraged to use the toilet with positive reinforcement. We find that Sarah's desire to be proactive in this area is probably in Paul's best interests, as his use of diapers and pull-ups in kindergarten may increase his social problems.

Finally, Sarah's approach to helping Paul provides more consistency for him. The kindergarten teacher at the school Sarah would have Paul attend in Stockport would also be Paul's first grade teacher. The speech therapist that Paul saw at Head Start is the same therapist that works at the Stockport school. This continuity of instruction would likely be helpful for Paul and would aid his speech development. Because Paul's parents agree on very little with regard to Paul's needs, it would be helpful for Paul to have consistency in his teachers and therapists.

C. Parental Interaction and Respect

It is important for the children's sake that their parents respect one another and encourage the children's relationship with the other parent. We think that

Sarah has better demonstrated respect in the past and believe that she will continue to do so in the future. The district court found that Jeff was “overtly condescending toward Sarah, seemed at ease and practiced in criticizing her, and displayed a penchant for the ‘sharp tongue’ his mother mentioned.” In contrast, the district court stated that Sarah “demonstrated in her courtroom testimony and demeanor that she understands the unique personalities involved” and that her “sincerity and resolve in addressing discipline and personal-control issues is borne of a concern for Paul’s sake, and not out of a desire to prevail over or deride a co-parent.”

Sarah has shown flexibility in the past with Crystal’s father, allowing Crystal to have regular contact with him. When Crystal’s father was in the military, Sarah arranged for him to visit Crystal when he was home. Now that Crystal’s father lives in Florida, Sarah allows Crystal to visit him there. She also allows Crystal to travel to her paternal grandparents’ house in Champaign to visit. Sarah does not seek to inhibit Crystal’s relationship with her father, but allows it to flourish.

Sarah has also been flexible with Jeff since the separation. Sarah allowed Jeff to see the children on three separate occasions during a week that was allotted for her to spend with the children. She testified that she would be willing to allow Jeff extra time with the children midweek. Sarah also invited Jeff to join Paul at “donuts for dads,” an event that was held through Paul’s Head Start program. Sarah has demonstrated that she will encourage the children’s relationship with their father.

Jeff, on the other hand, consistently discussed Sarah in a negative light during Paul's counseling sessions with Franje in front of both Paul and Elizabeth. We agree with the district court in its finding that "Jeff has intense and negative feelings for Sarah that . . . have spilled over to his actions with the children." Jeff has never had a good relationship with Sarah's mother, Linda. When Linda came to the parties' home during the marriage, Jeff would leave the house, often taking Paul with him, depriving Linda of the opportunity to see Paul. We find that Sarah shows a greater respect for Jeff and that she will continue to foster his relationship with the children.

D. Safety

Jeff makes much of the possible presence of sex offenders on the Hemm property where Sarah lives. The potential exposure of small children to sex offenders is an extremely serious matter. We find, however, that Sarah is properly managing the situation. The record reflects that only one of Sarah's step-brothers is on the property with any regularity, and when he is there, he stays outside to mow the lawn. Sarah has put in a wall with a locking door to protect the children. Sarah's parents are aware of the situation and are on the alert when any of the step-brothers are on the property. The children reportedly have never had unsupervised contact with any of the step-brothers. We are confident that Sarah and her parents are mindful of the situation and will not expose the children to risk of harm.

The record contains testimony that Jeff can be violent and at times throws, kicks, or punches inanimate objects. Crystal recounted an incident when Jeff hit a broomstick on the counter, denting both the broomstick and the counter. Jeff's

outbursts may have a negative effect on the emotional well-being of the children, and the children may seek to model Jeff's behavior.

Considering the record as a whole, we find that Sarah is the parent best able to provide a safe and loving home for the children. We do not believe that the trial court erred in placing physical care of the children with their mother, Sarah.

AFFIRMED.