

FILED

MAY 23 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ROBERT C. BUTLER AND SALLY A. BUTLER

Upon the Petition of
ROBERT C. BUTLER,

)

Petitioner-Applee,

)

70

And Concerning
SALLY A. BUTLER,

)

9-41
88-1218

Respondent-Appellant.

)

Appeal from the Iowa District Court for Lee County
(CD-1094(N)0887), D.B. Hendrickson, Judge.

Respondent appeals certain provisions of the decree of
dissolution entered for the parties in district court.

AFFIRMED.

T. K. Ford, of Ford Law Offices, Burlington, for
respondent-appellant.

Michael G. Dieterich, of Cahill & Dieterich,
Burlington, for petitioner-appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

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Respondent appeals the award of primary physical care of the parties' minor child to the petitioner. Our review is de novo. We affirm.

Robert and Sally Butler were married in September 1974 in New Jersey. They have one child, Katherine Ann Butler, born November 6, 1983. Robert is thirty-seven years old. He has an engineering degree from Rutgers University. He is an engineer for E.I. DuPont Company in Fort Madison, Iowa. He earns approximately \$43,324 per year. Sally is thirty-three years old. She worked outside the home for approximately three years. She plans to go back to school to obtain a degree in elementary education.

The court awarded the parties joint legal custody of Katie. Robert was granted primary physical care of Katie. The record reveals Sally has been very bitter toward Robert since their separation. She has received counseling for anxiety and depression. Sally was very restrictive of Robert's visitation during the pendency of the dissolution. Sally has been awarded liberal visitation with Katie. Sally has also been ordered to pay \$20 per week in child support. Robert has been ordered to pay \$400 per month in alimony for four years.

Sally appeals the award of primary physical care. She contends she was the primary caretaker for Katie and should have been awarded primary physical care.

In child custody cases, the primary concern in making the determination as to which parent shall be awarded primary care is the long-term best interests of the child. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983); Iowa R. App. P. 14(f)(15). We utilize the factors enumerated in Iowa Code section 598.41(3), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1979). We give weight to the fact-findings of the trial court especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7); In re Marriage of Vrbanc, 359 N.W.2d 420, 423 (Iowa 1984).

In making our determination of primary physical care we note that we are faced with a very difficult decision in this case. It is apparent from the record both Robert and Sally are good parents and are able to adequately care for Katie on a day-to-day basis. However, we note the record reveals some emotional instability in Sally for which she has sought counseling. We also note her emotional unrest and bitterness toward Robert affected Katie's visitation with Robert during temporary custody. In our custody determination, the child's chance for substantial contact with both parents is an important factor. Petition of Ferguson, 244 N.W.2d 817, 819 (Iowa 1976); Iowa Code § 598.41(3)(e) (1987). We find Katie would have a greater chance of maintaining substantial contact with both parents with primary physical care in Robert. Upon our review of

the record we conclude, on balance, Katie's best interests⁷³ dictate physical custody be with Robert.

As we have not changed the award of physical custody, we need not address Sally's contention concerning child support.

Sally seeks \$5,000 in attorney fees on appeal. Attorney fees are not recoverable as a matter of right but rest within the discretion of the court and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. See In re Marriage of Orgren, 375 N.W.2d 710, 714 (Iowa App. 1985). We order Robert to pay \$500 of Sally's attorney fees on appeal. Costs are to be split evenly among the parties.

AFFIRMED.