

IN THE COURT OF APPEALS OF IOWA

No. 1-240 / 90-1919

FILED

AUG 27 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF TANYA RUTH ROHWEDDER AND BRADLEY ALAN  
ROHWEDDER

Upon the Petition of

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TANYA RUTH ROHWEDDER,

Appellant,

And Concerning

BRADLEY ALAN ROHWEDDER,

Appellee.

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Appeal from the Iowa District Court for Butler County,  
Gilbert K. Bovard, Judge.

A decree of dissolution was entered for the parties in  
district court. The court awarded physical care of the  
parties' minor child to Bradley Rohwedder. Tanya Rohwedder  
appeals. **AFFIRMED.**

Judith O'Donohoe of Eggert, Erb, Ott, O'Donohoe & Frye,  
Charles City, for appellant.

Russell Schroeder, Jr. of the Schroeder Law Office,  
Charles City, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel,  
JJ., but decided en banc.

DONIELSON, J.

Tanya Rohwedder and Bradley Rohwedder were married in July 1985. They had one child, Brooke LeAnn Rohwedder, born April 30, 1988. During the marriage the parties lived in Greene, Iowa, in a house owned by Bradley's parents. Both parties had various jobs during the marriage.

Tanya was born in 1966. At the present time she lives in Rockford and commutes to work in Belmond. Tanya is employed as a quality control inspector. She works three twelve-hour all night shifts and one six-hour varied shift per week. Tanya would like to continue her education in accounting at an area community college. When Tanya has physical care of Brooke, Tanya's sister, Deborah Dunlap, looks after Brooke while Tanya is at work.

Bradley was born in 1964. He still lives in the marital home in Greene. Bradley opened an automobile repair shop in Marble Rock with financial help from his father. He works in his shop six days a week. Bradley also helps his father with farm work in return for living in the house rent-free. When Bradley has physical care of Brooke, he hires a baby-sitter, Virginia Rowe in Marble Rock, to care for Brooke while he is at work.

The district court entered a decree of dissolution for the parties on November 28, 1990. The parties had stipulated to the economic aspects of the divorce, and the only issue before the court was physical care of Brooke. The court found that physical care of Brooke should be

placed with Bradley. The court concluded both parents were loving and caring, both could appropriately provide for the child, and both had supportive families. The court also concluded both parents had made mistakes and had exercised poor judgment on occasion. The trial court noted the parents were "essentially in equipoise" and the decision of who was to be the primary physical custodian was quite difficult. The trial court then considered the following: Bradley's work schedule allowed him greater leeway to provide consistent parental contact; Bradley's family appeared to present a more strongly bonded family unit; while Tanya's desire to succeed financially was to be commended, concern was expressed that Brooke's interests might be subordinated in Tanya's desire to achieve; and Bradley's child-care provider was marginally superior to Tanya's child-care provider. The trial court concluded that under all the circumstances Bradley would be the more appropriate parent for primary physical placement.

Tanya now appeals. She contends that the court should have awarded her physical care of Brooke. She disputes the four factors which the court relied upon in awarding physical care to Bradley. She states her work schedule actually allows her more time with Brooke. Tanya asserts there are no facts showing that Mrs. Rowe is a better baby-sitter than Deborah. Tanya also feels her ambition to pursue further education should be viewed as a positive factor. Finally, she points out Brooke has spent much more

time with members of her family. Tanya argues she has been Brooke's primary caretaker, she can better support Brooke's relationship with Bradley, and she has demonstrated the most emotional stability.

In the alternative, Tanya contends that if she is not awarded physical care of Brooke, she should be granted more liberal visitation.

Both parties seek attorney fees and costs for this appeal.

Our review in this matter is de novo. Iowa R. App. P. 4. We give weight to the trial court's factual findings, especially concerning the credibility of witnesses. Iowa R. App. P. 14(f)(7).

There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person."

In re Marriage of Vrbn, 359 N.W.2d 420, 423 (Iowa 1984) (citing In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974)). "In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented." Id. (citing Lehmkuhl v. Lehmkuhl, 259 Iowa 686, 692, 145 N.W.2d 456, 460 (1966)).

In child custody cases, the best interests of the child is the first and governing consideration. The factors the

court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Upon our de novo review, we, like the trial court, find both parties to be capable, loving, and caring parents. The placement of Brooke with either parent would be appropriate. We find the trial court properly considered additional factors in reaching its conclusion. However, we note that we have not considered which of the two child-care providers was preferred by the trial court. If this matter is to be given any weight, it is limited to whether the parent adequately provides for the child's care through the services of another--beyond this consideration, we find the factor to be of dubious significance. Each party testified the other's child-care provider was an appropriate and adequate caretaker.

Upon our de novo review of this record, we find no reason to disturb the district court's award. We affirm the award of primary physical placement of Brooke with Bradley.

Tanya contends that if she is not awarded primary physical care, the visitation provisions of the dissolution decree should be modified. The issue is not properly before this court. The visitation provisions were established in accordance with Tanya's proposed schedule of visitation and in accordance with the stipulation of the parties. The schedule is an appropriate minimum guideline for visitation and Tanya cannot now argue to the contrary.

Both parties seek an award of appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Relying on these principles, we refuse to award either party appellate attorney fees.

Costs of this appeal are assessed to Tanya.

**AFFIRMED.**

All judges concur except Oxberger, C.J., and Schlegel, J., who dissent.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would grant custody of the children to Tanya.

Schlegel, J., joins this dissent.