

FILED

JUL 26 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JOHN PETER MILLER
AND DEBORAH KAY MILLER

Upon the Petition of)

432

JOHN PETER MILLER,)

Petitioner-Appellant,)

And Concerning)

DEBORAH KAY MILLER,)

8-715
88-936

Respondent-Appellee.)

Appeal from the Iowa District Court for Crawford County
(1204), James L. McDonald, Judge.

The husband appeals a district court dissolution decree
granting joint custody of the parties' children but
ordering physical custody be placed with the mother.

AFFIRMED AS MODIFIED.

Warren L. Bush, Wall Lake, for petitioner-appellant.

Robert L. Brink, Denison, and Frank J. Comito, Carroll,
for respondent-appellee.

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

SCHLEGEL, J.

In this appeal, we are asked to reverse the trial court's determination of the physical custody of the two daughters of the parties. The trial court awarded joint custody to the parents and primary physical custody to the mother. We affirm as modified.

John Miller and Deborah Miller are the parents of two daughters: Amy, born in 1980, and Kristi, born in 1986. In this dissolution matter, the issue of the physical custody of the children was bitterly fought. Professional counselors and practitioners were consulted for evaluations of both parents and the children. The trial court, concluding that the children should be placed in the physical custody of Deborah, stated:

[T]he court finds that the long-range interests of the minor children would be best served if physical care of the children remained with the respondent. All other things being equal, the court finds that changing the present custodial status would be disruptive and detrimental to the children. . . . The present custodial arrangements have produced good results as the children have adjusted well, they are well cared for, they are happy and enjoy the love and concern of both parents.

In child custody matters, 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 Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the court's determination of what will

be the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984).

John believes that Deborah's moral attitudes and practices disqualify her from having physical custody of the children. Deborah did, in fact, engage in an affair prior to the separation of the parties. She initially denied it but ultimately admitted it. The parties engaged in counseling to attempt to save the marriage, but that counseling broke down. The parties separated and she resumed the relationship. Deborah's misconduct seemed to be the driving force behind John's effort to obtain physical custody of the children. Moral misconduct is a circumstance to be given serious consideration in determining a parent's fitness to have custody of minor children, but it is not the sole consideration. In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983). The issue of custody is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interests of the children. Id.

From the whole record, while we find that John is a good parent and that he would be a satisfactory custodian of the children, we believe that Deborah has been the primary caretaker of the children and that it would be disruptive to the children to change that role. Deborah has been supportive of extensive and meaningful visitation

of the children with John. It is doubtful that John would be supportive of a meaningful relationship between the girls and their mother, were he to be the primary custodian. It is apparent that if the parties are to be able to make joint custody work, both parents should obtain counseling to dispose of the bitterness and anger that has made this such a difficult custody dispute. Deborah's conduct has been reprehensible in several ways, but the record does not show that her conduct has had a detrimental effect upon the children. John, on the other hand, has enlisted the parties' older child to support his suspicions and anger at Deborah's paramour.

We affirm the trial court's determination of physical custody.

Deborah, by cross-appeal, urges us to require John to pay her attorney's fees. The fees charged by counsel for the children were taxed as costs in the action, with both parties being ordered to pay one-half of the costs. The court further ordered that the parties would pay their own attorneys.

The property distribution heavily favored John. He was awarded the home and was required to assume the indebtedness against it. His earnings are far superior to those of Deborah. Attorney's fees rest within the court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. In re Marriage

of Estlund, 344 N.W.2d at 281. While John is obviously more able to pay fees and expenses than is Deborah, he also has obligations for attorney's fees, child support, and indebtedness. Deborah is obligated for, or has paid, attorney's fees in the amount of \$12,000, according to her brief and argument. In addition, she has undoubtedly incurred expenses in arranging for and participating in counseling for herself and for Amy.

We believe it is equitable for Deborah to be required to pay her own attorney and for John to pay his own attorney. We do, however, modify the decree of the trial court by requiring John to pay the costs at the trial court level, including the fees to counsel for the children, and we assess the costs of this appeal to John.

With this exception, we affirm the ruling of the trial court.

AFFIRMED AS MODIFIED.