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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-320 / 94-0025

IN RE THE MARRIAGE OF DAVID ALLEN KLEIST AND ADRIANA HILDA MENDEZ

Upon the Petition of
DAVID ALLEN KLEIST,

Petitioner-Appellant/Cross-Appellee,

And Concerning
ADRIANA HILDA MENDEZ,

Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Johnson County, Van D. Zimmer, Judge.

David appeals the child custody and property provisions of the parties' dissolution decree, and Adriana cross-appeals from visitation provisions. **AFFIRMED AS MODIFIED.**

Lori L. Klockau and Daniel L. Bray, Iowa City, for appellant.

John W. Hayek of Hayek, Hayek & Brown, Iowa City, for appellee.

Heard by Sackett, P.J., and Habhab and Cady, JJ., but decided en banc.

SACKETT, J.

Petitioner-appellant/cross-appellee David Allen Kleist appeals from the decree dissolving his five-year marriage. David contends he, not respondent-appellee/cross-appellant Adriana Hilda Mendez, should have been awarded physical care of their daughter, Juliana, born November 1, 1989. David also challenges the economic provisions of the dissolution decree. Adriana cross-appeals contending the decree should be modified to allow her to take Juliana out of the country for a period of up to six months when she is on sabbatical or a teaching or research assignment once every four years and, during such time, she should have no obligation to assure David have visitation. We affirm as modified.

David and Adriana were married in June 1988. At the time, Adriana was an assistant professor at the University of Iowa, and David was a full-time graduate student in counseling at the same university. Their daughter, Juliana Kleist-Mendez, was born November 1, 1989. While married, Adriana and David both shared the responsibility for Juliana's care. Juliana does not have a closer emotional attachment to either parent.

David and Adriana have significant areas of agreement. Both value education and are interested in introducing Juliana to various social and cultural experiences. They each have serious concern for Juliana's religious upbringing.

Our assessment agrees with that of the trial court that both were capable and loving parents. This assessment is also supported by the custody evaluator who reported to the court, "there is very little support for differentiating between the parents as to their abilities to serve as primary caretakers of Juliana. Also, Juliana did not display behaviors that would suggest that a more significant emotional attachment exists to either parent."

Our review is de novo. Iowa R. App. P. 4. The only question we need address is which parent has shown they can give Juliana better care. See In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983); In re Marriage of Sparks, 323 N.W.2d 264, 266 (Iowa App. 1982). In reviewing this issue, we consider all factors we are directed by statutory and case law to consider. See Iowa Code § 598.41; In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974); Neubauer v. Newcomb, 423 N.W.2d 26, 27 (Iowa App. 1988). This issue is extremely close.

Juliana will be better served if we grant custody or physical care to the parent who the evidence shows will do better in raising the child. See In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The gender of the parent seeking custody of Juliana is not relevant to our determination, and Adriana and David share the same burden in attempting to gain custody in a dissolution proceeding. See In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

The focal point of David's argument for reversal of the trial court's decision is he is the better parent and the trial court considered an impermissible factor in awarding Adriana primary care. The trial court's finding included the following reason given in part for the decision to award Adriana primary care: "Adriana would be much less effective in the role of visited parent than in the role of primary caretaker." The trial court's finding, in this regard, followed the conclusion of the custody evaluator who tipped the scales in Adriana's favor with the opinion:

> the physical care arrangement that would be most disruptive of Juliana's parent/child relationship would be placement of that care with Mr. Kleist. This is because, despite my opinion that Ms. Mendez can fulfill the role of primary caretaking parent, I doubt her ability to serve as an effective parent in the visited parent context. This is partly due to her ingrained/deep-seated doubts that a mother can fulfill the mothering role outside of the caretaking context and partly due to her parenting style which relies heavily on ongoing interactions and small continuous nurturing and guidance activities which are integrated with those interactions.
>
> In contrast, Mr. Kleist does appear to have the skills necessary to sustain and strengthen a sound parent/child relationship within the visiting parent context.

David contends this is an impermissible factor and Adriana has placed too great an emphasis on her belief she should be awarded custody of Juliana because she is the mother, and Adriana requested sole custody of Juliana even though she testified David is a nurturing parent and an important part in Juliana's life.

Adriana is of the opinion, as mother, she should have sole custody, and she has been opposed to joint custody.

Adriana was born in Cuba and, in 1961, when she was ten years old, she came with her family to the United States. She became a United States citizen when she was seventeen years old. Adriana has degrees from Duke and Cornell Universities. Adriana's family, as have many of the immigrant groups coming to the United States before them, brought with them from their homeland cultural beliefs. Adriana advances one of the cultural beliefs is a mother must be a child's primary caretaker. Adriana testified she continues to carry this belief. Adriana presented testimony from a child custody evaluator and psychologist who was of the opinion Adriana's belief, as to the position of a mother, made her psychologically incapable of performing as a noncustodial parent and putting her in the role of a noncustodial parent would result in a conflict in Juliana's and Adriana's relationship.

David was born and raised in Minnesota and has spent his life in the United States. David, too, wants to be Juliana's custodial parent because he contends he will be a better parent. He says he will be involved in Juliana's life whether he is the primary caretaker or a visiting parent.

The trial court accepted opinions Adriana would, because of her culture, be able to accept only the role of custodial parent in arriving at the result reached. Adriana's alleged opinion on this issue does not conform to the roles she and David assumed in Juliana's life while

they were married. While Adriana was a nurturing mother, David was an equally nurturing father. They nearly equally divided Juliana's care and shared homemaking duties as both maintained demanding careers. Adriana's demanding career made it necessary for her to be away from Juliana, and Juliana has grown in a situation where her mother has not served as her sole care giver.

We have been harsh with parents who have not been custodial parents and who have not met their obligations to their children, most particularly, in the area of support. See In re Marriage of Holcomb, 457 N.W.2d 619, 622 (Iowa App. 1990).

A noncustodial parent will not have as much contact with a child as a custodial parent. We respect the cultural differences of the litigants before us, but we cannot let a parent's cultural beliefs put him or her in a superior position when we assess the custody issue. Nor, is there a basis to adopt, contrary to current Iowa statutory and case law, a presumption in favor of motherhood, long erased from the Iowa law, because one of the parties in the dissolution claims such a presumption is a part of his or her cultural belief. See In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974); In re Marriage of Blume, 473 N.W.2d 629, 631 (Iowa App. 1991) (gender is irrelevant and neither parent should be given a greater burden than the other in attempting to gain custody of the children).

We look carefully at the evaluator's recommendations but, unlike the trial court, we do not consider the opinion Adriana may have difficulty functioning as a noncustodial parent as a factor in her favor in assessing the custody issue.

A primary concern is will David or Adriana create a better home environment for Juliana. David is supportive of Adriana's culture and encourages Juliana to appreciate it. One parent's ability to support the relationship of the other with a child is an important factor in assessing custody. See In re Marriage of Bolin, 336 N.W.2d 441, 445 (Iowa 1983). Adriana has exhibited certain intolerances to David's culture and religion. She has excluded David from certain medical and educational decisions concerning Juliana. Adriana enrolled Juliana in Montessori Preschool without considering David's views and excluded David's name as an emergency contact.

We find David the parent more likely to assist Juliana in maintaining the cultural roots and religious practices of both families and assuring the noncustodial parent have substantial contact with Juliana. David has all necessary parenting skills and the ability to mediate disputes. David supports joint custody; Adriana does not. A parent who prevents joint custody from working does not make a good showing of fitness for sole custody. See Bolin, 336 N.W.2d at 446.

In In re Marriage of Downing, 432 N.W.2d 692 (Iowa App. 1988), we said:

> the Code provides the court shall consider denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement. Iowa Code § 598.41(1) (1987). This statute registers the legislature's belief that relationships between children and their custodial and noncustodial parents are essential for that child's well being.

Id. at 694.

Juliana's interest will be better served in David's primary care. David has the maturity and understanding to foster her relationship with Adriana despite Adriana's professed resistance to being a noncustodial parent. In David's custody, Juliana will be assured exposure to the cultural values of both her father and mother.

We modify to award David physical care and provide he is not obligated to pay child support after the first day of the month following the filing of this opinion. Adriana should pay child support. The trial court, for purposes of imposing the child support guidelines, set David's net monthly income at $1518.70 and Adriana's monthly income at $2287.05. No one has challenged these figures. Applying the guidelines, we find Adriana should pay $514.58 a month starting on the first day of the month following the filing of this opinion.

David challenges the property division made by the trial court. The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell,

473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each circumstance. Id. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). Estlund, 344 N.W.2d at 280. We find the property division equitable.

We deny Adriana's request for unrestricted periods of time with Juliana when she engages in foreign study, but Adriana should not be precluded from taking Juliana with her for periods of up to six weeks when she is on sabbatical. Travel expenses for Juliana should be Adriana's responsibility.

We award no attorney fees. Court costs shall be paid one-half by each party.

AFFIRMED AS MODIFIED.

All judges concur except Habhab and Cady, JJ. who dissent.

CADY, J. (dissenting)

I respectfully dissent. I do so not to level criticism. The law is far from an exact science, and conclusions drawn by courts are often the result of narrowly crafted lines. This is especially evident in those areas where the shadows of the law cast little guidance.

The issue in this case is both significant and unaccompanied by settled law. We were required to consider the impact of a parent's foreign-based cultural belief, no longer embodied within the prevailing legal principles of the state, as a factor in designating that parent to be the primary caretaker of a child. The majority, I believe, failed to properly consider the cultural differences of the parent in its application of the best interest standard. I write to express my view on this issue of first impression, in hopes that it may find favor in the future as we continue to confront cultural differences in the context of child custody disputes.

It is important to recognize in the analysis that both Adriana and David are good and loving parents. The record clearly shows little separates them as parents. This, of course, only heightens the importance of the little differences that do exist, and magnifies the critical task

of the court to measure their impact on the custody decision.

The important difference recognized by the trial court is derived from Adriana's background and culture. She is a Cuban-born American, who maintains a deep-seated cultural belief that a mother should be the primary caretaker of the children. The importance of this belief, however, lies not with its content, but its effect. Expert testimony was presented at trial that, because of her deeply held belief, Adriana would be psychologically incapable of maintaining the role of noncustodial parent. The expert went on to state that requiring Adriana to act as the noncustodial parent would create an intense conflictual relationship between Adriana and Juliana. She also opined therapy and retraining to teach Adriana to be a noncustodial parent would be extremely lengthy and difficult. Finally, she testified David already possessed the necessary skills to successfully function as a noncustodial parent.

The trial court determined Adriana's strong belief helped tip the custody decision in her favor, since she would be "much less effective in the role of a visited parent than in the role of primary caretaker." The majority reverses that determination, and awards custody of Juliana to David. In doing so, they minimize and down-play the strength of Adriana's cultural belief, and conclude that any favorable treatment given to her belief would amount to an impermissible attempt to resurrect the tender

years doctrine.

Our de novo reviewing standard allows us to formulate our own view of the evidence, but we should refrain from rejecting evidence without some support from the record. In this case, the expert testimony concerning the effect of Adriana's cultural belief on her ability to properly assume the role of a visited parent was convincing. David offered no contrary expert testimony. The trial court accepted the evidence, and I believe we must as well. Moreover, we must be careful not to discredit cultural differences based upon our own cultural beliefs. It is not inconsistent for Adriana to maintain her cultural belief while maintaining a career outside the home. There was no evidence that Adriana will be able to accept the role of a visited parent because she works outside the home.

It is also important to recognize that the cultural belief held by Adriana is not contrary to any governing legal principles.

The tender years doctrine was a judicially recognized presumption that the interests of a young child were best served by placing the child in the custody of its mother. See Patzner v. Patzner, 250 Iowa 155, 162, 93 N.W.2d 55, 59 (1958); Maron v. Maron, 238 Iowa 587, 591, 28 N.W.2d 17, 19 (1947). The doctrine flourished in Iowa, and elsewhere, during the nineteenth century and by judicial proclamation for the bulk of this century. See Caldwell v. Caldwell, 141 Iowa 192, 195, 119 N.W. 599, 600-01. (1909); Beno v.

Beno, 260 Iowa 442, 451-52, 149 N.W.2d 778, 783-84 (1967); see also Sheri A. Ahl, A Step Backward, 70 Minn. L. Rev. 1344, 1347-48 (1986). Our laws, however, generally mirror our prevailing values and beliefs, and change with time to reflect adjustments in those beliefs.[1] This principle of jurisprudence is responsible for the creation of the tender years exception, as well as its eventual erosion and ultimate demise. Our courts formally abandoned the doctrine in 1974. See In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). It was discontinued because its underlying assumptions lost validity through the passage of time. Id. The roles of parents have changed. Women now pursue careers and provide for their children; men now nurture and care for their children.

Adriana is not asking that we recognize any presumption based on her belief. The abandonment of the legal presumption once accorded her belief does not handcuff our consideration of her cultural beliefs or their effect on

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1. Until the early nineteenth century the ancient doctrine of Patria potestas gave fathers virtually unlimited right to custody and control of all legitimate offspring until they reached the age of majority. See Zummo v. Zummo, 574 A.2d 1130, 1135 (Pa. Super 1990). In the early nineteenth century, however, courts began to reject patria potestas in favor of a pariens patria power of the government to award custody in accordance with the judicially determined best interests of the children. Id. In practice, however, rejection of the paternal preference merely paved the way for a maternal preference via the tender years doctrine which dominated the best interests analysis. Id.

the best interests of the child. We simply no longer view them in terms of a presumption. We must, however, recognize and respond to the cultural diversity of litigants as shown by the evidence. We must discover its impact on behavior, and consider its place within the best interest standard found at the heart of child custody determinations.[2]

The key to the inquiry lies in understanding that evidence of cultural diversity is only considered as it impacts on the best interests of the child. It transcends racial or gender lines, and does not undercut the equal footing both parents enjoy in a custody determination. Nor does it presume every mother is unable to function as a noncustodial parent due to culturally defined sex roles. It does not act as a substitute for a searching factual analysis. To the contrary, it enhances the factual analysis and requires us to focus on the effect of a parent's particular trait on the best interests of the child, not the source or even the presence of the trait.

Our law is not required to adopt cultural differences, but it must not fail to recognize and consider how they may impact the child. Moreover, courts need not be concerned with issues involving the appropriateness of the cultural

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2. Culture is defined by Webster's New Collegiate Dictionary 277 (1976), as "the integrated pattern of human behavior that includes thought, speech, actors . . . the customary beliefs, social forms, and material traits of a racial, religious, or social group."

differences or even the fairness of considering cultural beliefs on the other parent. Those concepts are consumed by the best interest of the child standard, which determines what is fair for the child. The overall best interest of the child is superior to any individual parent's claim of superiority.

In this case, it is better for Juliana to have the benefit of two active and loving parents in her life; than one capable and loving custodial parent and one parent who will likely struggle as the visited parent. This conclusion, I believe, embodies the true meaning of the best interests of the child, and should govern our courts consideration of cultural differences.

Habhab, J., joins this dissent.

HABHAB, J. (dissenting)

I join with Judge Cady in his dissent. It is a well-reasoned opinion that reaches a result that is consistent with what is in the best interests of Juliana. Like Judge Cady, I would affirm the trial court and grant physical custody of Juliana to Adriana.

Our review in dissolution actions is de novo. The majority recognizes this rule of law, but to my dissapointment it places undue emphasis on Adriana's cultural beliefs and not enough on what is in the best interests of Juliana.

I agree without hesitation that gender is irrelevant and neither parent should be given a greater burdern than the other in attempting to gain custody of their children. I also agree with the majority that a parent's cultural beliefs should not put him or her in a superior position when assessing a custody issue.

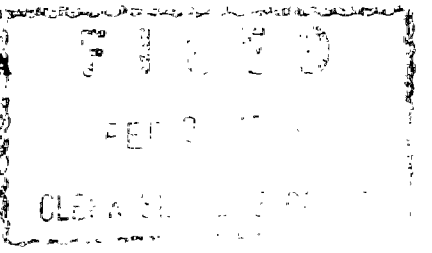
But this is where the majority missed the mark. It is not Adriana's cultural beliefs that should impact upon the custody issue--rather it is the effect this belief has on Juliana when the courts of this state are called upon to apply the best interests standard. Be that as it may, even when I put aside Adriana's cultural beliefs, I believe Juliana's best interests will be served by granting physical custody to Adriana.

The majority readily recognizes that both Adriana and David are loving and capable parents. A similar assessment

was made by the trial court and by expert testimony. The trial court was in a much superior position to determine the custody issue. All we have before us is, in what has been described in supreme court decisions, as the cold record. Although we are not bound by the trial court's findings, we do give them weight. I would affirm the trial court and leave custody with Adriana for she has now had custody for some period of time.

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David and Adriana were married in June 1988. At the time, Adriana was an assistant professor at the University of Iowa, and David was a full-time graduate student in counseling at the same university. Their daughter, Juliana Kleist-Mendez, was born November 1, 1989. While married, Adriana and David both shared the responsibility for Juliana's care. Juliana does not have a closer emotional attachment to either parent.

David and Adriana have significant areas of agreement. Both value education and are interested in introducing Juliana to various social and cultural experiences. They

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1. We filed an opinion on January 23, 1995, and granted rehearing. This opinion follows our consideration on rehearing.

each have serious concern for Juliana's religious upbringing.

Our assessment agrees with that of the trial court that both were capable and loving parents. This assessment is also supported by the custody evaluator who reported to the court, "there is very little support for differentiating between the parents as to their abilities to serve as primary caretakers of Juliana. Also, Juliana did not display behaviors that would suggest that a more significant emotional attachment exists to either parent."

Our review is de novo. Iowa R. App. P. 4. The only question we need address is which parent has shown they can give Juliana better care. See In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983); In re Marriage of Sparks, 323 N.W.2d 264, 266 (Iowa App. 1982). In reviewing this issue, we consider all factors we are directed by statutory and case law to consider. See Iowa Code § 598.41; In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974); Neubauer v. Newcomb, 423 N.W.2d 26, 27 (Iowa App. 1988). This issue is extremely close.

Juliana will be better served if we grant custody or physical care to the parent who the evidence shows will do better in raising the child. See In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The gender of the parent seeking custody of Juliana is not relevant to our determination, and Adriana and David share the same burden in attempting to gain custody in a dissolution proceeding.

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The focal point of David's argument for reversal of the trial court's decision is he is the better parent and the trial court considered an impermissible factor in awarding Adriana primary care. The trial court's finding included the following reason given in part for the decision to award Adriana primary care: "Adriana would be much less effective in the role of visited parent than in the role of primary caretaker." The trial court's finding, in this regard, followed the conclusion of the custody evaluator who tipped the scales in Adriana's favor with the opinion:

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Adriana is of the opinion, as mother, she should have sole custody, and she has been opposed to joint custody.

Adriana was born in Cuba and, in 1961, when she was ten years old, she came with her family to the United States. She became a United States citizen when she was seventeen years old. Adriana has degrees from Duke and Cornell Universities. Adriana's family, as have many of the immigrant groups coming to the United States before them, brought with them from their homeland cultural beliefs. Adriana advances one of the cultural beliefs is a mother must be a child's primary caretaker. Adriana testified she continues to carry this belief. Adriana presented testimony from a child custody evaluator and psychologist who was of the opinion Adriana's belief, as to the position of a mother, made her psychologically incapable of performing as a noncustodial parent and putting her in the role of a noncustodial parent would result in a conflict in Juliana's and Adriana's relationship.

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The trial court accepted opinions Adriana would, because of her culture, be able to accept only the role of custodial parent in arriving at the result reached.

Adriana's alleged opinion on this issue does not conform to the roles she and David assumed in Juliana's life while they were married. While Adriana was a nurturing mother, David was an equally nurturing father. They nearly equally divided Juliana's care and shared homemaking duties as both maintained demanding careers. Adriana's demanding career made it necessary for her to be away from Juliana, and Juliana has grown in a situation where her mother has not served as her sole care giver.

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Juliana's interest will be better served in David's primary care. David has the maturity and understanding to foster her relationship with Adriana despite Adriana's professed resistance to being a noncustodial parent. In David's custody, Juliana will be assured exposure to the cultural values of both her father and mother.

We modify to award David physical care and provide he is not obligated to pay child support after the first day of the month following the filing of this opinion. Adriana should pay child support. The trial court, for purposes of imposing the child support guidelines, set David's net monthly income at $1518.70 and Adriana's monthly income at $2287.05. No one has challenged these figures. Applying the guidelines, we find Adriana should pay $514.58 a month starting on the first day of the month following the filing of this opinion.

David challenges the property division made by the trial court. The partners in the marriage are entitled to

a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each circumstance. Id. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). Estlund, 344 N.W.2d at 280. We find the property division equitable.

We deny Adriana's request for unrestricted periods of time with Juliana when she engages in foreign study, but Adriana should not be precluded from taking Juliana with her for periods of up to six weeks when she is on sabbatical. Travel expenses for Juliana should be Adriana's responsibility.

Additionally, we order Adriana will have visitation during the following periods:

A. Every other weekend from Friday at 5:00 p.m. until Sunday at 6:00 p.m. Holiday visitation will have precedence over regular weekend visitation if a holiday falls on a Monday or Friday, in which case the weekend will be included with the holiday visitation.

B. Midweek visitation from 5:00 p.m. until 8:00 p.m. on Wednesday evening unless otherwise agreed between the parties.

C. Other visitation times as the parties may agree upon.

D. If Adriana has or will exercise her right to take Juliana out of the country in a calendar year, she shall have no additional visitation during summer school vacation. If Adriana will not exercise this right during the calendar year, then summer school vacation will be equally divided. Unless otherwise agreed, Adriana will have the first half of the summer school vacation during

odd-numbered years and the second half of the summer school vacation during even-numbered years. Each year by May 15, the parents will confer to review and agree upon the plans for summer activities and vacation with each parent. During Adriana's period of visitation summer care, David will have the weekend and midweek visitation granted to Adriana unless Adriana is away from her residence on vacation with Juliana.

E. The following schedule of visitation has precedence over other weekend visitation:

(1) One-half of the winter school holiday as defined by the school calendar of the school which Juliana attends. If Juliana is under school age, this period will be defined by the school calendar of the district in which Juliana resides. During even-numbered years, Adriana will have the first half of the winter school holiday; and during odd-numbered years, the second half of the winter school holiday. Unless otherwise agreed, the first half of the winter school holiday will always include Christmas Eve and Christmas Day until noon.

(2) During odd-numbered years, the entire Thanksgiving school vacation with the adjoining weekend.

(3) Mother's Day with Adriana at her option. Father's day with David at his option.

(4) Regardless of which parent has care of Juliana on her birthday, the other parent will have an opportunity for personal contact with Juliana on her birthday. Absent other agreement of the parties, personal contact will mean at least one hour in Juliana's physical presence, but not limited to one hour.

(5) During even-numbered years, the entire spring school holiday as defined by the school year of the school which Juliana attends. If Juliana is under school age, this period will be defined by the school calendar of the district in which Juliana resides.

(6) President's Day in even-numbered years.

(7) Easter Sunday in even-numbered years.

(8) Memorial Day in odd-numbered years.

(9) Independence Day in even-numbered years.

(10) Labor Day in odd-numbered years.

(11) Other periods of visitation as the parties may agree upon.

We award no attorney fees. Court costs shall be paid one-half by each party.

AFFIRMED AS MODIFIED.

All judges concur except Habhab and Cady, JJ. who dissent.

CADY, J. (dissenting)

I respectfully dissent. I do so not to level criticism. The law is far from an exact science, and conclusions drawn by courts are often the result of narrowly crafted lines. This is especially evident in those areas where the shadows of the law cast little guidance.

The issue in this case is both significant and unaccompanied by settled law. We were required to consider the impact of a parent's foreign-based cultural belief, no longer embodied within the prevailing legal principles of the state, as a factor in designating that parent to be the primary caretaker of a child. The majority, I believe, failed to properly consider the cultural differences of the parent in its application of the best interest standard. I write to express my view on this issue of first impression, in hopes that it may find favor in the future as we continue to confront cultural differences in the context of child custody disputes.

It is important to recognize in the analysis that both Adriana and David are good and loving parents. The record clearly shows little separates them as parents. This, of course, only heightens the importance of the little differences that do exist, and magnifies the critical task

of the court to measure their impact on the custody decision.

The important difference recognized by the trial court is derived from Adriana's background and culture. She is a Cuban-born American, who maintains a deep-seated cultural belief that a mother should be the primary caretaker of the children. The importance of this belief, however, lies not with its content, but its effect. Expert testimony was presented at trial that, because of her deeply held belief, Adriana would be psychologically incapable of maintaining the role of noncustodial parent. The expert went on to state that requiring Adriana to act as the noncustodial parent would create an intense conflictual relationship between Adriana and Juliana. She also opined therapy and retraining to teach Adriana to be a noncustodial parent would be extremely lengthy and difficult. Finally, she testified David already possessed the necessary skills to successfully function as a noncustodial parent.

The trial court determined Adriana's strong belief helped tip the custody decision in her favor, since she would be "much less effective in the role of a visited parent than in the role of primary caretaker." The majority reverses that determination, and awards custody of Juliana to David. In doing so, they minimize and down-play the strength of Adriana's cultural belief, and conclude that any favorable treatment given to her belief would amount to an impermissible attempt to resurrect the tender

years doctrine.

Our de novo reviewing standard allows us to formulate our own view of the evidence, but we should refrain from rejecting evidence without some support from the record. In this case, the expert testimony concerning the effect of Adriana's cultural belief on her ability to properly assume the role of a visited parent was convincing. David offered no contrary expert testimony. The trial court accepted the evidence, and I believe we must as well. Moreover, we must be careful not to discredit cultural differences based upon our own cultural beliefs. It is not inconsistent for Adriana to maintain her cultural belief while maintaining a career outside the home. There was no evidence that Adriana will be able to accept the role of a visited parent because she works outside the home.

It is also important to recognize that the cultural belief held by Adriana is not contrary to any governing legal principles.

The tender years doctrine was a judicially recognized presumption that the interests of a young child were best served by placing the child in the custody of its mother. See Patzner v. Patzner, 250 Iowa 155, 162, 93 N.W.2d 55, 59 (1958); Maron v. Maron, 238 Iowa 587, 591, 28 N.W.2d 17, 19 (1947). The doctrine flourished in Iowa, and elsewhere, during the nineteenth century and by judicial proclamation for the bulk of this century. See Caldwell v. Caldwell, 141 Iowa 192, 195, 119 N.W. 599, 600-01. (1909); Beno v.

Beno, 260 Iowa 442, 451-52, 149 N.W.2d 778, 783-84 (1967); see also Sheri A. Ahl, A Step Backward, 70 Minn. L. Rev. 1344, 1347-48 (1986). Our laws, however, generally mirror our prevailing values and beliefs, and change with time to reflect adjustments in those beliefs.[1] This principle of jurisprudence is responsible for the creation of the tender years exception, as well as its eventual erosion and ultimate demise. Our courts formally abandoned the doctrine in 1974. See In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). It was discontinued because its underlying assumptions lost validity through the passage of time. Id. The roles of parents have changed. Women now pursue careers and provide for their children; men now nurture and care for their children.

Adriana is not asking that we recognize any presumption based on her belief. The abandonment of the legal presumption once accorded her belief does not handcuff our consideration of her cultural beliefs or their effect on

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1. Until the early nineteenth century the ancient doctrine of Patria potestas gave fathers virtually unlimited right to custody and control of all legitimate offspring until they reached the age of majority. See Zummo v. Zummo, 574 A.2d 1130, 1135 (Pa. Super 1990). In the early nineteenth century, however, courts began to reject patria potestas in favor of a pariens patria power of the government to award custody in accordance with the judicially determined best interests of the children. Id. In practice, however, rejection of the paternal preference merely paved the way for a maternal preference via the tender years doctrine which dominated the best interests analysis. Id.

the best interests of the child. We simply no longer view them in terms of a presumption. We must, however, recognize and respond to the cultural diversity of litigants as shown by the evidence. We must discover its impact on behavior, and consider its place within the best interest standard found at the heart of child custody determinations.[2]

The key to the inquiry lies in understanding that evidence of cultural diversity is only considered as it impacts on the best interests of the child. It transcends racial or gender lines, and does not undercut the equal footing both parents enjoy in a custody determination. Nor does it presume every mother is unable to function as a noncustodial parent due to culturally defined sex roles. It does not act as a substitute for a searching factual analysis. To the contrary, it enhances the factual analysis and requires us to focus on the effect of a parent's particular trait on the best interests of the child, not the source or even the presence of the trait.

Our law is not required to adopt cultural differences, but it must not fail to recognize and consider how they may impact the child. Moreover, courts need not be concerned with issues involving the appropriateness of the cultural

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2. Culture is defined by Webster's New Collegiate Dictionary 277 (1976), as "the integrated pattern of human behavior that includes thought, speech, actors . . . the customary beliefs, social forms, and material traits of a racial, religious, or social group."

differences or even the fairness of considering cultural beliefs on the other parent. Those concepts are consumed by the best interest of the child standard, which determines what is fair for the child. The overall best interest of the child is superior to any individual parent's claim of superiority.

In this case, it is better for Juliana to have the benefit of two active and loving parents in her life; than one capable and loving custodial parent and one parent who will likely struggle as the visited parent. This conclusion, I believe, embodies the true meaning of the best interests of the child, and should govern our courts consideration of cultural differences.

HABHAB, J. (dissenting)

I join with Judge Cady in his dissent. It is a well-reasoned opinion that reaches a result that is consistent with what is in the best interests of Juliana. Like Judge Cady, I would affirm the trial court and grant physical custody of Juliana to Adriana.

Our review in dissolution actions is de novo. The majority recognizes this rule of law but, to my dissapointment, it places undue emphasis on Adriana's cultural beliefs and not enough on what is in the best interests of Juliana.

I agree without hesitation that gender is irrelevant and neither parent should be given a greater burden than the other in attempting to gain custody of their children. I also agree with the majority that a parent's cultural beliefs should not put him or her in a superior position when assessing a custody issue.

But this is where the majority missed the mark. It is not Adriana's cultural beliefs that should impact upon the custody issue--rather it is the effect this belief has on Juliana when the courts of this state are called upon to apply the best interests standard. Be that as it may, even when I put aside Adriana's cultural beliefs, I believe Juliana's best interests will be served by granting physical custody to Adriana.

The majority readily recognizes that both Adriana and David are loving and capable parents. A similar assessment

was made by the trial court and by expert testimony. The trial court was in a much superior position to determine the custody issue. All we have before us is, in what has been described in supreme court decisions, the cold record. Although we are not bound by the trial court's findings, we do give them weight. I would affirm the trial court and leave custody with Adriana for she has now had custody for some period of time.