**IN THE COURT OF APPEALS OF IOWA**

No. 1999-293 (9-523) / 99-35
Filed November 23, 1999

**IN RE THE MARRIAGE OF NICOLE A. BODENSTEINER AND BRIAN M. BODENSTEINER**

FILED
NOV 23 1999
CLERK SUPREME COURT

Upon the Petition of
**NICOLE A. BODENSTEINER,**
Appellee,

And Concerning
**BRIAN M. BODENSTEINER,**
Appellant.

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Appeal from the Iowa District Court for Allamakee County, John Bauercamper, Judge.

Brian Bodensteiner appeals the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Dale L. Putnam of Putnam Law Office, Decorah, for appellant.

Bradley D. Shidler of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for appellee.

Heard by Streit, P.J., and Vogel and Vaitheswaran, JJ.

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**VOGEL, J.**

Brian Bodensteiner appeals the custody provisions of the parties' dissolution decree. We affirm.

***Background facts.*** Brian and Nicole Bodensteiner were married in 1993. Two children were born to the marriage: Celena in 1994, and Hanna in 1996. Nicole filed a petition for dissolution of marriage in October of 1998.

Trial was held in December of 1998. The district court entered a decree which granted the parties joint custody of the children, with Nicole having primary physical care. Brian appeals.

***Scope of review.*** Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa App. 1998). We give weight to the fact findings of the district court, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

***I. Primary physical care.*** Brian claims that the district court erred in granting Nicole primary physical care of the children. He contends that Nicole's mood swings, temper and immoral behavior make her unfit to be the children's primary care parent.

In assessing an issue of child custody, the controlling consideration is the interest of the children. *In re Purscell,* 544 N.W.2d 466, 468 (Iowa App. 1995). The court determines placement according to which parent can minister more effectively

to the children's long range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). 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 re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996).

We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997) (citation omitted). Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *See id.* at 54; *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

In concluding that Nicole should be the children's primary physical caretaker, the district court found:

> It is in the best interest of the children that they be placed in the primary care of their mother. This decision is a close one, since both parties are excellent parents. The Court has considered all of the factors in Section 598.41.

We are slightly handicapped in our appellate review by the lack of findings by the trial court as to the parties' parental strengths. However, we note that the same judge heard both the temporary custody hearing and the trial and therefore had a

greater familiarity with the parties than would a judge who heard evidence only at trial. Furthermore, our de novo review allows us to consider the entire record anew. After consideration of the record, we agree that it is in the children's best interests to be in Nicole's care. Although Brian contributed to some of the children's physical care, the record supports that Nicole was the primary caregiver. Nicole was the parent who made the girls' medical appointments and checkups, planned their birthday parties and other holiday gatherings, bought their clothes, signed them up for dance lessons, and saw to their religious education. Nicole was also responsible during the marriage for making the meals, doing laundry, and most of the other housekeeping tasks while still working full-time. While we do not discount Nicole's occasional lapses in behavior, mood swings and temper, we note that she has taken the responsibility to seek counseling and medication to combat her problems. Brian will have ample opportunity to maintain a strong relationship with the girls through the generous visitation provided by the decree. We affirm the district court's decision on primary physical care.

***II. Appellate attorney fees.*** Nicole requests that the court award her appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). 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 district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d

680, 684 (Iowa App. 1997). After considering these factors, we award Nicole $1800 in appellate attorney fees. Costs of this appeal are assessed to Brian.

Having considered all issues properly before us on appeal, we hereby affirm the district court's decree.

**AFFIRMED.**