

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF GLENNA G. ANTHONY
AND EUGENE L. ANTHONY

FILED

APR 25 1989

CLERK SUPREME COURT

Upon the Petition of)
GLENN A. ANTHONY,)
 Petitioner-Appellant,)
 vs.)
EUGENE L. ANTHONY,)
 Respondent-Appellee.)

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8-668
88-1044

Appeal from the Iowa District Court for Jasper County
(No. DD9-268), M. C. Herrick, Senior Judge.

Petitioner appeals from the decree of dissolution which
was entered in district court granting respondent physical
care of the parties' minor children. **AFFIRMED.**

Mark A. Otto of Brierly, McCall, Girdner, Chalupa,
McCall & Otto, Newton, for petitioner-appellant.

Roger J. Kuhle and Thomas A. DeSio of Kuhle & Sanders,
P.C., Des Moines, for respondent-appellee.

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

HABHAB, J.

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Glenna Anthony, mother of Sarah and Sean, appeals the decision of the district court placing primary physical care of the children in their father, Eugene Anthony. She argues the court erred in this regard. We disagree and accordingly affirm the decision of the district court.

Glenna and Eugene were married on August 19, 1978. Glenna was sixteen; Gene was nineteen. Sarah Kay was born on January 30, 1979, and Sean was born on November 2, 1982. At the dissolution hearing, the parties stipulated to the majority of issues before the court, including joint custody. The court then considered physical placement of the children, visitation schedule, and child support.

We review de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact; but are not bound by them. Iowa R. App. P. 14(f)(7). In determining a question of custody, our first and governing consideration is the best interests of the children. Iowa R. App. P. 14(f)(15). We must determine which parent can minister more effectively to the long-term interests of the children. In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982). 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 Bowen, 219 N.W.2d 683, 689 (Iowa 1974).

Glenna asserts the decision to place the children with their father is contrary to Iowa law and against the weight of the evidence. We disagree. The trial court based its placement decision upon the fact that both parents failed to exhibit model behavior during the marriage and after the parties separated. Both engaged in extramarital affairs, drug usage, and abuse disciplinary measures. However, the court continued by noting that "Gene seems to have more appropriately matured and marshalled his actions." A review of the record bears this out. Gene's testimony reveals a willingness to accept some responsibility for upheaval in the family. Whereas Glenna testified that the discord between herself and her daughter stems from the fact that Sarah doesn't understand what has occurred. We believe that a nine-year-old might not be able to grasp the psychological stresses of a divorce. However, the responsibility for providing a stable emotional environment during turmoil is upon the parent. We agree with the district court that Gene exhibited more maturity regarding his parental role and interaction with his children. We are confident that both parents love their children deeply.

We note the trial court also based its decision to place the children with the father upon a fact not placed in evidence, specifically that "a rehabilitating drug user cannot use alcohol in moderation, nor can one safely be near drug use by others." The truth of this statement is

not in issue. However, we find no evidence presented to the court in the record to support it. It is harmless error, because substantial evidence exists otherwise to support the trial court's placement decision.

Glenna argues that Gene has not been supportive of her emotionally and has made disparaging remarks concerning her to the children. The record affirms her assertion. For the sake of the welfare of the children, we remind the parties that while visitation has not been obstructed by Gene, the denial by one parent of an opportunity for maximum continuing contact with the children with the other parent, without just cause, is one factor in determining custody. Iowa Code § 598.41(1) (1987).

A review of those considerations set forth in Iowa Code section 598.41(2) supports the trial court's decision regarding primary physical care of Sarah and Sean.

Glenna and Gene request appellate attorney fees. Such an award 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).

Glenna grossed \$6,673 in 1987; Gene grossed \$22,942. Glenna is obligated to pay \$20 per week per child as child support. We find Glenna's income is not substantial enough to support an award of attorney fees against her. We decline her request for attorney fees. We assess costs on appeal to the appellant.

AFFIRMED.