IN THE COURT OF APPEALS OF IOWA

No. 1-709 / 01-339
Filed December 12, 2001

IN RE THE MARRIAGE OF TODD W. VELDHOUSE AND MICAH J. VELDHOUSE

Upon the Petition of
TODD W. VELDHOUSE,
Petitioner-Appellant,

And Concerning
MICAH J. VELDHOUSE,
Respondent-Appellee.

FILED
DEC 12 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Grundy County, Stephen C. Clarke, Judge.

The petitioner appeals from the decree dissolving his marriage to the respondent. **AFFIRMED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan, Condon & Frese, Marshalltown, for appellant.

Bradley J. Harris of Kliebenstein, Heronimus, Schmidt & Harris, Grundy Center, for appellee.

Considered by Huitink, P.J., and Zimmer, and Vaitheswaran, JJ.

000479

ZIMMER, J.

Todd Veldhouse appeals the child custody provisions of the parties' dissolution decree. We affirm the trial court's decision to grant primary physical care of the children to Micah Veldhouse. We deny Micah Veldhouse's request for appellate attorney fees.

I. Background Facts and Proceedings

Todd and Micah Veldhouse were married in November of 1994. They have three daughters: Jordan, born in July 1994; Haley, born in May 1997; and Skylar, born in August 1999.

During the marriage, Todd and Micah demonstrated a total inability to manage their finances. They spent more than they earned throughout their marriage. The resulting financial chaos clearly had a negative impact on their relationship.

Todd filed a petition for dissolution of marriage in June of 2000. The parties' poor relationship continued to deteriorate after the petition was filed. Micah moved out of the family home in September. The parties were unable to agree to a permanent custody arrangement. As a result, the matter proceeded to trial in February of 2001. The trial court ordered Todd and Micah to have joint legal custody of the three girls with Micah having primary physical care. Todd appeals contending he should have been awarded primary physical care of the children. Micah seeks an award of appellate attorney fees.

II. Scope of Review

Our review of a custody order is de novo and our primary consideration is the best interests of the children. *In re Marriage of Kleist,* 538 N.W.2d 273, 276

(Iowa 1995). In determining what is in the best interests of the affected children, we give considerable weight to the judgment of the trial judge, who has had the benefit of hearing and observing the parties first hand. *Id.*

There is no inference favoring one party as opposed to the other in deciding which one should have custody. *See In re Marriage of Bowen,* 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long range interests of the children. *In re Marriage of Winter,* 223 N.W.2d 165, 166 (Iowa 1974). The critical issue is determining which parent will do better in raising the children; gender is irrelevant. *See In re Marriage of Ullerich,* 367 N.W.2d 297, 299 (Iowa Ct. App. 1995). In so far as is reasonable and in the best interests of the children, the court should make an award of custody which will assure the children the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage parents to share the rights and responsibilities of raising the children. *See* Iowa Code § 598.41(1). To effectuate that policy, the court must consider the willingness of each party to allow the children access to the other party. *In re Marriage of Burham,* 283 N.W.2d 269, 276 (Iowa 1979).

III. Primary Physical Care

The determination that Micah should be awarded primary physical care of the children was based in part on the trial court's finding that she was more likely to assure the girls would have the opportunity for the maximum continuing physical and emotional contact with Todd. The trial court gave the following reasons for its decision:

> After the separation the petitioner has continued to criticize the respondent's lifestyle and associates, notwithstanding the fact that since the parties were physically separated, the respondent has appeared to conduct herself in a more responsible manner. The petitioner has been known to repeatedly call the respondent both at home and at work, insisting that she talk with him. At least one of these series of phone calls occurred after eleven o'clock at night while the children were with their mother. In the context of that series of phone calls, the petitioner seemed to insist that the children should be brought to the phone so he could speak with them. He was unable to accept the fact that the children were asleep.
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> While both parents clearly love the children and each desires to have primary physical care, the respondent appears to be the one more able to support the relationship of the children with the other parent. To date the petitioner has been unable to quell his anger at the respondent for the separation and divorce of the parties. His anger has displayed itself in the repetitious phone calls noted above. In an incident in September when the respondent was attempting to leave the residence of the parties and the petitioner was not yet done arguing, he persisted in the argument to the point where he refused to let the respondent close her car door and, in fact, grabbed her hand as she attempted to start the car. This anger has further displayed itself in at least one incident in July 2000 where the petitioner insisted on and did consummate a sexual act with the respondent against her will.

Our de novo review of the record convinces us the district court correctly awarded primary physical care to Micah. We acknowledge, as the district court did, that both parents clearly love the children and have the ability to provide for their physical needs. Unfortunately, the record also reveals both parents have engaged in some very immature behavior and decision making during the marriage. Although Todd has assisted in caring for the children, we agree with the trial court's finding that Micah was the children's primary caregiver before the parties separated. The record also supports the trial court's conclusion that Micah is more likely to encourage an emotional environment which will allow and encourage the children's relationship with both parents.

Viewing the record as a whole, we conclude the district court carefully weighed the evidence before it and established a suitable custodial arrangement that is in the best interests of the parties' children. In making this assessment, we give considerable weight to the sound judgment of the trial judge who had the benefit of hearing and observing the parties first hand. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

IV. Attorney Fees

Micah requests 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 Ct. App. 1997). After considering these factors, we deny an award of appellate attorney fees. Costs of this appeal are assessed to Todd.

AFFIRMED.

000433