

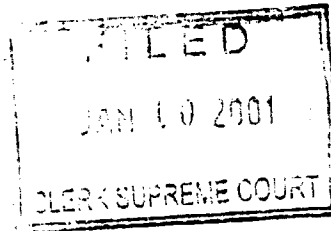
IN THE COURT OF APPEALS OF IOWA

No. 0-550 / 00-406
Filed January 10, 2001

**IN RE THE MARRIAGE OF JADEAN R. ROGGENTIEN
AND DANA H. ROGGENTIEN**

Upon the Petition of
JADEAN R. ROGGENTIEN,
Petitioner-Appellee,

And Concerning
DANA H. ROGGENTIEN,
Respondent-Appellant.



Appeal from the Iowa District Court for Benton County, Thomas L. Koehler, Judge.

The respondent appeals from the custody provisions of the decree dissolving the parties' marriage. **AFFIRMED.**

Patricia C. Kamath of Kamath Law Office, Iowa City, for appellant.

Michael L. Mollman of Mollman Law Office, Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

VAITHESWARAN, J.

When Dana and Jadean Roggentien divorced, the district court awarded primary care of their three children to Jadean, the mother. On appeal, we affirm.

I. Background Facts and Proceedings

Jadean graduated from high school and, soon after, met and married Dana. Dana worked at a custom molding plant, where he held several positions over the years, including plant manager and, most recently, production team leader. Jadean earned wages intermittently throughout the marriage but she was primarily responsible for taking care of the parties' three children: Danielle, born in 1988; Amanda, born in 1989; and Dustin, born in 1991. At the time of trial, Danielle was in sixth grade, Amanda in fifth, and Dustin in third. Dustin was diagnosed with spina bifida at birth and requires the use of a wheelchair and leg braces and assistance with basic needs.

After twelve years of marriage, Jadean filed a dissolution petition. Following trial, the district court dissolved the marriage and awarded her primary care of the children. This appeal followed.

II. Primary Care

This appeal presents one substantive issue: whether the district court acted equitably in awarding Jadean primary care of the children. We review this issue de novo. Iowa R. App. P. 4. We consider the factors set forth in Iowa Code section 598.41, although the weight assigned to these factors depends on the facts of each case. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa App. 1998). The paramount consideration is the best interests of the children. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

Dana maintains he should have received primary care because: (1) he is an excellent employee; (2) he is devoted to his children; (3) he can address Dustin's handicap; (4) he is involved in a stable, happy relationship; (5) he has family and friends nearby; (6) school staff were impressed with his commitment to the children; and (7) he has demonstrated his commitment by willingly paying child support and sharing his retirement funds with Jadean. Dana maintains Jadean, in contrast, is a poor housekeeper, has not attended to the hygiene of the children, has left the children alone, has not obtained medication for Dustin, and has placed her needs above those of the children.

We are not persuaded by Dana's contentions. Although there is no question Dana loves his children, his past conduct raises doubts about his newfound commitment to them. Dana concedes he spent little time at home during the marriage. When he was not at work, he was drinking with friends or engaged in an extramarital affair. Dana attributes his absences to unhappiness with the marriage but fails to acknowledge the toll these absences took on Jadean and the children. Jadean testified she was never sure when or if Dana would come home or whether she would find him in a ditch somewhere. On occasion, he would spend the entire weekend with his mother but would fail to let Jadean know where he was. When he did come home, he was often drunk. As a result, he often missed planned events with the children. On two occasions, he returned drunk and threatened suicide in the children's presence.

Despite this history of absences, Dana maintains there is no evidence "the circumstances regarding the children were as bad then, as they are now." We disagree. By default, Jadean was the children's primary caretaker during the

marriage, even during periods when she earned wages outside the home. After divorce proceedings were filed, Dana continued to relegate that function to Jadean. For example, he advised Jadean it was not his responsibility to take Dustin to Minneapolis for medical treatment. When the children's grades were suffering, he agreed to help them with their homework during the week, but only did so steadily for about two weeks. While he regularly exercised weekend visitation, he admitted he sometimes went to work on those weekends, leaving his girlfriend to care for the children.

We also are troubled by Dana's apparent lack of judgment concerning the children's welfare. The record is undisputed that Dana's nephew sexually abused Danielle. Dana nevertheless continued to place the children in close proximity with this nephew. Additionally, he admitted to drinking and driving with the children, a fact that is all the more troubling in light of evidence he destroyed one car and has been arrested for operating a motor vehicle while intoxicated. Despite an admitted genetic predisposition toward alcoholism, Dana has refused to obtain treatment.

We recognize Jadean's parenting history has not been exemplary. She has been cited by the Department of Human Services for leaving one or more of her children unattended. School staff uniformly testified on behalf of Dana, citing supervision and hygiene problems they had noticed. Additionally, Jadean's own mother admits Jadean is not a good housekeeper and has, at times, placed her needs above those of the children. Without minimizing these problems, we note Dana had a responsibility to assist in correcting them. Although he did ensure the children were clean on the weekends he had them, there is little evidence he

assisted with their care at any other time. Jadean, in contrast, took steps to rectify supervision issues, electing to quit her part-time job so she could be home when the children arrived from school. Additionally, by the time of trial, she had established a stable routine for herself and her children that ensured they were supervised and clean. Specifically, she began working a night shift. After school, she took the children to her mother's home, where they stayed the rest of the evening and through the night. The children bathed and dressed at their grandmother's home before going to school. In the year preceding trial, all three children's physical and emotional health and their academic performance had improved.

Despite the significant role played by Jadean's mother in the months preceding trial, the record does not suggest Jadean abdicated her role as a parent. Her mother began to provide evening care four months prior to trial. Before that time, Jadean single-handedly raised the children. Even after this arrangement began, the grandmother recognized Jadean was the parent and had primary responsibility for the children along with Dana. She also testified, "[e]ven though Jadean's not the best housekeeper, she's a good mother. Her kids love her and she takes good care of her kids."

Like the district court, we are persuaded that an award of primary care to Dana would not be in the children's best interests. The children moved from one school district to another to allow Jadean to be closer to her mother following the parties' separation. If Dana were to assume primary care, the children would have to move to a third school district. The children have now adjusted to their school and are beginning to make friends. By all accounts, Dustin's behavior and

outlook toward life have improved substantially since his transfer to a school in Atkins which is handicapped accessible and has supportive teachers and aides.

As Jadean's mother testified:

I don't think it's good for children to move to a lot of different schools period, regardless of who moves them or why. Had there been a way that Jadean could have left her children at College Community, I would have really liked to have seen her have done that. But the housing and the fact that she needed to be close to us so we could help her with the child care and the things like that, she did have to move them. And I feel bad that they had to move that time because they adjusted there well, and I really think it would be hard on them to make another adjustment to another school.

While the children's grandmother admittedly has an incentive to want the children close by, we, like the district court, find her testimony on this and other issues compelling. She repeatedly recognized that both parents had failings. Nevertheless, she stated she was willing to assist either parent with the children's care. The following testimony is instructive:

And I said to Dana, we need to talk about what's happening to these kids. And think [sic] that Dana can tell you on numerous times that I have told him repeatedly--- and Jadean also--- that I don't care what they do, but they're not going to hurt those kids because--- it's just not going to happen.

And I told Dana, I said we need to talk about the situation with these kids. And we talked on a couple of occasions about what would happen to the kids. And my husband was there at the time. And at one of those, Dana said, Shirley, if I get custody of the kids, will you raise them? And I had told him at that time I didn't really feel like I could take on a full-time, but that I would help him if he got custody. And I would help him if he did. Or I would hope that he would allow me to help him. The same way I help Jadean. Because they are my grandchildren and I do put my kids and grandkids first. That's---
You're going to think, oh, my, what an unselfish woman. But I'm not. I'm very selfish. I love having my kids there. I feel better when my house is full.

We defer to the district court's finding concerning her credibility. *In re Marriage of Williams*, 589 N.W.2d at 761.

The critical issue in determining the best interests of the children is which parent will do better in raising them. See *In re Marriage of Rebouche*, 587 N.W.2d 795, 798 (Iowa App. 1998). In its conclusions of law, the district court stated the following:

The Petitioner has made mistakes during the marriage, but she appears to be a caring and understanding person. She is sincere and verbalizes that her life has not been as stable as she had wished throughout the marriage relationship. She has not been a good housekeeper and she has, at times, been overwhelmed by the needs of the children. . . . Although the Petitioner admits to her various failings, she understandably became frustrated during the marriage over the lack of cooperation by the Respondent, which led her to be placed in untenable situations. She must improve her housekeeping and care for the children or the Department of Human Services may once again become involved; however, the Court is convinced that she can provide for the moral, educational, and spiritual needs of the children much more effectively than the Respondent. Furthermore, the Respondent's assurances that he will in the future place less emphasis on his employment and more towards the needs of the children is commendable, but highly speculative and conjectural given the Respondent's past track record.

We agree with and adopt these statements as our own. We conclude the children's best interests will be served by awarding primary care to Jadean.

II. Attorney Fees

Jadean seeks appellate attorney fees of \$2500. An attorney fee award is not a matter of right but rests within the sound discretion of the court. *Williams*, 589 N.W.2d at 767. We 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. *Id.* After consideration of these factors, we award Jadean \$1,000. We affirm the decision of the district court.

AFFIRMED.