

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CARRIE D. BENGTON
AND CHARLES L. BENGTON

FILED

DEC 22 1988

CLERK SUPREME COURT

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Upon the Petition of	)	
CARRIE D. BENGTON,	)	
Petitioner-Appellant,	)	
And Concerning	)	
CHARLES L. BENGTON,	)	8-499
Respondent-Appellee.	)	<u>88-75</u>

Appeal from the Iowa District Court for Page County
(No. DM-1608), Glen N. McGee, Judge.

Petitioner appeals the portion of the decree of
dissolution entered in district court which granted
physical care of the parties' minor child to respondent.
AFFIRMED.

Jennifer J. Rose, Shenandoah, for petitioner-appellant.

Verd R. Bailey, of Bailey Law Office, P.C., Clarinda,
for respondent-appellee.

Considered by Schlegel, P.J., and Hayden and Habhab,
JJ.

PER CURIAM

Carrie Bengston appeals the district court's order awarding primary physical care of her daughter, Candice, to Charles Bengston, the father. She contends the trial court erred in this regard. We affirm.

Carrie and Charles Bengston were married on February 4, 1984. Candice was born of this marriage on July 20, 1984. Both parents are presently living with relatives. Carrie lives with her parents. Charles lives with his sister and her children. Carrie is twenty-two years old; Charles is thirty years old. Both are presently employed.

On appeal we review de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). The parties have stipulated to joint custody. The only issue on appeal concerns primary physical care of Candice.

The best interests of the child is our primary consideration when determining custodial rights. Iowa Code § 598.41. After reviewing the entire record, we find the district court correctly applied Iowa Code section 598.41(3) in arriving at its decision.

Carrie argues she is a better parent; that she was primarily responsible for the child's upbringing; that Charles has acted violently in the past and has attempted to erode her relationship with Candice; and that Carrie's

relationship with another man during the course of her marriage to Charles should have no bearing on whether she is able to adequately care for her child. She asserts the trial court is punishing her for this liaison. Charles makes similar counter accusations.

The record clearly reflects the district court was not rewarding or punishing either parent when it made its determination. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). To the contrary, the court set out all factors which pointed to the fact that both parents would be suitable primary custodians. After viewing all the evidence, the trial court determined that Candice's best interest requires that her physical custody be placed with her father. In this respect, we note that the "critical issue in determining the best interest 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 attempting to gain custody in a dissolution proceeding." In re Marriage of Bowen, 219 N.W.2d 683, 689 (Iowa 1974). We affirm the trial court.

Carrie requests appellant 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) Both Carrie and Charles are presently employed. Therefore, each party is ordered to pay his or her own appellate

attorney fees Costs on appeal are assessed one-half to
each party

AFFIRMED.