

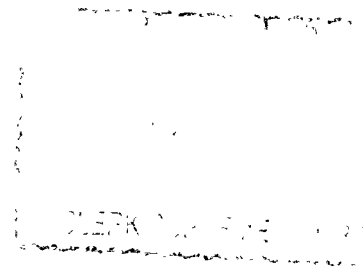
IN THE COURT OF APPEALS OF IOWA

No. 7-082 / 96-0417

**IN RE THE MARRIAGE OF DANIEL GLENN WILDEBOER
AND EMELINE IRENE WILDEBOER**

Upon the Petition of
DANIEL GLENN WILDEBOER,
Petitioner-Appellant,

And Concerning
EMELINE IRENE WILDEBOER,
Respondent-Appellee.



Appeal from the Iowa District Court for Black Hawk County, Thomas N.
Bower, Judge.

On appeal from the entry of a dissolution decree, appellant argues he should
have been awarded the sole custody of the parties' children. **AFFIRMED.**

John W. Ackerman of Ackerman Law Office, Waterloo, for appellant.

Gary F. McClintock of Hoeger & McClintock, Independence, for appellee.

Considered by Habhab, C.J., and Huitink and Streit, JJ.

STREIT, J.

On appeal from the entry of a dissolution decree, the appellant argues he should have been awarded the sole custody of the parties' three children, physical placement of the children, with liberal rights of visitation to the appellee. The appellee requests an award of appellate attorney fees.

Daniel and Emeline were married on June 22, 1991. They have three children, Torin, born January 11, 1990, Katherine, born October 17, 1991, and Danielle, born July 13, 1993. Daniel is in the Marine Corps and was stationed in North Carolina from October 1992 until October 1995. Emeline and the children resided with him on base. In October 1994, Emeline and the children moved to Waterloo, Iowa, after Emeline was asked to leave the base. Daniel was transferred to Waterloo in October 1995, and he filed a petition for dissolution of marriage on November 13, 1995. An order was filed on November 27 requiring Daniel to pay \$395 per month in temporary child support.

A dissolution trial was held January 8, 1996, and Daniel requested he be awarded the sole custody of the children. He testified if he was awarded sole custody he would be given a hardship discharge from the military. He would also be provided with educational benefits which would enable him to live in Waterloo and go to college. If he was not awarded custody of the children, he would be stationed in Japan for the next year and would remain in the Marine Corp until his discharge in

February 1998. Emeline requested the parties be awarded joint custody and she be awarded the physical care of the children.

The district court filed its findings of fact, conclusions of law, and decree on February 7, 1996. The court concluded joint custody was appropriate and Emeline should be awarded the children's physical care. The court noted Emeline had cared for the children without Daniel's help for over a year after she returned to Waterloo in October 1995, and she had cared for the children for the last several months. The court determined Emeline could best meet the day-to-day needs of the children.

On appeal, Daniel argues it is in the children's long-term best interests to be placed in his care. He contends he was the children's primary caretaker from the time he returned to Waterloo in October 1995 until the time of the entry of the dissolution decree. He argues awarding him the physical care of the children ensures that both parties will have contact with them because he would receive a military discharge and could reside in Waterloo. If he is not awarded their physical care, he will be stationed in Japan for one year and then transferred back to the States for another year. As a result, it would be difficult for him to see the children for two years. Daniel also questions Emeline's ability to adequately care for the children. Emeline requests an award of appellate attorney fees.

Our review of custody and economic provisions of a dissolution decree is 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. Iowa R. App. P. 14(f)(7). We are not bound by these determinations. *Id.*

In child custody cases, our first and governing consideration is the best interests of the child. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). The factors courts consider in awarding custody are found in our statutes, as well as prior cases. See Iowa Code § 598.41(3); *In re Marriage of Weidner*, 338 N.W.2d at 355-56; *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). These factors essentially bear on what will be in the long-term best interests of the child. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). Gender is irrelevant in the determination. *Id.* Neither party should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. *Id.*

The role of primary care taker of the children during the marriage does not ensure the court will designate that parent as the primary caretaker at the time of the divorce. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). The role of primary caretaker is, however, critical in the development of children. Careful consideration is given in custody disputes to allowing the children to remain with the parent who has been the primary caretaker to add needed continuity to the lives of children during a time which can be a difficult and confusing for them. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992).

Daniel states the district court erred in granting physical custody to Emeline because he was the primary care giver five months preceding the divorce. During the marriage, Daniel and Emeline lived on the base in North Carolina where Daniel was stationed in the Marine Corps. Emeline took care of the children on the base. In October 1994, Emeline was asked to leave the base after she agreed not to pursue charges against a perpetrator she claims raped her on the base. She moved back to Waterloo, Iowa, with the children. Daniel did not request the children stay with him on the base. One year later, Daniel was transferred to Waterloo, at his request, to resolve the divorce. During the months preceding the divorce, Emeline allowed extensive liberal visitation.

We find, while both parents appear capable of adequately caring for the children, the district court properly gave primary physical care of the children to Emeline. Although certainly not controlling, due consideration should be given to the fact Emeline has been the historical primary care giver during the marriage. *See In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App.1992). Emeline has the closer interpersonal relationship with the children. Daniel's plan to use the custody of the children to get a discharge is tentative at best and exploitative at worst. Emeline offers the more stable home for the children. There is not sufficient reason to disturb the primary-care-giver relationship the children have enjoyed with Emeline

all their lives. It is in their best interests to continue with Emeline as the primary care giver.

Both these parents love their children very much and each is capable of providing for their long-range best interests. It is unfortunate that Daniel will not be able to see his children while he is stationed in Japan, but he will be in the States after one year, either in North Carolina or California, and could arrange for visits during this time. In situations such as this, we note the district court had the parties before it and was able to observe and evaluate the parties as custodians. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996); *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App.1993). The court found Emeline the superior parent. From our de novo review of the record, we agree with the trial court and affirm its decision to award primary physical care of the children to Emeline.

Emeline requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we find equity warrants an award of \$750 appellate attorney fees to Emeline.

AFFIRMED.