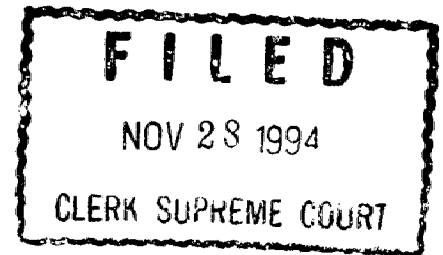


IN THE COURT OF APPEALS OF IOWA

No. 4-394 / 94-125



IN RE THE MARRIAGE OF KEVIN L. GRAESER AND
ROBIN R. GRAESER

Upon the Petition of
KEVIN L. GRAESER,

Petitioner-Appellee,

And Concerning
ROBIN R. GRAESER,

Respondent-Appellant.

Appeal from the Iowa District Court for Bremer County,
Jon Stuart Scoles, Judge.

Robin appeals from the child custody provisions of the parties' dissolution decree, contending the district court erred in placing the parties' four children in Kevin's primary physical care. **AFFIRMED.**

Gerald B. Carney of Carney, Gohlke & Thalacker,
Waverly, for appellant.

Dale E. Goeke of Hagemann, Goeke & Egli, Waverly, for
appellee.

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

HABHAB, J.

Robin and Kevin were married on December 18, 1981. They had four children: Mandy, born March 31, 1982, Nicole, born June 2, 1985, and twins, Danny and Kyle, born February 17, 1990. During the marriage, Kevin worked for Greene Farm Equipment & Agriculture, often working overtime. Robin stayed at home caring for the children.

Kevin filed a petition for dissolution of marriage in June 1993. Both parties sought joint custody and primary care of the children. The couple separated with Robin moving out of the family home on August 29, 1993. Robin moved out with assistance from several members of her family and friends.¹ She took the children with her. Mandy and Nicole returned to live with their father within a few days.² Robin moved into a house in Waverly which was

1. Robin and nine other people arrived unexpectedly at Kevin's house early in the morning on August 29, 1993. The group removed furniture and much of the family belongings. Robin grabbed the children and gave them to others in the group to take to the car. The oldest daughter was confused as to what was going on and began to cry. One of Robin's brothers, who had previously threatened to kill Kevin if any quarrels developed due to the divorce proceedings, stood by Kevin while the removal was taking place.

2. Mandy refused to enter the middle school in Waverly and indicated that she wanted to return to Plainfield. Nicole attended the elementary school, but was noticed to be crying shortly before lunch. According to her teacher, Nicole said she missed her sister. Kevin and Robin had discussions during the school day and it was apparently agreed that Nicole and Mandy would return to Plainfield to school. Nicole's teacher testified that Nicole seemed pleased with that decision. Mandy and Nicole then returned to Plainfield and began school. They have continued to reside with Kevin since that time and attend the Plainfield Elementary School. Danny and Kyle have continued to reside in Waverly with Robin.

purchased by her parents. At the time of the trial, Robin's brothers, Bill and Charles, as well as Charles' friend, Darren, were living at the residence also.

At the dissolution hearing, Kevin testified that Robin was not a good housekeeper and, beginning in 1993, stayed out late drinking often. He also testified, however, that he believed that either he or Robin could properly care for the children if awarded primary care. Robin testified she had always been the children's primary caretaker and Kevin sometimes displayed a violent temper.

Although the court expressed concerns about Kevin's outbursts of temper, it awarded primary care of all four children to Kevin. The court found Kevin demonstrated more maturity than Robin, was in a better position to provide the children with a stable home environment, and was more likely to support Robin as a noncustodial parent. The court also noted that it reached its decision independent of Mandy's and Nicole's expressed preference to live with their father. Robin appeals.

I. Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to

After Robin removed the children and furniture from the family home, she did not return items belonging to the children when Mandy and Nicole returned to Plainfield. Mandy asked for some of her belongings and Robin replied, "I'll only give your stuff back if you come and live with me."

examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Primary physical care. In child custody cases, the first and governing consideration is the best interests of the child. The factors the court considers in determining child custody are enumerated in Iowa Code section 598.41(3) (1993), in In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests 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 Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Robin argues the district court erred in placing primary physical care of the children with Kevin. Robin contends she was the historical primary caretaker, she demonstrated the most maturity in providing for the children, and she is able to provide the children with a stable home environment. Robin also minimizes the older children's stated preference to live with Kevin.

Testimony was given supporting the district court's finding that Kevin is able to provide a more stable home environment. Robin is virtually unable to dispute this finding. In fact, Robin concedes in her brief that Kevin's home would be a healthy environment for the children. Robin's only argument is that Kevin requires some assistance in caring for the children due to his employment. The fact that Kevin has a support network and uses this assistance when the need arises surely cannot be a sign that he is unable to provide a stable home environment. To the contrary, it shows Kevin is concerned for his children's welfare. Robin, as the district court found, cannot provide as stable home environment as Kevin. She was in a very weak and uncertain financial position at the time of the trial, and the people she chose to surround herself with were of questionable character.³

We acknowledge Robin was the historical primary caretaker prior to the separation of the parties. Past performance, however, is not the only factor to be considered when determining which parent can provide better care for the children. Testimony shows Kevin has performed well as the caretaker of the older children since the separation.

3. Upon returning from a weekend camping trip, Robin had a number of friends stay overnight. Condoms were out in plain view for the children to see. At one point, Mandy entered the basement and saw two of Robin's friends together naked.

Although it is not to be controlling, the children's preference regarding custody is relevant and may be considered. In re Marriage of Blume, 473 N.W.2d 629, 631 (Iowa App. 1991). In considering the child's preference, a court should consider, among other things, the child's age, maturity, relationship with family members, and reasons for giving the preference. Id. While the district court stated it made the custody decision independent of the preferences expressed by the two older children, we find the children's preference to live with Kevin to be one of many factors weighing in Kevin's favor. We do not view this factor as controlling, but do consider it in reaching our determination.

We agree with the district court's assertion that Kevin, rather than Robin, is more likely to support the noncustodial rights of the other parent.⁴ This assertion is supported by the testimony regarding each of the parties behavior during the separation.⁵

After reviewing the case de novo, we find the district

4. The boys frequently cried when it was time to go back to Robin. Kevin has had to resort to tricks to get the boys into Robin's care.

5. Robin's method of taking the children when she moved out was forceful and even intimidating. This behavior certainly cannot be considered warranted or supportive of Kevin's rights particularly since there was no reason to believe the children were in any danger. Although Robin testified she believes the children should continue their relationship with Kevin, testimony was given that, while the children were in Robin's care, they were exposed to adults, including Robin, bad-mouthing Kevin. Kevin testified he continues to encourage the children's relationship with their mother.

court properly placed the children in the primary physical care of Kevin. We determine it is in the best long-term interests of the children to be placed in Kevin's primary care. We affirm the decision of the district court on this issue.

III. Attorney fees. Robin requests attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99 (Iowa App. 1991). We determine each party should pay his or her own attorney fees for this appeal.

AFFIRMED.