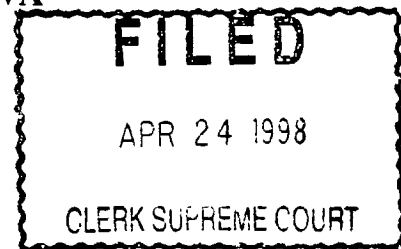


IN THE COURT OF APPEALS OF IOWA

No. 8-104 / 97-1113

Filed April 24, 1998

IN RE THE MARRIAGE OF DEAN ALLAN
NELSON AND CINDY LU NELSON

Upon the Petition of
DEAN ALLAN NELSON,
Appellant,

And Concerning
CINDY LU NELSON,
Appellee.

Appeal from the Iowa District Court for Chickasaw County, James L. Beeghly,
Judge.

The petitioner appeals the child custody and visitation provisions of the
parties' dissolution decree. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, Charles City,
for appellant.

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C.,
Decorah, for appellee.

Heard by Streit, P.J., and Vogel, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

STREIT, P.J.

A father appeals the award of primary custody of the children to his ex-wife. He claims his ex-wife is mentally unstable and verbally abusive to the children. Because his contentions are unsupported by evidence and the mother has been the primary caregiver to the children, we find it in the children's best interests to have primary physical care placed with the mother.

I. Background & Facts.

Dean and Cindy Nelson were married on June 27, 1981. Dean was thirty-seven and Cindy was thirty-eight at the time of trial. The couple had two children, Laura, born January 29, 1986, and Sarah, born May 20, 1988. Since 1990, the family has lived in New Hampton, Iowa, where Dean works at Plainview Agri Power and Cindy has a successful at-home embroidery business.

During the marriage Cindy was the primary caregiver to the children. Because she works in her home, she is able to care for the children with no need for outside day care. Prior to the divorce, Cindy performed the household tasks such as cooking, cleaning, bathing, and clothing the children. She arranged their medical care. She pursued special help from the school district and counselors to aid the children with learning deficiencies. Cindy enrolled the girls in activities such as biking, camping, jet skiing, swimming, softball, and music lessons and took the children on field trips.

Dean has always worked outside the home. When the children were small and Cindy worked part-time outside the home, Dean and Cindy rotated caring for the

children while the other worked. After Cindy starting working in the home, Dean's routine care of the girls lessened. He still participated with the girls in recreational activities on a regular basis such as horseback riding, playing frisbee, and participating in motor sports.

In 1990, Cindy began having symptoms of depression. She began taking medication and counseling with a pastor. With these steps taken, Cindy has effectively managed the symptoms of depression.

The parties' marriage was filled with turmoil and accusations. Cindy was continually upset by Dean's flirtatious behavior with other women. During the marriage, she accused Dean of having numerous affairs. Often this subject led to heated arguments between the parties, some of which took place in front of the girls. Dean denied he was having affairs and attributed Cindy's accusations to mental instability on her part. Cindy accused Dean of sexually molesting the girls. Dean denied he had done so and told Cindy she was crazy. The allegations were not proven.¹

After trial, the court concluded it was in the children's best interests Cindy be awarded primary physical care and Dean awarded liberal visitation. Dean was ordered to pay \$653.98 per month in child support. Dean appeals.

¹ Cindy did not attempt to prove these allegations at trial. Dean offered these incidences as proof of Cindy's instability.

II. Standard of Review.

Our review is denovo. Iowa R. App. P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Custody of the Girls.

Either Cindy or Dean are suitable primary physical caregivers for the girls. However, in this situation, where the parents can not work jointly to raise their children because of their own differences, it is in the best interests of the girls to have one primary physical caregiver. *See Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This fact requires us to select the custodial parent who can minister most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

Cindy was the primary caregiver of the girls before the divorce. The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated by the court to be primary caretaker at the time of the divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the role the primary caretaker has played in the lives of the children is given consideration in custody disputes. *In re Marriage of Burkle*, 525 N.W.2d 439,

441 (Iowa App. 1994). Allowing a parent to continue as the primary caretaker after the divorce gives continuity to the lives of children. *Id.*

Dean attempts to down play the importance of Cindy's role as primary caregiver and goes to great lengths to portray Cindy as verbally abusive toward her children and mentally unstable.

There is insufficient evidence Cindy verbally abuses her children. She admitted she frequently swore in front of her children, but has corrected this habit. Cindy has a record of depression. However, she has actively sought treatment for the condition and her depression has not interfered with her ability to provide a stable environment for her girls. Psychological testing by Dr. Rick Jennings indicated Cindy's depression does not interfere with her ability to provide a stable environment for her girls. Dr. Jennings recommended primary physical custody of the girls be with Cindy. His recommendation was shared by two other psychologists, Dr. Marcia Oltrogge and Dr. Lorne Johnson.

Cindy's negative characteristics, of which Dean focused upon at trial, are far outweighed by the evidence of Cindy's role as a good primary caregiver of the girls. As a result of her role, she has developed stronger interpersonal relationships with the girls than Dean. Cindy is better suited to meet the emotional, social, and nurturing needs of the girls. For all these reasons, it is in the best interests of the girls that Cindy, the primary caretaker of the children before the divorce, be awarded primary physical care after the divorce.

Dean argues the court should have granted him more liberal visitation. The court ordered visitation on alternating weekends, alternating holidays, and six weeks' visitation during summer vacation to be exercised consecutively. This visitation schedule is appropriate in light of the geographical proximity of the parties and the inability of the parties to cooperate. The visitation schedule is affirmed. The trial court's order regarding child support is affirmed.

Cindy contends Dean should pay for the attorney fees she spent defending the trial court's judgment on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). In deciding to award attorney fees on appeal, the court considers "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 trial court's decision on appeal." *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa App. 1994). Due to the parties' income differences and Cindy's success on appeal, we award Cindy appellate attorney fees of \$1000.

AFFIRMED.