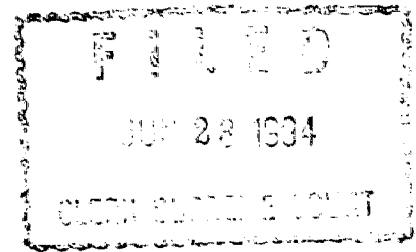


IN THE COURT OF APPEALS OF IOWA

No. 4-177 / 93-1435



IN RE THE MARRIAGE OF TODD M. McCREA AND JULIA J. McCREA

Upon the Petition of
TODD M. McCREA,

Appellant,

And Concerning
JULIA J. McCREA,

Appellee.

Appeal from the Iowa District Court for Black Hawk
County, William G. Klotzbach, Judge.

Todd McCrea appeals the custody provisions of the
parties' dissolution decree. **AFFIRMED.**

James L. Wagner of Gartelos, Wagner & Ament, Waterloo,
for appellant.

Susan Bernau Staudt of Redfern, Mason, Dieter, Larsen &
Moore, Cedar Falls, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Todd and Julia McCrea's first marriage was dissolved in 1989. They remarried each other in 1990. This marriage was dissolved in 1993. The parties have one child, Chanisse, born June 3, 1990. Julia is twenty-four years of age, has a high school diploma and nursing certificate, and works as an LPN nurse earning a net monthly income of \$907. Julia is living with a Greg Appleby and is pregnant by him. Todd is twenty-six years of age, has a high school diploma, and works at J.C. Feed Mills earning a net monthly income of \$1006. Todd lives with a Tammy Bass who has three young children and receives ADC.

Among other things, the dissolution decree awarded joint legal custody of Chanisse to the parties and primary care to Julia. Todd was ordered to pay \$53 per week in child support.

Todd appeals. He contends the district court erred in awarding Julia primary care of Chanisse for the following reasons: Julia has moved her residence five times in the last five years; she has been fired from several jobs; she is a drug abuser, convicted felon, and misdemeanant; and she has generally behaved immorally without showing remorse. Todd asserts he is a hard worker, has a steady job, has never been in trouble with the law, does not use drugs, and has demonstrated, when he had temporary physical care prior to dissolution, he can effectively care for Chanisse.

Julia argues Todd is merely concentrating on her past mistakes and indiscretions. For example, she claims she has not used alcohol or drugs since before she became pregnant with Chanisse. Julia further argues she has been Chanisse's primary caretaker and supports Chanisse's relationship with Todd (who does not promote Chanisse and Julia's relationship). She also claims Todd has a history of irresponsibility, abandonment, and heavy reliance on his girlfriend and mother in caring for Chanisse. She requests appellate attorney fees.

Our review in this matter is de novo. Iowa R. App. P. 4. In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), 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). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrbanc, 359 N.W.2d 420, 424 (Iowa 1984). 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).

Todd contends the trial court erred in granting physical custody of his daughter Chanisse to his wife Julia. We determine the evidence supports the trial court's holding custody of Chanisse with her mother is in her best interest.

Todd's primary objection to Julia stems from her involvement with an individual named Richard Foster. During her association with Richard Foster, Julia experienced some difficulties with the law. Julia was arrested for shoplifting, convicted of forgery, and was arrested for harboring a felon. However, these problems with the law seemed to be limited to the time period in which Julia associated with Richard Foster. The trial court found Julia had terminated any relationship with Richard Foster. We find the evidence to be supportive of that conclusion also. Moral misconduct is a circumstance which the court will consider in determining the parent's fitness to have custody of the minor child; however, it is not the only consideration. In re Marriage of Estlund, 334 N.W.2d 276, 280 (Iowa App. 1983). In the case of In the Interest of Mann the Iowa Supreme Court reversed a previous custody decision finding that the previous decision had been based in part on the mothers unstable lifestyle in the first three years of her child's life. In the Interest of Mann, 293 N.W.2d 185, 190 (Iowa 1980). The court noted, "Parents are not to be denied custody for past indiscretions which do not demonstrate a present risk."

Id. The court then reversed the previous ruling and granted custody to the mother. Id. In the case at bar, Julia should not be denied custody based solely upon the poor judgment she exhibited in engaging in a relationship with Foster. The trial court found, and the record indicates Julia has terminated any relationship she may have had with Foster and is continuing in her attempt to improve her life and create a caring and loving atmosphere for her daughter. It is our determination Julia's indiscretions with Foster should not be the overriding and determining consideration.

Todd also raises the issue of Julia's drug abuse. Julia testified regarding her drug problems and admitted she had used various drugs while in high school. She further testified she received treatment for her drug abuse and discontinued her drug use prior to becoming pregnant with Chanisse. Todd did not present any evidence to suggest Julia had continued to use drugs or had any remaining problems with drugs.

Todd attempts to rely upon the March 18, 1992, order giving him temporary physical custody of the minor child to support his argument he should be given permanent custody. In many situations, the placement of temporary custody is very persuasive with regard to the decision of permanent custody. It is less persuasive in this instance. While the order provided Todd have temporary custody, Todd and Julia were sharing physical custody. Julia had custody of

Chanisse from 6 p.m. Tuesday until 6 p.m. Friday, and Todd then had custody the remaining days. Clearly, during these proceedings the court felt confident Julia could care for her child since the child was placed with her for one-half of the week.

The record strongly indicates it would be in Chanisse's best interest to be placed in the physical custody of her mother. Julia is currently employed as an LPN and works Friday, Saturday, and Sunday 7 p.m. to 7 a.m. This schedule enables her to spend the remaining part of the week with Chanisse. Todd has been known to work eighteen-to twenty-hour days and often works between sixty and seventy hours per week. In his absence, either his girlfriend, Tammy, or his mother care for Chanisse. Based upon the testimony at trial, it appears likely Tammy or Margaret McCrea would be the primary caretaker for Chanisse. Todd's girlfriend, Tammy, is a divorced mother of three who is currently living on ADC. Her testimony indicated she was comfortable living on ADC and had no plans to go to school or obtain a job. Because Todd is living at her home, Chanisse has spent a significant amount of time there also. Tammy has been baby-sitting Chanisse while Todd works. When staying at Tammy's home, Chanisse sleeps in a room on the main floor of Tammy's house with Tammy's daughter while Tammy and Todd sleep in a room down in the basement. Testimony also indicated Chanisse had developed some disciplinary problems while staying at

Tammy's and did not sleep as well when she was returned to Julia's care.

An additional aspect which must be considered is Todd's failure to demonstrate stability in his home life. During his marriage to Julia, he repeatedly left her, had an extramarital liaison, and was absent from the home during Julia's pregnancy up until approximately two months before Chanisse was born. The record indicates Julia was committed to the marriage, and Todd was unable to commit himself to the relationship.

Another consideration is Todd's refusal to encourage a relationship between Chanisse and Julia. Julia testified Chanisse on at least one occasion came home from staying with Todd and jumped up and down saying, "Mommy is a fucking bitch." It is reasonable to assume this is not a phrase Chanisse created on her own. Additionally, Todd has been less than reasonable in accommodating special requests by Julia with regard to visitation. To the contrary, the evidence shows Julia encourages a good relationship between Todd and Chanisse.

Both parties have experienced problems in their lives. However, both Todd and Julia appear to have Chanisse's best interest at heart. Based upon the trial testimony and evidence admitted at trial, it is this court's determination the best interests of Chanisse will best be served by placement of physical custody with her mother, Julia. The judgment of the trial court is affirmed.

Julia also requests attorney fees on 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We determine Julia shall be awarded \$500 in attorney fees, and costs of this appeal shall be taxed to Todd.

AFFIRMED.