

FILED

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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DONNA LYNN MUELLER AND THOMAS J. MUELLER.

Upon the Petition of	)	
DONNA LYNN MUELLER,	)	Filed August 25, 1981
Petitioner-Appellant,	)	
and Concerning	)	
THOMAS J. MUELLER,	)	<u>1-266</u>
Respondent-Appellee.	)	<u>3-66401</u>

Appeal from Dubuque District Court - Frank D. Elwood, Judge.

Petitioner-wife appeals from the child custody provisions of the decree dissolving her marriage to respondent-husband, asserting that the record as a whole does not support trial court's findings which led the court to award custody to respondent. **AFFIRMED.**

Celeste F. Bremer of Raben, Liebe, Shinkle & Bremer, Davenport, Iowa, for petitioner-appellant.

D. Michael King, Dubuque, Iowa, for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Petitioner-wife, Donna Lynn Mueller, appeals from the child custody provisions of the decree dissolving her marriage to respondent-husband, Thomas J. Mueller. She asserts that the record as a whole does not support trial court's findings which led the court to award custody to respondent. She specifically challenges findings relative to the amount of time the child was under each parent's care, the court's assessment of her stability, and the court's reliance on her misconduct. She further asserts that trial court improperly considered her "extra-home activity" without properly evaluating the same activities of the father and that trial court gave improper weight to each party's financial status. We affirm.

The parties were married on January 5, 1974. Douglas, their only child, was born April 3, 1978. At the time of hearing on November 13, 1980, both parties were approximately 30 years old and in good health. Petitioner was employed as a store manager for a women's store in Dubuque. She had attended college and accumulated approximately 400 credit hours, but needed approximately eight credit hours to complete her bachelor's degree in psychology. Petitioner held numerous jobs during the marriage, largely due to the parties' geographical moves to further respondent's career. However, in 1976, she embarked on a business venture involving the operation of a cosmetics store but closed the business in 1979 after sustaining substantial debts.

Respondent is a mechanical engineer, employed at a company in La Crosse, Wisconsin. His work requires him to travel occasionally. At trial he estimated that his travel time averages ten or twelve days per year.

The parties have not lived together for any extended period since the birth of the minor child. Since August, 1978, respondent has lived on an acreage near La Crescent, Minnesota. Petitioner has lived in several locations during that same period and was residing in a rented trailer at the time of trial. During the period in which the parties maintained separate homes, the minor child spent some time in the care of each parent, although the parents disagree sharply over which of them has had primary responsibility for his care. He has, however, lived with petitioner since August, 1980.

By decree entered January 31, 1981, trial court awarded custody of the child to respondent. On March 13, 1981, the supreme court entered an order staying transfer of custody to respondent pending this appeal.

1. Child Custody. In assessing child custody provisions, the best interests of the minor child are our first and governing concern. Iowa R. App. P. 14(f)(15).

"... [C]hild custody cases are to be decided 'upon what the evidence actually reveals in each case, ...'." In re Marriage of Tresnak, 297 N.W.2d 109, 112 (Iowa 1980) (quoting In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974)). Neither party is given initial preference in our determination. In re Marriage of Meier, 267 N.W.2d 46, 47 (Iowa 1978). We base our conclusion on the factors set forth in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), as a guide in determining which parent can minister more effectively to the long range best interests of the child. Id.

Trial court concluded that both parties love the child and wanted custody of him. However, the court concluded that respondent had shown a greater interest in the child by assuming much of the responsibility for his care, that respondent had shown greater stability, and that petitioner had shown greater concern with her business interests. From our review of the record, we find no reason to disturb trial court's findings. The evidence clearly shows that respondent has assumed significant responsibility for the minor child since his birth. When the child was approximately six weeks old, petitioner returned to her business activities in Dubuque and frequently was gone for two or three weeks at a time. During this time, respondent, with the assistance of a babysitter, cared for the child. After the child was approximately one year old, the parties apparently assumed a more fifty-fifty arrangement. In assessing the parties' overall previous performance as parents, we believe trial court gave proper consideration to each parent's abilities, contributions, stability, and dedication to rearing the child. Further, even without the strength of this evidence, since the record shows both parents would be suitable custodial parents, we would defer to trial court's superior position in observing both parties and evaluating the evidence. In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). See also In re Marriage of Steenhoek, 305 N.W.2d 448, 454 (Iowa 1981).

II. Attorney Fees. Petitioner requests an award of attorney fees for this appeal in the amount of \$1,500. The primary consideration in this regard is the parties' resources. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). After reviewing the entire financial situation of both parties, we conclude an award of attorney fees is unwarranted.

Based on the foregoing, we affirm trial court's judgment. Costs of this appeal are assessed against petitioner.

AFFIRMED.