FILED
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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 3-157 / 92-1779

**IN RE THE MARRIAGE OF JANET KAY EAVES AND KEVIN WILLIAM EAVES**

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Upon the Petition of

**JANET KAY EAVES,**

Appellant,

And Concerning

**KEVIN WILLIAM EAVES,**

Appellee.

Appeal from the Iowa District Court for Lee County, R. David Fahey, Judge.

Janet appeals the dissolution decree granting Kevin primary care of the parties' minor child. **AFFIRMED.**

Michael J. Schilling, Burlington, for appellant.

Thomas T. Skewes of Johnson & Skewes, Fort Madison, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

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DONIELSON, J.

Janet and Kevin were married in 1985 and have one child, Ian, born in 1986. Janet was born in 1965 and attended cosmetology school after graduating from high school. She worked as a hair stylist and for a cleaning service during the first year of the marriage. She stayed home through Ian's birth and remained home until Ian was about five months old. She is presently employed full-time as a bank teller. Janet is engaged to Larry Humphries, a vice-president at the bank where she is employed. Kevin was born in 1964 and graduated from high school. He presently works at Hy-Vee as an assistant shift manager.

The parties separated in February 1992. A hearing was held in August 1992 regarding the issue of primary physical custody. In October 1992, the district court issued its decree of dissolution awarding primary physical care of Ian to Kevin.

Janet now appeals. She contends she is the parent better able to provide for Ian's long-term best interests and thus she should be awarded primary physical custody of Ian.

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 Vrban, 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 In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985). Gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. Id.

At the hearing, both parties presented evidence attesting to the other's character and past conduct. Janet alleged Kevin was violent and aggressive. Kevin alleged Janet had engaged in immoral behavior by sleeping with her fiance, Larry, in Ian's presence. He also criticized Janet for slapping Ian and cutting his lip.

On our review, we find the most persuasive evidence to be the evidence Kevin presented of how well-adjusted Ian has become to his school and home. Ian presently attends an elementary school in Fort Madison five blocks away from his home. He goes to school with friends in the neighborhood and plays with other children regularly. After school, he is either picked up by Kevin or by his paternal grandparents. On the evenings that Kevin works, Ian stays with his paternal grandparents.

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In addition to evidence of Ian's well-being, Kevin has provided the primary care for Ian since the time of the separation. Kevin took Ian on vacation to Texas with him. He registered Ian at school, bought his school supplies and clothes, and took Ian to the doctor and dentist for checkups. Kevin has spent time with Ian fishing, riding bikes, camping, and playing baseball.

On the other hand, much of the evidence presented by Janet referred to specific incidents of Kevin's behavior. Janet alleges Kevin is a person with "violent, aggressive tendencies." She points to Kevin's behavior as a teenager and several incidents in which Kevin acted violently including the times Kevin used a shotgun to kill a dog, assaulted a known shoplifter outside Hy-Vee, and assaulted a man who was arguing with his father.

In making the decision regarding primary physical custody, we give considerably more weight to the evidence of Kevin's adjustment and well-being than to Janet's testimony of the alleged "violent" episodes. Janet presented no credible evidence that the above episodes were anything more than isolated incidents. More importantly, she has not shown how the above episodes have either affected or have had the potential to affect Ian's well-being.

The evidence suggests Ian has not bonded as closely with Janet than he has with Kevin. Janet has had trouble disciplining Ian. On one occasion, she slapped Ian and

split his lip. Since the time of the separation, Janet often abdicated Ian's care to Kevin and to baby-sitters. During the summer of 1992, Janet and Larry went to Six Flags in St. Louis, an amusement park, without taking Ian with them. If custody were awarded to Janet, Ian would move to Illinois and transfer schools. Because of Janet's work schedule, Ian would be delivered to a day care center or baby-sitter after school.

Janet argues the district court gave undue emphasis to Janet's moral misconduct. In its findings, the district court noted Janet's fiance, Larry, had routinely slept with Janet while Ian was at home and that Janet and Larry had shared a bed while sharing a room with Ian on vacation. A parent's moral misconduct is a serious consideration in custody determinations, but it alone cannot be the determinative factor In re Marriage of Zablecki, 389 N.W.2d 396, 399 (Iowa 1986) (citations omitted). In its conclusions of law, the court based its decision on Kevin's emotional stability, honesty, morality, his ability to effectively discipline Ian, and the likelihood he would better promote the relationship between Ian and the non-custodial parent. The district court clearly did not give undue weight to Janet's moral misconduct.

On our review, we find it is in the best interests of Ian to award primary physical custody to Kevin. We affirm the district court on this issue.

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We also address Kevin's failure to comply with the Iowa Rules of Appellate Procedure regarding the compilation of an appendix. Kevin filed a second separate appendix in this case instead of designating certain parts to be included in Janet's appendix as provided in Iowa Rule of Appellate Procedure 15(b). As a result, certain parts of the record have been duplicated two times for inclusion in each appendix.

The cost of producing the appendix is normally taxed as costs in the case. Iowa R. App. P. 15(b). However, "if either party shall cause matters to be unnecessarily included in the appendix the appropriate appellate court may impose the cost of producing such parts on that party." Id. We tax the costs of producing Kevin's separate appendix, $369.60, to Kevin. All other costs are taxed to Janet.

For the reasons stated, we affirm the judgment of the district court.

**AFFIRMED.**