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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-476 / 94-867

IN RE THE MARRIAGE OF GRETA ELLEN HAVEL AND LARRY LEVON HAVEL

Upon the Petition of
GRETA ELLEN HAVEL,

Appellee,

And Concerning
LARRY LEVON HAVEL,

Appellant.

Appeal from the Iowa District Court for Cedar County, David E. Schoenthaler, Judge.

Larry Havel appeals the district court's ruling in a dissolution of marriage action awarding Greta Havel primary physical custody of their two children. **AFFIRMED.**

Bradley Norton of Norton & Norton, P.C., Lowden, for appellant.

Lowell E. Dendinger of Casterline & Dendinger, Tipton, for appellee.

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

HAYDEN, J.

Larry and Greta Havel were married in 1983. Greta filed a petition for dissolution of marriage in October 1993. There are two children from the marriage, Chad, born in 1985, and Chelsea, born in 1987.

The focus of the April 1994 trial was whether Larry or Greta should be awarded primary physical custody of Chad and Chelsea. Larry was forty-three and Greta was thirty-one at the time of trial. Larry is a high school graduate and works as a self-employed carpenter. Greta does accounting work for the Clarence Co-op. Greta is taking courses through Kirkwood Community College with the goal of earning a degree; however, she is uncertain which major course of study she wants to pursue.

Both Greta and Larry live in Clarence, Iowa, about three blocks apart from each other. Greta rents a three-bedroom home, and Larry resides in the three-bedroom home in which the family has lived since 1985. Both homes are within walking distance of the children's schools.

Jane Pini, a marriage counselor, testified at trial she thought both parents would be good primary physical care providers for the children. However, she expressed some concerns about whether Larry would use the children to retaliate against Greta.

The trial court awarded Larry and Greta joint legal custody and Greta primary physical custody of the children. The trial court found Greta had spent more time

with the children and she would provide more effective day-to-day guidance to them.

Larry argues on appeal the trial court erred in failing to properly consider his parenting strengths or Greta's weaknesses. On the one hand Larry asserts the evidence showed Greta had taken the kids with her when she visited male friends, had been charged with shoplifting eight years ago, cannot control Chad when he has outbursts, does not always know where Chad is after school, and does not provide enough discipline for the children. On the other hand, Larry contends the evidence showed he is better able to handle Chad's outbursts, can provide a more stable home environment for the children, and is a stricter disciplinarian than Greta.

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;

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).

Larry alleged Greta had several relationships with men during the separation. No evidence of any type of sexual misconduct was introduced nor were any suspicions substantiated. Greta testified she had only a few contacts with men during the separation and they were not real dates. No hugging or kissing occurred. Any encounters were brief and public.

Larry also urges this court to consider Greta's shoplifting conviction. Eight years ago Greta shoplifted a greeting card and a baby gift for a niece having a birthday. She attributes the shoplifting incident to great financial problems. Shoplifting bears directly on a person's character and has to be considered in this case. However, there is no evidence of any further shoplifting or similar activity. We share the trial court's hope the incident "was an aberrational act that will not be repeated."

Larry claims Greta cannot control Chad when he has outbursts. The trial court disagreed. Further, there was testimony which attributed Chad's occasional outbursts to the turmoil caused by the dissolution. This should become less of a problem.

Larry also states Greta does not always know where Chad is after school. The evidence is to the contrary. It is Greta who rises at 6 a.m. to get herself ready for work, fixes breakfast for the children, and gets them off to school. It is Greta who sees the children's needs are met after school. She fixes supper, helps with school work, and gets them off to bed. This was Greta's schedule during the marriage as well as the separation.

Larry finally alleges Greta does not provide enough discipline for the children. Greta's approach to discipline is different than Larry's, which was a major problem during the marriage. Greta's approach is based upon patience, reasoning with the children, and time-outs. Larry's approach was much more authoritarian. There are no indications Greta's approach to discipline is harming the children at all. To the contrary, they appear to be thriving in her care.

We hold the children's best interests would be served by placing them with their mother. Greta was the major care provider during the marriage. The children are currently thriving in her care. She has spent more time helping the children with their homework. She has good arrangements in place with a baby-sitter. She appropriately disciplines the children. She has cooperated fully with liberal visitation. Greta has proven she is more able to provide for the children's emotional and social needs.

Our decision is not intended to reflect badly on Larry. The concept of joint legal custody allows Larry every opportunity to be a valuable part of his children's lives. If Larry would work with Greta for the benefit of the children, the effect would be positive.

Judgment of the trial court affirmed. Costs on appeal are taxed to Larry Havel.

AFFIRMED.