**IN THE COURT OF APPEALS OF IOWA**

No. 1-387 / 00-1817
Filed July 18, 2001

**IN RE THE MARRIAGE OF NICHOLE L. MILLER AND KEITH L. MILLER**

Upon the Petition of
**NICHOLE L. MILLER,**
Appellant,

And Concerning
**KEITH L. MILLER,**
Appellee.

FILED
JUL 18 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, Michael J. Moon, Judge.

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

James S. Blackburn of Williams, Blackburn, Hudson & Maharry, P.L.C., Des Moines, for appellant.

William T. Talbot of Parker Law Firm, Nevada, for appellee.

Considered by Hayden, S.J., Habhab, S.J., and Honsell, S.J.*

*Senior judges assigned by order pursuant to Iowa Code section 602.9206 (1999).

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**HABHAB, S.J.**

Keith and Nichole Miller were married in November 1992. They have three minor children, Nicholas, born May 10, 1993, Katie, born September 23, 1994, and Kylie Rae, born March 30, 1999. Kylie is a special needs child, and suffers from serious developmental delay and other health challenges. Nichole works as a cosmetologist at a salon in Iowa Falls. Keith is a quality control specialist for Pella Window Company.

In October 1999, Nichole moved out of the family home in Zearing, Iowa, and relocated with the children to Iowa Falls, where they are currently enrolled in school. Soon thereafter, Nichole became romantically involved with Pat Bistle, with whom she currently lives. Nichole filed a petition for dissolution in February 2000.

The main issues at trial concerned the children's physical care and the division of marital assets. Keith argued he could provide a more stable and nurturing environment for the children and that Nichole set a bad example by living with her boyfriend with the children. Nichole argued she was the children's primary caregiver throughout the marriage and could more easily meet the challenges presented by Kylie's developmental and health issues. She further alleged she was the parent more capable than Keith of fostering a positive relationship with the other parent.

The district court awarded Keith the children's physical care, concluding he could provide a more stable home for the children and had a close family upon which to rely. As part of its division of marital property, the district court

ordered that the parties' tax refund, held in trust pending the dissolution, be applied to the parties' debt with the remainder divided equally. Nichole has appealed. We affirm.

***I. Scope of Review.*** In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. Ap. P. 14(f)(7).

***II. Primary Physical Care.*** Nichole contends the district court erred in placing primary physical care of the children with Keith. 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 found in our statutes, as well as in prior cases. *See* Iowa Code § 598.41(3) (1993); *In re Marriage of Weideman*, 838 N.W.2d 351, 355-58 (Iowa 1983). These factors bear on 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).

As we stated in *In re Marriage of Kunkel*, 555 N.W.2d 250 (Iowa Ct. App. 1996):

> The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interest of the child. *Heyer v. Peterson*, 307 N.W. 2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long range best interest of the child. The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental and social maturity. *See In re Marriage of Winter*, 223

> N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status. *Id.*
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> There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but it does not insure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). In so far as is reasonable and in the best interest of the child, the court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. *See* Iowa Code § 598.41(1) (1995). To effectuate that policy the court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

Each party submitted witnesses to bolster his/her position. Nichole directs our attention to the testimony of Dr. Ann H. Kennedy, who met with Nichole in the doctor's office on two separate occasions and with Nichole and the children at Nichole's home in Iowa Falls on one occasion. She also met separately with Keith once at her office and once at his home in Zearing with the children present. Dr. Kennedy testified "that either parent or both parents were very good with the children . . . ." Dr. Kennedy was especially kind to both parents and had nothing bad to say about either. She did think that the children were more at ease with Nichole "and that she could be the primary custodial parent, but that every weekend and any of the days or nights in between that Keith was available that they could spend with him also, be at his home."

Charlie Bywaters, pastor of the Zearing church the Millers attended, was called as a witness for Keith. He felt that Keith's parenting skills were superior to Nichole's. He testified that Keith was more even tempered and was able to correct the children without removing love. He further testified that Keith respects Nichole and that he would keep her informed and would consult with her regarding the future of the children.

The pastor was aware that Kylie would probably be significantly handicapped as she grows older. He believed that Keith has the talent to care for such a child. (There is testimony in the record that Keith worked at Behavioral Technologies for five years. He worked up to a supervisor level. His tasks included the daily care of individuals with mental retardation and handicaps and some with mental illness.) The pastor concluded his testimony by stating "As much as I dislike saying it, I feel that Keith would be and has and continues to have the superior parenting skills that under the given situation the children would require."

Both Keith and Nichole appear to be willing, able, and capable parents. Although Nichole's experience as primary caretaker is entitled to considerable weight, it standing alone does not justify awarding her physical care. *Kunkel*, 555 N.W.2d at 253. As we noted in *Kunkel*, "Successful parenting following a dissolution implicates far more than a parent's ability to attend to the daily details of raising a child." *Id.*

To the trial court's credit, it made detailed findings of fact. In this respect, we adopt as our own the following findings of the trial court:

Respondent has assumed the stereotypical male role in the marriage. He has been steadily employed throughout the marriage and has been the primary bread winner in the family. The record is replete with examples of his positive interaction with the children and his attentiveness to their needs. Not only does he provide the creature comforts, but he has assumed the parental role of caregiver and nurturer alongside the Petitioner.

There was not one witness who testified that either the Petitioner or Respondent was a bad parent or that either exhibited traits from which one might conclude that parenting skills were lacking. Each party testified that the other was an excellent parent. The child custody evaluator, Dr. Ann Kennedy, could not think of one bad characteristic which either party possessed. Even the sister of the Petitioner testified to the good qualities of the Respondent. It would therefore appear that the children would not be at risk if placed in either home and the Court is therefore confronted with the necessity of choosing from between two excellent parents.

Both parents have exhibited an understanding of the importance of the children maintaining a close relationship with the non-custodial parent. Both expressed a desire for the other to maintain an ongoing close relationship with the children. For a period of time this past summer, the parties share physical custody of the children. The custody evaluator testified that both of the parties were good parents and she wished that the children could spend an equal amount of time with each. That is now not an option, however.

* * *

The court has had the opportunity to observe the witnesses and to assess their credibility. The respondent seems to be genuinely interested in doing what is in the long-term best interests of his children. He has put their needs before his and there is no reason to believe that he will not do so in the future. He has a broad-based support system consisting of members of his church and family. He has a more stable lifestyle. He addresses each child's needs on an individual basis and deals evenly and fairly with the children collectively. He is slow to anger and possesses the ability to reason with the children on their level so that they understand the logical consequences of their actions.

The court concluded by stating: "In balance, the interests of the children dictate that they be placed in the physical care of their father."

***III. De Novo Review.*** From our de novo review of the record, we agree with the trial court's assessment that Keith can provide a more stable environment for the children. In addition, he has family within a two-hour drive of Zearing. They have in the past and are willing in the future to lend as much help to him as is necessary. Although we are not bound by the trial court's findings, we do give them weight for it is the trial court who has the parties before it and is in the best position to make determinations of credibility. *In re Marriage of Sprague*, 545 N.W.2d 325 (Iowa Ct. App. 1996).

***IV. Division of Marital Assets.*** Nichole directs our attention to the pretrial compliance statements of the parties. Nichole recognized the debts the trial court ordered paid from the trust account, but stated further that the "parties have been unable to reach an agreement on how the debt should be divided." Keith, in his statement, suggested that the debts be divided equally. The appellant is correct in stating that Keith asked that he be awarded the parties' residence and that he in turn would assume payment of the credit card debt, farm plan debt, and the debt owed to Ken Miller. The assumption of those debts according to Keith's statement was to offset the equity in the home. From the court's decree, we find that the trial court did indeed order Keith to pay those debts and to hold Nichole harmless.

We see no need in disturbing the trial court's order that those certain debts be paid from money that was held in a trust account during the dissolution proceedings and that the balance be divided equally between the parties. This is well within the equitable powers of the court.

**AFFIRMED.**