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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-238 / 90-1811

IN RE THE MARRIAGE OF DAVID R. KIEFER AND RHONDA M. KIEFER

Upon the Petition of

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DAVID R. KIEFER,

Appellee,

And Concerning

RHONDA M. KIEFER,

Appellant.

Appeal from the Iowa District Court for Des Moines County, D. B. Hendrickson, Judge.

Wife appeals dissolution decree placing custody of the parties' two sons with the husband. She also appeals the trial court's failure to award her rehabilitative alimony. **AFFIRMED.**

J. Bryan Schulte of Ruther, Bauer, Schulte, Hahn, Swanson & Crowley, Burlington, for appellant.

Michael J. Schilling, Burlington, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

In this dissolution of marriage action, the trial court awarded the primary physical care of the parties' two boys to their father, the appellee. It did not require the mother to pay child support. It declined the mother's request for rehabilitative spousal support. The mother, Rhonda Kiefer, appeals.

David and Rhonda Kiefer were married in 1979. They have two children, boys born in July 1980 and August 1985. In addition, Rhonda has a daughter born in July 1989. The parties agree that David is not the father of this child, and her custody is not in issue.

David, thirty-seven years old at trial time, is employed as a Navy recruiter. He receives a gross income of $2,044 per month and a net income of $1,520 per month. In addition, he receives free housing. He has been in the Navy for fourteen and a half years and plans to complete twenty years of service.

Rhonda, twenty-eight years old at trial time, held a variety of low-paying jobs during the marriage. Presently she works part-time and attends a community college; her goal is to become a registered nurse.

The district court dissolved the marriage in a decree dated November 16, 1990. The court placed the two boys in joint legal custody and in David's primary physical care. The younger daughter is to remain in Rhonda's custody.

The court characterizes the choice of a primary physical custodian for the boys as a close and difficult question. In choosing David, the court concluded he has shown greater emotional stability, has demonstrated more patience with the boys, and has formed a better relationship with the older boy (who has emotional and behavioral problems).

The district court did not require Rhonda to pay any child support. The court also declined to award Rhonda any alimony, noting among other things that David would be required to assume most of the parties' extensive debts. The court divided the parties' assets in accordance with their stipulation. David was directed to contribute $1,000 toward Rhonda's trial attorney's fees.

Rhonda has appealed from the dissolution decree. She contends the two boys should have been placed in her primary physical care. She notes that she was the children's primary care-giver during the marriage and also during the period between the parties' separation and the dissolution decree. In addition, she argues the district court's placement order will separate the boys from their younger half-sister, who remains in Rhonda's care. Rhonda asserts the boys and the younger half-sister have become very attached to each other. She also contends she should be awarded rehabilitative spousal support until she has finished her education and has found employment as a nurse. Finally, Rhonda requests attorney's fees on

appeal. Her attorney's itemized statement reveals a charge of $4,506.95 for services rendered in connection with the appeal.

David requests that all costs of the appeal be taxed to Rhonda. He does not, however, request attorney's fees on appeal.

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) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), and 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).

I. CUSTODY. Rhonda's main contention on appeal is the trial court erred in placing physical custody with David. The trial court found that although there is no question Rhonda has provided the children with their basic

day-to-day needs, David showed a greater measure of maturity and responsibility. He additionally found David displayed a higher degree of emotional stability. After a thorough review of the record, we find we are in agreement with the trial court and accordingly affirm.

We find, as did the trial court, this to be a very difficult case to resolve. Both parents love their children and are anxious to do what is best for them. Our overriding concern lies with the emotional stability of Rhonda. We note several instances which leads to this concern. When doing so, we make clear we are discussing the problems Rhonda has encountered, not for the purpose of judging moral turpitude, but rather to show her lack of maturity.

During the couples' marriage Rhonda had an affair with the fifty-three-year-old husband of one of her baby-sitters. She became pregnant by this man and had the baby. After David became aware of this affair, Rhonda was hospitalized for emotional problems with some evidence indicating she contemplated suicide.

In addition, there is testimony that during the affair, Rhonda and her boyfriend were stopped by the police in Fort Madison. Her friend was arrested for OWI and Rhonda was arrested for public intoxication and interference with official acts resulting in being jailed overnight. In January of 1990, Rhonda took Stephanie and Darren, while David was at work, and moved from the family home without

any warning. She was unable to take Tony with her as he was in school at the time.

We have considered the merits of the mother's claim she should be awarded the physical custody of the two boys. We do not doubt her love and concern for her children. We believe the question is close as to which parent can provide for the long-range best interests of the children. The trial judge had the opportunity to judge the credibility of the witnesses. He came down on the side of the appellee. We see no reason to disturb that result.

We must, however, address the problem of separating the siblings. We are well aware of the general rule when an award of custody or physical care is made, siblings, including half-brothers and half-sisters, should be kept together. See, e.g., In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). We are also aware that to depart from this general rule it must appear that separation "may better promote the long-range best interests of the children." Jones, 309 N.W.2d at 461. While the mother does have custody of the child which resulted from her extra-marital relationship, our review of the record still leads us to conclude the best interest of the boys would be best served if they were placed with their father. We strongly encourage both parents to put aside their differences to ensure the children maintain a good relationship with their half-sister. We affirm on this issue.

II. ALIMONY. Rhonda also contends she should have been awarded rehabilitative alimony. We agree with the trial court's determination she should not receive alimony. The trial court found Rhonda makes too little money to contribute to the support of the children. In view of David's income, the fact he will be the sole support for the children, and because he assumed the majority of the parties debt, we affirm the trial court on this issue.

III. ATTORNEY FEES. 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 find each party shall be responsible for his or her own attorney fees. Costs on appeal shall be assessed to the appellant.

AFFIRMED.