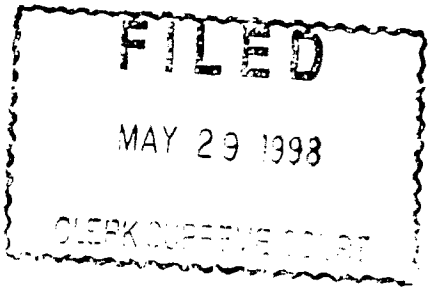
IN THE COURT OF APPEALS OF IOWA

No. 8-173 / 97-1504

IN RE THE MARRIAGE OF CHAD ALLEN BERRY AND TAMARA KAY BERRY



Upon the Petition of
CHAD ALLEN BERRY,

Petitioner-Appellant,

And Concerning
TAMARA KAY BERRY,

Respondent-Appellee.

Appeal from the Iowa District Court for Worth County, Jon Stuart Scoles, Judge.

Petitioner appeals the child custody provisions of the parties' dissolution decree. **REVERSED AND MODIFIED.**

Russell H. Schroeder, Jr. of Schroeder Law Office, Charles City, for appellant.

Patrick J. Rourick, St. Ansgar, for appellee.

Heard by Cady, C.J., and Sackett and Streit, JJ.

CADY, C.J.

Chad Berry appeals the primary physical care provision of the dissolution decree. He claims the district court erred by awarding primary physical care of the parties' minor children to his former wife, Tamara. We reverse the primary physical care findings of the district court.

Chad and Tamara Berry married on November 2, 1990. They separated in 1996 and divorced in July 1997. The parties had two children, Jacqueline, born October 4, 1989, and Amanda, born July 23, 1991. Chad also has two children from a prior marriage and Tamara has one child from a prior marriage.

Chad is currently employed with Vigen Construction as a superintendent of a construction crew. In 1996, he earned a gross income of $53,284. Chad's job requires him to travel frequently. He is home approximately eight days per month. Chad testified his employer may allow him to spend more time at home in the future. After Chad and Tamara separated, Chad began a relationship with Debra Peters. At the time of trial, Chad and Debra were living together. Debra is primarily a homemaker, but does some secretarial work.

Tamara was a full-time homemaker during the marriage. Since January 1997, she has been employed with A to Z Drying. She earns a gross monthly income of approximately $1213. Following the parties' separation, Tamara began a relationship with Larry Henaman. Larry was convicted of child endangerment after an incident where he inflicted injuries upon an eighteen-month-old child. Tamara testified Larry

plays with her children and interacts with them, but is not left alone with them. He spends several nights per week at Tamara's home.

Tamara has a history of alcohol problems. Three bartenders testified about Tamara's behavior while she drinks. Mike Morische, a bartender at Sportsman's Lounge, observed Tamara become intoxicated at least one night a week. He testified she would frequently bring the children to the bar with her. She would sometimes swear and yell at the children, and allow them to play outside unsupervised. He also observed the children were dirty. Further, he witnessed Tamara drive the children home after she had too much to drink.

Karen Kauffman, another bartender at Sportsman's Lounge, testified Tamara would drink to the point of intoxication four to five times per week and the children were with her most of the time. She further observed the children eating food from other customers' plates. She also witnessed Tamara drive with the children following excessive drinking.

Pamela Demays, an owner of a different bar, testified to observing Tamara drink. Tamara would come to her bar approximately once a week to drink. She noticed the children were dirty, and Tamara would drive them home after drinking.

Tamara testified she had stopped drinking alcoholic beverages to the point of intoxication. She admitted, however, she had not sought any alcohol treatment and still has a drink on occasion.

The trial court awarded Tamara primary physical care of the parties' children. Although the district court had reservations about Tamara's parenting skills, drinking habits, and relationship with Larry Henaman, it determined she had been the primary caretaker of the children since they were born. While the trial court recognized Chad had a good relationship with the children, it determined he was only available to parent the children on weekends due to his job. Consequently, most of the care of the children would fall on Debra Peters if Chad was given primary care. On appeal Chad claims the district court erred by awarding Tamara primary physical care of the children.

I. Primary Physical Care

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

In resolving child custody issues, the best interests of the children is the first and governing consideration. *See In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41. *See* Iowa Code § 598.41 (1997). The critical issue in determining the best interests of the children is which parent will do

better in raising the child. *See In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). Gender is irrelevant in a custody determination and neither parent should have a greater burden in attempting to gain custody. *See Fynaardt*, 545 N.W.2d at 892-93. The objective should always be to place the children in the environment most likely to bring them healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

Both parties love their children and are capable of providing a home for them. We must weigh the favorable and unfavorable aspects each parent would bring to the role of primary physical care giver to determine the best interests of the children.

Tamara has been the primary care giver to the children since they were born. She has attended the children's school functions and attended to their daily needs. On the other hand, she has a history of frequent drinking to the point of intoxication while caring for the children. She has also placed their safety in jeopardy by taking them to bars and driving them home in a vehicle after drinking. In addition, Tamara maintains a relationship with a man convicted of child endangerment. He spends time with her and the children several nights each week.

Chad's work took him away from the home for extended periods of time. However, he has a positive relationship with his children despite his frequent absences from the home. He has also provided financial support for the family. While he has been unable to parent the children from day to day, he makes an effort to spend time with them when he is home.

Although not controlling, we give weight in deciding the issue of primary care, to which parent served as the primary caretaker during the marriage. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). We do this for a number of reasons. Foremost, it provides a known history of performance in the role of primary caretaker. Furthermore, it is often associated with several factors that are closely tied to the best interest standard, including the closeness of the relationship between parent and child, and an indication of the true interest and devotion of a parent to the child.

In this case, Tamera was the clear primary caretaker during the marriage. Yet, her performance was, at times, deficient. Her desire to consume alcoholic beverages often took priority over her parenting responsibilities, and adversely affected the interests of the children. Tamera attempted to separate herself at trial from her drinking problem, but her efforts were not convincing. Many of the reasons for giving weight to a parent's role as primary caretaker during the marriage do not exist in this case.

We also consider the evidence that Tamera maintains a close relationship with a man convicted of child endangerment. The conviction occurred within a time frame to justify a continuing concern for Jacqueline and Amanda.

Although Chad was not home a lot during the marriage, it is apparent this occurred due to the roles the parents assumed during the marriage, not a lack of concern for the children. Chad was involved with the children on weekends and

maintained a good relationship with them. Moreover, there was evidence that Chad could change his work schedule to be close to home. There was no evidence to suggest his housemate was an inappropriate care giver.

While the decision is painfully close, and the district court had to confront many negative factors in the balancing process, we conclude the overall best interests of the children would be met by designating Chad as the primary caretaker. We reverse the decision of the district court on this issue and modify the decree to grant primary care to Chad. We further modify the decree to require Tamera to pay monthly child support of $ 375.25, under the same terms imposed upon Chad by the district court, and grant Tamera visitation under the same terms granted to Chad by the district court unless otherwise agreed by the parties. We no not retain jurisdiction.

II. Attorney Fees

An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.*

Considering Tamara's need and both parties' ability to pay, we find Chad should contribute $750 for Tamara's appellate attorney fees. Costs divided equally.

REVERSED AND MODIFIED.