FILED
MAR 30 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-608 / 94-984

IN RE THE MARRIAGE OF KIMBERLY A. MATHER AND MICHAEL J. MATHER

Upon the Petition of
KIMBERLY A. MATHER,

Appellee,

And Concerning
MICHAEL J. MATHER,

Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Michael Mather appeals the district court's dissolution of marriage decree granting Kimberly physical custody of the parties' two children. **AFFIRMED.**

Michael J. Manno, West Des Moines, for appellant.

Thomas Gillespie, Cedar Rapids, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HAYDEN, P.J.

Michael and Kimberly were married in Arizona in 1987. They have two children, Joseph, born April 27, 1988, and Justin, born December 16, 1990.

Sometime in the Spring of 1990, when the parties were separated, Kimberly moved to Iowa with Joseph. In July 1990 the couple reconciled, and Michael moved to Iowa. The family eventually moved to Ankeny where Michael attended the Des Moines Area Community College. In October of 1991 Michael moved out of the family home.

In March 1992 Kimberly moved with the children to Cedar Rapids where her father was living. While in Cedar Rapids Kimberly filed a petition for dissolution of marriage.

Michael did not personally appear at a July 1992 hearing on temporary allowances and custody. The court awarded Kimberly temporary custody of the children and ordered Michael to pay child support in the amount of $100 per week.

Kimberly met Jim while living in Cedar Rapids. In September 1993 Kimberly moved back to Arizona with Jim and the children.

At the April 1994 trial Kimberly did not appear in person but testified by telephone from Arizona. She was still living with Jim and was pregnant. Kimberly testified her prior work experience has been primarily in childcare and she has taken two courses in child development. She stated she was not currently working but would like to run

a childcare business out of her home. Kimberly stated Michael has not talked to the children or sent them cards or gifts since she moved to Arizona. She stated Michael had prior knowledge about each of her moves.

Michael testified he obtained a degree in actuarial science from Drake University and currently works as an actuary for Hawkeye Insurance in Des Moines. He stated he paid $517.51 in bills Kimberly left behind when she moved to Cedar Rapids and is being sued for the balance of the lease Kimberly broke in Ankeny. Michael testified he was not informed of Kimberly's moves until after the fact. He stated he had regular visitation with the children until Kimberly moved to Arizona and attempted to see them around Christmas 1993. Michael testified he had overpaid child support by $1500.

The trial court granted the parties joint legal custody and Kimberly primary physical care of the children. Michael was granted liberal visitation. The court found Michael's net monthly income was $1533 and Kimberly's net monthly income was $780. The court ordered Michael to pay child support in the amount of $494 per month. Michael was also ordered to pay $750 toward Kimberly's attorney fees.

Michael appeals. He argues the court erred in granting Kimberly primary physical care of the children without making a specific finding she could minister more effectively to the children's long-range best interests. Michael also requests the appellate court declare he

overpaid temporary support by $1480.44 and order Kimberly to pay for any judgment obtained against him in the suit on the lease. Kimberly requests appellate attorney fees.

I. **Custody.**

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).

This is an exceedingly close case. The trial court found Kimberly should be granted primary physical care of the children. After a de novo review of the record, we agree. Kimberly has been the primary caregiver for these children in the past. Most of Kimberly's posthigh school education and work experience has been in the field of

childcare. She had taken college courses in child development. By all accounts, the children are now happy and healthy. Joseph is doing well in school. For the most part, Kimberly has done well caring for the children.

We are not without reservations, however. In determining custody, it is important to place the children with a parent who has shown an ability to cooperate with the other and who does not try to interfere with the other parent's relationship with the children. In re Marriage of Downing, 432 N.W.2d 692, 694 (Iowa App. 1988). Unfortunately, the record discloses instances where Kimberly has interfered with Michael's relationship with the children. We urge Kimberly in the strongest possible terms not to do so again. Children of a divorce have a need to maintain meaningful relationships with both parents. In re Marriage of Leyda, 355 N.W.2d 862, 866 (Iowa 1984) (citations omitted); In re Marriage of Jerome, 378 N.W.2d 302, 305 (Iowa App. 1985) (citation omitted). If Kimberly does not foster a willingness to allow the children access to their father, it may well be a determinative factor in any future court proceedings.

Despite these concerns, we hold the best interest of the children will be served by designating Kimberly as the primary caretaker. She is better able to meet their needs and long-range interests. We affirm the trial court in granting the parties joint legal custody and Kimberly primary physical care.

II. Child Support.

The child support guidelines are applicable here. We agree with the trial court for the purpose of calculating child support, Kimberly's net income is $780 per month. Michael's net income is $1533 net per month. Under the child support guidelines, the applicable percentage of support Michael should pay is 32.2%. The trial court correctly used the guidelines to determine Michael should pay $494 per month in child support.

Michael claims he has overpaid temporary support in the amount of $1480.44. However, there is no definitive showing he has overpaid. There is insufficient proof to adjust Michael's child support. We affirm on this issue.

III. Appellate Attorney Fees.

Kimberly requests Michael pay her appellate 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).

After careful consideration of these factors, we award Kimberly $500 in appellate attorney fees. Costs on appeal

are taxed to Michael. Judgment of the trial court affirmed.

AFFIRMED.