FILED
DEC 29 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-479 / 93-75

IN RE THE MARRIAGE OF DANIEL L. KOHLS AND DAWN M. KOHLS

Upon the Petition of

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DANIEL L. KOHLS,

Appellant,

And Concerning

DAWN M. KOHLS,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, Peter Van Metre, Senior Judge, and Paul W. Riffel, Judge.

The husband appeals the custody provision of the parties' dissolution decree. **AFFIRMED.**

Jay P. Roberts and Heidi Noonan of Beecher, Rathert, Roberts, Field, Walker & Morris, P.C., Waterloo, for appellant.

Stanford J. Patterson of Patterson Law Firm, Waterloo, for appellee.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

Daniel and Dawn Kohls were married on January 28, 1989. They have one child, Cody Allen Kohls, born on June 9, 1990. During the marriage the parties lived in Cedar Falls, Iowa. The marriage was relatively short, the parties separating in September 1991.

Dawn was twenty-four years old at the time of the dissolution hearing. She has a high school diploma. At the time of the marriage Dawn was working as a waitress. In February 1991 she began working at Iowa Beef Processors (IBP). She left IBP in August 1992 to become an insurance agent, but returned to IBP in October 1992. She works the second shift, which is from 3:30 p.m. until midnight. Dawn earns about $13,338, and has net monthly income of about $800.

Daniel was twenty-six years old at the time of the dissolution hearing. He dropped out of high school. Daniel had several jobs after the marriage, and he was fired from at least two of these jobs for excessive absenteeism. Daniel also began working at IBP in February 1991. He injured his back in April 1991, but continued to work until November 1991. He subsequently had back surgery and did not work for several months. He was working as a technician at Rydell Chevrolet at the time of trial, where he earns about $15,600 and has net monthly income of about $974.

After the separation in September 1991, Daniel refused to allow Dawn to have the care of the child. He moved in with his parents, and Daniel's mother became the primary caretaker for Cody. In November 1991, Dawn began living in a rented house with David Weigel, who also works for IBP. They planned on eventually being married.

Daniel filed a petition for dissolution of marriage on January 24, 1992. He obtained a temporary injunction restraining Dawn from having any contact with the child. After a hearing was held on February 3, 1992, the temporary injunction was quashed. The court found there was no basis for many of the allegations made by Daniel and concerning Dawn. Daniel was granted temporary custody of Cody, and Dawn was given visitation rights.

The dissolution decree was filed on December 8, 1992, after trial. The trial court granted the parties joint custody of Cody, with Dawn having primary physical care. The court noted that Daniel's employment history did not show stability and that he needed help from his mother to care for Cody. The trial court found Dawn had been the primary caretaker for Cody prior to the separation, that she had maintained employment throughout the marriage, and that she was presently in a stable relationship with David.

Daniel was granted liberal visitation and ordered to pay child support of $226 per month. Each party was awarded the personal property in his or her possession. Daniel had incurred a large amount of debt during the

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marriage due to his hobby of working on cars. Dawn was ordered to pay $3,000 towards the marital debts, and Daniel was ordered to pay the remainder.

Daniel filed a motion for a new trial and a motion pursuant to Iowa Rule of Civil Procedure 179(b). He claimed the district court judge had been prejudiced against him, had not allowed him to fully cross-examine Dawn, and that the judge had been otherwise inattentive during the trial. Daniel, his mother, and his father each filed an affidavit stating that the judge had not paid attention during the hearing.

The trial judge then withdrew from the case. While the posttrial motions were pending, Daniel filed notice of appeal and also filed a motion for stay with the supreme court. On January 21, 1993, the supreme court denied the stay and remanded the case for the limited purpose of allowing the court to rule on Daniel's posttrial motions.

In response to the posttrial motions, counsel for the appellee, Stanford J. Patterson, made a professional statement that the trial judge was attentive during the trial. Dawn and five other witnesses at the trial filed affidavits stating that the trial judge was alert and attentive during the trial.

Judge Paul Riffel was designated to hear the posttrial motions. In his ruling on March 19, 1993, Judge Riffel reviewed a transcript of the trial and the handwritten notes made by the trial judge at trial. He noted the

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affidavits submitted by the parties were contradictory and concluded that the handwritten trial notes of the trial judge were the most reliable evidence. The court found that such notes were consistent and tracked with the testimony presented at the trial and which indicated that the presiding judge was attentive throughout the trial. The posttrial motions were therefore denied.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the findings of fact of the trial court, but we do give them deference because it had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. Daniel contends that he should receive physical care of Cody. He believes he can better meet the child's long-term best interests. He points out that Dawn is at work much of the time. He asserts that she places her own interests before those of the child.

During oral argument before this court, Daniel's counsel raised the issue of gender bias in the decision of the district court. This issue was not raised in his posttrial motions or in his appellate brief. Assuming this issue is preserved on appeal, in our de novo review, we do not consider the gender of the parties. Gender is irrelevant and neither party should have a greater burden than the other in attempting to gain custody in a

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dissolution proceeding. In re Marriage of McElroy, 475 N.W.2d 221, 222 (Iowa App. 1991).

In child custody cases, the long-term best interests of the child is the first and governing consideration. Id. The factors we consider are enumerated in Iowa Code section 598.41(3). Id. The critical factor in determining the best interests of the child is which parent will do a better job in raising the children. In re Marriage of Rodgers, 470 N.W.2d 43, 44 (Iowa App. 1991).

We determine it is in the long-term best interests of the child to be placed in the physical care of Dawn. The evidence clearly shows she is a more stable parent than Daniel. Dawn has been able to maintain employment throughout the marriage, while Daniel has a very spotty employment record. Daniel has also shown himself to be financially irresponsible by incurring a large amount of debt for his car hobby.

As the district court noted, when looking to the future it is hard to predict what sort of a parent Daniel would be. When Cody was in Daniel's temporary care, Daniel lived with his parents and relied upon his mother to take care of the child. Daniel has never been solely responsible for Cody's care. On the other hand, Dawn was Cody's primary caretaker during the marriage. She has shown herself able to meet Cody's physical and emotional needs. She lives in a house that has adequate room for Cody and she can provide him with a stable home.

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We affirm the district court's grant of physical care of the child Cody to Dawn.

III. Daniel also contends he was denied due process during the trial because of purported judicial misconduct and that he was denied the right to a fair and impartial hearing. In making this claim, Daniel argues that there was no credible evidence in the record to support the grant of physical care of Cody to Dawn. We have already determined the record contains credible evidence supporting the trial court in this regard.

The affidavits filed on this matter are contradictory. We have reviewed the notes of the trial court and find they reflect the evidence given. We find Daniel has failed to show he was denied due process during the trial and affirm the denial of his posttrial motions.

IV. Finally, Dawn seeks attorney fees for this appeal. 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine each party has the ability to pay his or her own attorney fees for this appeal, and we therefore deny her request.

We affirm the district court on all issues raised in this appeal. Costs of the appeal are assessed to Daniel Kohls.

AFFIRMED.