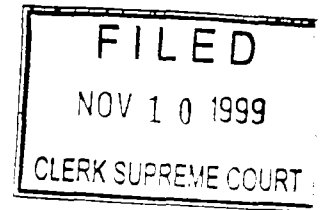


IN THE COURT OF APPEALS OF IOWA

No. 1999-288 (9-518) / 98-2244

Filed November 10, 1999



**IN RE THE MARRIAGE OF RHONDA LYNN MITCHELL
AND PAUL MARVIN MITCHELL**

Upon the Petition of
RHONDA LYNN MITCHELL,

Appellee,

And Concerning
PAUL MARVIN MITCHELL,

Appellant.

Appeal from the Iowa District Court for Monona County, Phillip S. Dandos,
Judge.

Father appeals from trial court decree dissolving the parties' marriage.

AFFIRMED.

Kermit Dunahoo of the Dunahoo Law Firm, Des Moines, for appellant.

Francis L. Goodwin of Baron, Sar, Goodwin, Gill, & Lohr, Sioux City for
appellee.

Considered by Sackett, C.J., and Zimmer, and Miller, JJ.

000259

ZIMMER, J.

Paul Mitchell appeals the custodial provisions of the parties' dissolution decree. We affirm the trial court's decision to award primary physical care of the parties' minor children to Rhonda Mitchell.

I. Background Facts and Proceedings. Paul Mitchell and Rhonda Mitchell were married in 1988. They have two children, Jared, born in 1988, and Andrew, born in 1990.

Paul was thirty-one years old at the time of trial. He works for his parents' small trucking company and on his parents' family farm in Monona County. During the parties' marriage, Paul's work as a truck driver often kept him away from his family. He continues to reside in a mobile home on his parents' farm, which also served as the marital residence during most of their marriage.

Rhonda was thirty-seven years old at the time this case was tried. She works at Metz Baking Company as an account manager. Rhonda resides in a nice home that her parents purchased for her use. Her home is located in Oto, Iowa, not far from where Paul lives. It is undisputed Rhonda was the children's primary caregiver prior to the parties' separation.

Rhonda filed a petition for dissolution of marriage in May of 1998. In July of 1998, a judge awarded Paul temporary custody of the children because he "will be living in the home the children are most familiar with." Trial was held in October 1998. The district court entered a decree which granted the parties joint custody of the children with Rhonda having primary physical care of both boys. Paul appeals,

~~contending he should~~ have been awarded primary physical care of the children. Rhonda ~~seeks~~ appellate attorney fees.

II. 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 Stark*, 542 N.W.2d 260, 262 (Iowa App. 1995) (citing *In re Marriage of Steenhoek*, 305 N.W.2d 448, 453 (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. App. P. 14(f)(7); *In re Marriage of Griffin*, 570 N.W.2d 258, 259 (Iowa App. 1997).

III. Primary Physical Care. In assessing an issue of child custody, the controlling consideration is the interest of the children. *In re Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995). The court determines placement according to which parent can minister more effectively to the children's long-range best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The court's objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Id.* The critical issue in determining the best interests ~~of the~~ children is which parent will do better in raising them; gender is irrelevant ~~and~~ neither parent should have a greater burden than the other. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984)); *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa App. 1996).

We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa App. 1998) (citing *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997)). Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *See Daniels*, 568 N.W.2d at 54. Pursuant to Iowa Code section 598.41 and prior case law, domestic abuse is a factor in determining the custodial parent. *See id.* Domestic abuse is, in every respect, dramatically opposed to a child's best interest. *Id.* Primary care experience is also a factor 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).

Paul contends the district court's decision to award primary physical care to Rhonda is not supported by the evidence and is not in the best interests of the children. He argues he should have custody of the children because (1) Rhonda is emotionally unstable; (2) the children should not be uprooted from their family home; (3) the children prefer to live with him; and (4) the trial court erred in concluding he was abusive to Rhonda. Finally, Paul contends his recent experience as temporary physical caretaker of the children demonstrates he has the ability to care for them.

Rhonda claims the trial court correctly awarded her primary physical care after considering (1) her role as long-term primary caretaker; (2) Paul's long and inconsistent work hours; (3) Paul's inability to properly supervise the children; and (4) Paul's physical and emotional abuse of her and its effect on the children.

Our de novo review of the record convinces us that the district court was correct in **awarding** primary physical care of the children to Rhonda. It is undisputed that Rhonda was the principle caregiver for the children until Paul was awarded a period of temporary care in July 1998. The children have always been the top priority in Rhonda's life. She has been involved in all aspects of their lives since they were born. Rhonda has also been the family disciplinarian. The evidence demonstrates Rhonda distinguished herself as a more mature and stable parent than Paul.

We acknowledge Paul did a good job as temporary custodian during the pendency of this case. Paul obviously has love and affection for his sons and they enjoy spending time with him. The boys also have a good relationship with Paul's parents. Nevertheless, we agree with the district court's conclusion the long-range best interests of the children require that Rhonda be named their primary physical caretaker.

We note that Paul's interest in serving as a caretaker for the children is of fairly recent origin. Prior to the summer of 1998, Paul had little to do with the children's upbringing. In part, this was because of Paul's employment as a truck driver. **However**, even when he was at home, he refused to do some of the most simple ~~tasks~~ **such as** changing diapers. He stated he did not like the smell and would feel ill if he had to change a diaper. He also did not like to feed the boys because he did not want them to spit up on him. Some of his behavior with the children is questionable. He lets them ride in the car without wearing seatbelts and has given Andy beer. He rarely involves himself in the boys' activities. He has not gone to

~~parent-teacher~~ conferences and even refused to attend one such conference in place of Rhonda ~~when~~ she was sick, finding it unnecessary for a parent to always go to such events. These incidents are merely symptomatic of Paul's overall attitude and behavior.

Rhonda, on the other hand, has demonstrated her ability to care for the children on a daily basis. We believe the children will have more continuity in their day-to-day lives if they remain in Rhonda's primary care. We also note that the children have done well under Rhonda's supervision. The children succeed in school and get along well with others.

Unfortunately, the issue of domestic abuse also factors in our conclusion Rhonda should be awarded primary physical care. The evidence supports the trial court's conclusion that Paul has abused Rhonda physically and emotionally throughout their marriage. Aided by the trial court's firsthand observation of the parties, we are unpersuaded by Paul's claim that the incidents of physical and emotional abuse reported by Rhonda were fabricated. We believe it is in the children's long-term best interests to remain in the primary care of Rhonda.

IV. Appellate Attorney Fees. Rhonda requests appellate attorney fees. An award of ~~attorney fees~~ on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). 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 a district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa

App. 1997). We award Rhonda \$500.00 in appellate attorney fees in this case. Costs of this appeal are taxed to the appellant.

Having considered all arguments before us on appeal, we affirm the district court's decree in its entirety.

AFFIRMED.