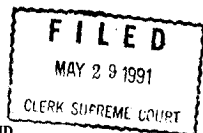


IN THE COURT OF APPEALS OF IOWA

No. 1-150 / 90-1611



IN RE THE MARRIAGE OF KATHLEEN ANNE ROSENBERG AND
DENNIS WAYNE ROSENBERG

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Upon the Petition of

KATHLEEN ANNE ROSENBERG,

Appellee,

And Concerning

DENNIS WAYNE ROSENBERG,

Appellant.

Appeal from the Iowa District Court for Dallas County,
James W. Brown, Judge.

Father appeals district court order placing physical
custody of the children with the Mother. **AFFIRMED.**

Martin E. Spellman and Thomas L. Spellman, Perry, for
appellant.

Toby Swanson and Emil Trott, Jr., Des Moines, for
appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

HABIB, J.

Kathleen and Dennis Rosenberg were married in 1981. They have two children, a girl born in February 1982, and a boy born in November 1983.

The dissolution decree entered October 12, 1990, placed the children in joint legal custody and in Kathy's primary physical care. Because Kathy is to be the primary custodian of the children, the district court awarded her the parties' home, in which they have an equity of \$35,000. She is to pay Dennis \$17,500 as his share of this equity. Dennis is directed to pay child support.

In placing the children in Kathy's primary physical care, the trial court based its decision in large part on its finding that Kathy had been the primary caregiver before the parties' separation. However, the court noted that Dennis was also active in caring for the children before separation, that he has been temporary custodian since the separation in October 1989, and that he has performed well as temporary custodian.

Dennis has appealed from the dissolution decree. He contends the children should be placed in his primary physical care. He also asserts that, if he is named primary custodian of the children, he should be awarded possession of the marital residence and Kathy should be required to pay him child support pursuant to the Uniform Child Support Guidelines. He does not otherwise challenge the decree's economic provisions. Kathy requests attorney's fees on appeal. We affirm.

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 there listed 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 Vrbanc, 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).

We have reviewed the entire record and, like the trial court, find this to be a very difficult case. It is evident that both parents love their children very much. And, as occurs in many divorce cases, each parent believes he or she is more fit than the other to care for the children.

We also are faced with a variety of conflicting facts and therefore must rely on the trial judge and his ability to determine the credibility of the witnesses. In this respect we give weight to the fact findings of the trial

court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

We initially find, as did the trial court, that Kathy has been the primary caretaker of the children. This status may have varied during the time separation occurred; however it is clear Kathy assumed that role prior to separation. While Dennis contends he is the primary caretaker, the record reveals more clearly that it is his mother and father that devote a great deal of their time caring for the children while in his care.

In making this observation, we do not mean to infer that grandparents should not participate in the lives of their grandchildren. We believe they should, for they can and do play an important role. The final result, of course, should be a relationship where Kathy is the sole mother figure, Dennis is the father figure, and grandparents are grandparents.

Each party raises a number of reasons as to why the children should be placed in his or her care. Dennis contends the children have expressed a preference to live with him. "In custody determinations, courts may give some weight to the preferences of the child, if the child is of sufficient age and maturity." In re Marriage of Grandenetti, 342 N.W.2d 876, 879 (Iowa App. 1983).

But here both children are of young and tender years. Since separation, Kathy has continued to assist the children with their extracurricular activities by taking

Stephanie to piano lessons on weekends, attending Brownie camp with Stephanie and Kyle, shopping for clothes with them, and practicing math in the car. In addition, she has taken the children to the doctor, bought their prescriptions and taken care of them when they were ill. She has purchased new furniture and other items for the children. She has helped them deal with the divorce by going to the library to find books on the subject and has made an effort to understand their feelings. We are convinced the trial court took the children's preference into consideration when it reached its decision. The trial court determined that it was in the children's best interests that Kathy become their primary caretaker. We see no reason to disturb that ruling.

Dennis also is concerned Kathy will move with the children. However, Kathy testified she intended to stay in the family home with the children. There is no evidence presented which would lead us to believe she will do otherwise. Dennis is also concerned with Kathy's employment outside of the home and the idea of child care. He contends the children would be better with him because his parents could care for the children while he is at work.

Dennis relies heavily on his parents for child care and baby-sitting responsibilities. The grandparents are to be commended for giving so freely of their time in attending to the needs of their children. But this is not a custody

contest between the mother and the children's grandparents. This is a dispute between the mother and father and which is better equipped to provide for the long-range best interests of the children. The trial court came down on the side of the mother. We agree with this finding.

We strongly encourage Dennis and Kathy and the grandparents to work together and put aside their differences. Divorce is traumatic for all members of a family but is especially traumatic for the children. It would certainly be in the children's best interest for Kathy and Dennis to encourage the children to be close to the entire family and not attempt to only encourage visitation with one side or the other.

Kathy has also requested attorney fees on 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 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).

In reviewing the record, we find Dennis is not in any better position to pay attorney fees than is Kathy. We therefore find each party should be responsible for his or her own attorney fees on appeal. However, costs of this proceeding shall be assessed against the appellant.

AFFIRMED.