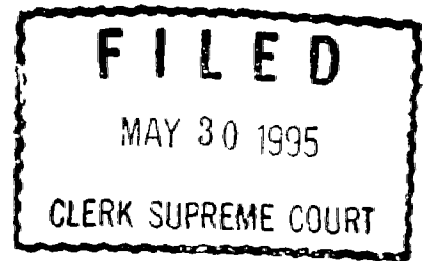


IN THE COURT OF APPEALS OF IOWA

No. 5-190 / 94-1817



**IN RE THE MARRIAGE OF DANIEL DEAN KERF AND
ROXANNE LEE KERF**

Upon the Petition of
DANIEL DEAN KERF,

Appellant,

And Concerning
ROXANNE LEE KERF,

Appellee.

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

Daniel Kerf appeals the custody provision of the parties' dissolution decree.

AFFIRMED.

Karen Harris, Iowa City, for appellant.

Margaret T. Lainson and James D. McCarragher of Meardon, Sueppel, Downer
& Hayes, P.L.C., Iowa City, for appellee.

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

HUITINK, J.

Daniel Kerf appeals the custody provision of the parties' dissolution decree. We affirm.

Daniel and Roxanne Kerf married in March 1973. They have three children. Their oldest child is eighteen years of age, and her custody is not at issue. Their fifteen- year- old son was residing at the training school in Eldora; therefore the district court did not have jurisdiction over him. At trial the parties disputed placement of their daughter, Kelly, born in 1989.

Daniel is forty-one years of age. He works the 7 a.m. to 4 p.m. shift at Brandt Heating and has a gross income of \$17,680 per year. Roxanne is thirty-nine years of age. She works the 11 p.m. to 7 a.m. shift at Moore Business Forms and has a gross income of \$25,557 per year.

In its decree the court noted both parties were "clearly adequate parents." The court found Roxanne was the primary caretaker for all three children during the marriage. The court awarded joint legal custody and placed Kelly in Roxanne's primary physical care. The court awarded Daniel liberal visitation rights and ordered him to pay \$240.56 per month in child support.

Our review in custody cases is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). In custody cases

our first and governing consideration is the best interest of the child. Iowa R. App. P. 14(f)(5).

Daniel contends the district court erred in awarding physical custody of Kelly to Roxanne. He argues the court failed to consider her frequent moves and her history of extramarital affairs in making its custody decision. In addition he claims the court improperly relied on gender in awarding primary physical care. We disagree.

The factors the court considers in awarding physical care are enumerated in Iowa Code section 598.41. The critical issue is which parent will do a better job of raising the child. Gender is irrelevant, and neither parent has a greater burden than the other in attempting to gain physical care in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). The primary care provider prior to separation is not assured an award of physical care. *In re Marriage of Fennel*, 485 N.W.2d 863, 865 (Iowa App. 1992).

During their separation the parties shared physical care of Kelly. The record indicates Kelly is a well-adjusted and bright child. Both parties are good parents and are capable of being Kelly's primary physical caretaker.

Daniel charges Roxanne lacks stability. However, she testified her changes in residence were precipitated by financial concerns. Throughout the parties' separation Roxanne has supported Kelly's relationship with Daniel.

Roxanne is engaged to Duane Hochstetler, and they currently live together. Daniel also attempts to make an issue of this arrangement, claiming it is moral misconduct on Roxanne's part. Any moral misconduct is a circumstance to be given serious consideration in determining a parent's fitness to have physical care of a child, but it is not the only consideration. *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

The record shows Duane supports and encourages Kelly's relationship with her father. Duane is also divorced, and his children visit often. The evidence shows Kelly gets along well with Duane and his children. We, like the district court, consider Roxanne's relationship with Duane but do not find it to be a disqualifying circumstance. This is a very close case. However, we believe Roxanne's greater primary care experience distinguishes her as the better custodian.

We have often noted that the district court is helped in making a wise decision about the parties by listening to them and assessing their demeanor. *See In re Marriage of Behn*, 385 N.W.2d 540, 543 (Iowa 1986). This is certainly true in this case, and we agree with the district court's assessment of the parties. We will not interfere with its decision to place Kelly in Roxanne's primary physical care on appeal.

Roxanne requests 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 Sires*, 506 N.W.2d 813, 815 (Iowa App. 1993). 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 Manson*, 503 N.W.2d 427, 431 (Iowa App. 1993).

Each party shall be responsible for his or her own attorney fees. Costs of this appeal are assessed to Daniel Kerf. The district court is affirmed.

AFFIRMED.