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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-346 / 89-1795

IN RE THE MARRIAGE OF DENNIS RATZLAFF AND LOUISE BERNICE RATZLAFF

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Upon the Petition of
DENNIS RATZLAFF,

Appellant,

And Concerning
LOUISE BERNICE RATZLAFF,

Appellee.

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Appellant appeals the custody provision of the district court's decree dissolving his marriage. **AFFIRMED.**

Allan L. Harms of Wenzel, Piersall & Harms, P.C., Cedar Rapids, for appellant.

Timothy S. White and Allison M. Heffern of White & Johnson, P.C., Cedar Rapids, for appellee.

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

HABHAB, J.

Appellant Dennis Ratzlaff appeals the custody provision of the district court's decree dissolving his marriage to appellee Louise Ratzlaff. We affirm.

The parties were married in 1974. Their only child, September, was born on September 1, 1985. Throughout most of their marriage, they worked in the ceramics industry, owning two different business ventures. Their latest business enterprise, Kelly Molds, was purchased in 1986. This business required Dennis and Louise to make numerous trips to trade shows.

In 1987, the parties purchased a van so that September could accompany them on business trips. They also employed the services of baby-sitters to take care of September. In 1988, however, Dennis decided to discontinue his travels. Louise, however, continued traveling to trade shows either by herself or with a friend. It was during this period of time that Louise began an affair with another man who also worked in the ceramics trade. The parties' marriage deteriorated soon thereafter.

In October 1988, Dennis filed for dissolution. Louise was granted temporary physical custody of September. During the pendency of the dissolution, the parties engaged in several physical confrontations reminiscent of scenes from the fictional motion picture, "War of the Roses." Ultimately, injunctions were issued restricting Dennis from entering the family home and Louise from entering the

business premises. Louise's willful violation of the injunction in January of 1989 resulted in her being found in contempt and temporary custody of September was transferred to Dennis. On November 20, 1989, after trial on the merits, the district court entered its decree awarding the parties joint custody of September, with primary physical care awarded to Louise.

I.

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 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).

The district court found, and we agree, that Louise can better provide for September's well being. Both parties

are fit parents who are highly involved in September's care and obviously love September a great deal. The trial court, who was in a better position to observe the witnesses and their conduct on the witness stand, determined that September's best interests required her placement with Louise. Although we are not bound by those findings, we do give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We decline to alter the physical custody of September.

II.

Louise seeks 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). Considering the fiscal uncertainty of Dennis's ceramics business, we decline to award Louise appellate attorney fees. Costs of this appeal shall be assessed to Dennis.

AFFIRMED.