FILED
OCT 9 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-395 / 91-395

IN RE THE MARRIAGE OF TERRI TANEEN MOULDS AND DAVID DALE MOULDS

Upon the Petition of
TERRI TANEEN MOULDS,

Appellant,

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And Concerning
DAVID DALE MOULDS,

Appellee.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

The wife appeals a dissolution decree, contending the parties' two children should be placed in her primary physical care. **AFFIRMED AS MODIFIED.**

Margaret T. Lainson of Meardon, Sueppel, Downer & Hayes, Iowa City, for appellant.

Randall B. Willman and Steven E. Ballard of Leff, Haupert & Traw, Iowa City, for appellee.

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

HAYDEN, J.

Terri and David Moulds were married in 1985. They have one child, a girl born in July 1986. In addition, during the marriage David adopted Terri's older child from an earlier relationship. This child, a boy born in October 1983, has been treated throughout the marriage as a child of both parties.

The marriage was dissolved on March 1, 1991. The decree provided for joint legal custody of the children with David having primary physical care. In choosing David as the primary custodian, the trial court found David provides the children a more wholesome environment than does Terri and he places the children's welfare ahead of his own. In addition, the trial court expressed concern with Terri's current live-in boyfriend, Richard Shay. The dissolution decree awarded Terri visitation two weekends per month, alternating holidays, three weeks in the summer, and any other times mutually agreed upon by the parties.

Terri appeals, contending the trial court erred in awarding David primary physical care of the children. Terri maintains she has been the children's primary caretaker since their births while David has had minimal involvement in their daily care due to long work hours. Terri also asserts David occasionally left the children dangerously unsupervised when they were in his care. In the alternative, if the children are not placed in her primary physical care, Terri asks her visitation rights be expanded. Terri also requests attorney fees on appeal.

I. Custody. 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 trial court found the best interests of the children would not be served if their primary physical care was placed with Terri. We agree.

The evidence demonstrates the home environment Terri provided is not suitable for minor children. The trial court expressed concern, as does this court, with Terri's current live-in boyfriend. Shay is an alcoholic with a prior OWI conviction and nine prior convictions for public intoxication. Terri reported Shay's drinking had increased and was becoming a problem in their relationship. Shay has

been the subject of three founded child abuse reports concerning his own children who are no longer in his custody. On one occasion he allegedly spanked one of the children in the present case with a board. Because Shay is a frequently unemployed member of the house in which Terri and the children live, he is a caretaker and role model for the children. Therefore, Shay's character is an important factor we must consider in making a custody determination. The record reveals Terri and Shay used inappropriate language in the children's presence. The evidence also indicates the children observed Terri and Shay engaging in sexual conduct. A parent's moral misconduct is a serious consideration in making a custody determination, but such misconduct is only one of several factors to be considered. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986).

These facts demonstrate the home environment provided by Terri is not suitable for rearing minor children, particularly when a better environment with David exists. Although Terri alleges David has left the children dangerously unsupervised, the record reveals any resulting injuries were sustained accidentally. In addition, David sought appropriate medical care for the children when the injuries were discovered. We conclude the trial court correctly determined the best interests of the children would be furthered if David was given responsibility for their primary physical care. We affirm this issue.

II. Visitation. Prior to trial, the parties stipulated to visitation for the parent not awarded primary physical care of the children. The trial court modified the parties' stipulation by ordering weekend visitation for the first and third weekends of each month rather than every other weekend. In addition, the trial court did not order Wednesday evening visitation, and it expanded the holiday visitation schedule. Terri requests the visitation schedule be modified to include every other weekend and each Wednesday evening from 6 p.m. until 8:30 p.m. Terri also requests the summer visitation be expanded from the court ordered three weeks to six weeks and the Christmas holiday be expanded to one week.

Iowa law mandates courts should include liberal visitation, where appropriate, in order to afford the children the opportunity to maximize the continuing physical and emotional contact with both parents. Iowa Code § 598.41(3)(1991); In re marriage of Ullerich, 367 N.W.2d 297 (Iowa App. 1985). David indicates the visitation schedule the parties agreed to will provide the children with continuing contact with both parents. Therefore, we modify the trial court's decree to include every other weekend visitation, rather than the first and third weekends of each month. In addition, Terri shall have Wednesday evening visitation from 6 p.m. to 8:30 p.m. We also modify the decree to include one week visitation for Terri during the Christmas holiday in the numbered

years she does not have the children on Christmas day. Finally, we modify the trial court's decree by increasing Terri's three weeks of continuous summer visitation to six weeks. A six-week period maximizes the opportunity for the children and Terri to continue their relationship. Petition of Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988). During this six-week period, David shall have the same visitation schedule as Terri does throughout the year.

III. Attorney Fees. Terri 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 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). We conclude the parties shall pay their own appellate attorney fees in this case.

Costs of appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.