IN THE COURT OF APPEALS OF IOWA

No. 8-366 / 97-1685

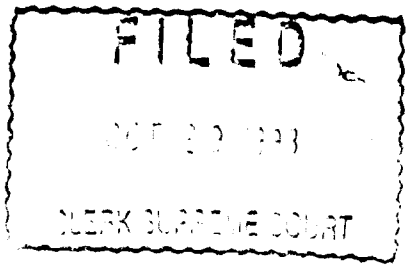
IN RE THE MARRIAGE OF MONTE A. EATON AND KELLY A. EATON

Upon the Petition of MONTE A. EATON,

Petitioner-Appellant,

And Concerning KELLY A. EATON,

Respondent-Appellee.



Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

Monte Eaton appeals from the custody provision of the parties' dissolution decree. **AFFIRMED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan, Condon & Klaessy, Marshalltown, for appellant.

Delbert C. Binford, West Des Moines, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Monte Eaton appeals from the custody provision of the parties' dissolution decree. Monte contends he is better suited than Kelly to be the primary physical caretaker of their son. We affirm.

Monte and Kelly Eaton were married in 1989. They have one child, Alex, born on March 14, 1993. Both parties are in good health; both are capable of providing for Alex's personal needs.

Kelly works with mentally challenged students. Her supervisor and fellow teachers describe Kelly as very patient, competent, and capable of teaching students who have been difficult for other teachers to handle. Kelly worked for the YWCA supervising gymnastics, tumblebugs, and fitness for children; she was described as an excellent employee.

Kelly is an expressive and competitive person, while Monte is generally passive. Kelly's qualities led to several incidents which Monte contends show Kelly is an unstable, irrational, and immature person.

In early 1996, Kelly took Alex and left Monte's father's birthday party after she objected to being seated in the smoking section of the restaurant. Kelly was concerned about the effect of the smoke on Alex's allergies and she refused to return to the party. A scene occurred when Monte tried to prevent Kelly from leaving and harsh words were spoken.

During the Labor Day weekend that same year, Kelly, with others, danced on tables at a bar following a high school reunion. Later that weekend, Kelly attempted

to pick up Alex from Monte's parents' home. Words were exchanged and Kelly was physically removed from the house.

In 1997, Kelly joined a new softball team because her teammates from 1996 did not want her on the team; they felt she was too competitive. Kelly made an unprovoked inappropriate hand gesture to her mother-in-law at a softball game. Kelly has also been ejected from a wrestling meet because she yelled at a referee.

The district court awarded primary physical care to Kelly. The court found Kelly had been Alex's primary caretaker. Kelly arranged for Alex's day care, pre-school, and medical care. Kelly took Alex to the library and the zoo. She read books to Alex and tried to involve him in church activities. The court found Monte to be indifferent to, and uninvolved with, Alex's activities; Monte and his parents became considerably more interested in Alex's day-to-day care after Monte filed for dissolution. The court further observed Kelly to be intensely concerned during the proceedings, while Monte appeared passively indifferent.

I. STANDARD OF REVIEW. Our review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings, but we do give them deference considering its opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

II. PRIMARY PHYSICAL CARE. The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section

598.41; *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). The issue in determining the best interests of the children 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). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Monte argues Kelly is unstable. We do not condone Kelly's behavior during the incidents described above. However, we find those incidents do not show Kelly is unsuitable to be Alex's primary caretaker. Kelly is experienced in dealing with children and is considered competent by her supervisor and co-workers. None of Kelly's "inappropriate behavior" was directed at Alex; he was not present at any of the incidents. Dr. Kinnaird, the court-appointed custody evaluator, found both parties were stable and concluded Kelly should be Alex's primary caretaker. Finally, the district court had an opportunity to observe both parties during the trial, finding Kelly to be intensely concerned while Monte seemed passively indifferent.

For these reasons, we affirm the district court's decree awarding Kelly primary physical care of Alex.

AFFIRMED.