

IN THE COURT OF APPEALS OF IOWA

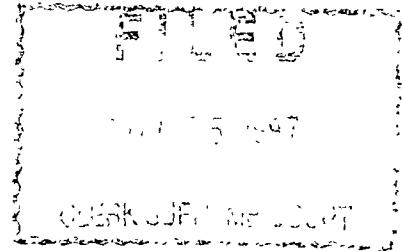
No. 7-427 / 96-2097

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IN RE THE MARRIAGE OF KARL FREDERICK HERMAN AND MARY ANNE HERMAN

Upon the Petition of
KARL FREDERICK HERMAN,
Appellee,

And Concerning
MARY ANNE HERMAN,
Appellant.



Appeal from the Iowa District Court for Mitchell County, John S. Mackey,
Judge.

Mary Herman appeals the custody provisions of the decree dissolving her
marriage to Karl Herman. **AFFIRMED.**

Russell Schroeder, Jr. of Schroeder Law Office, Charles City, for appellant.

Jerry H. Folkers of Dunkelberg, McKinley, Folkers & Walk, Osage, for
appellee.

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

VOGEL, J.

Mary Herman appeals the custody provision of the decree dissolving her marriage to Karl Herman. The court granted joint legal custody of the children but gave their primary physical care to Karl.

Background facts. Karl and Mary Herman were married on May 28, 1991. They have two children, Samantha, born November 1989, and Jacob, born May 1991. Karl and Mary lived together on an acreage in Osage until their separation in March of 1995. An attempted reconciliation failed, and Mary left the children with Karl in the marital residence.

Karl filed a petition for dissolution of marriage on March 5, 1996. At the time of the dissolution hearing, Karl was thirty-five years old and Mary was thirty-four. Karl owned his own grain handling equipment business, and Mary worked third shift at Tops Business Forms.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Placement of children. Mary contends the trial court erred in awarding primary physical care of the children to Karl because she has been the children's primary caregiver, while Karl has generally been disinterested in their care.

The controlling consideration regarding placement of the children is their best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The court determines placement according to which parent can minister more effectively to the children's long range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *Kunkel*, 555 N.W.2d at 253.

The pivotal concern in this case is the promotion of stability in the children's lives. With regard to the child custody issue, the court made the following findings:

Throughout the marriage Mary had been the primary caretaker of the children. However, in the recent past, she began frequenting bars and staying out late at night. She threatened to commit suicide at one point. She began bowling in leagues and spending more time at the bowling alley than at home with the children. The evidence establishes that Karl has been more stable than Mary with respect to parental duties.

Mary asserts she began staying away from the marital home after Karl, on one occasion, had sex with her when she had refused. She suggests the trial court overemphasized her mentions of suicide which she made while in mourning the loss

of a friend. Nevertheless, the record supports that Karl is a good father dedicated to providing a stable home environment for the children. He has a flexible work schedule. Additionally, the continued placement of the children with Karl will promote stability in the children's lives as they will remain in the family home. The children's paternal grandmother lives close by and would be there to assist in the children's care and supervision if needed.

Conversely, Mary's actions militate against granting her primary physical care of the children. We agree with the trial court that Mary provided good primary care for the children during their early years, but more recently has been less attentive to the children's needs. She has exhibited emotional instability by frequently keeping late hours and drinking to excess. While Mary minimizes her suicide suggestions, we, as did the trial court, find them to be more serious and troubling in weighing the stability of the parties.

This case presents us with the frequent and difficult dilemma of whose testimony we should believe in a heated custody dispute. Each parent and various family members make damaging accusations of the other's conduct. The accusations are either denied or minimized. It is nearly impossible for us to discern from examining this record who is better representing the behavior of the parties during the marriage. However, the trial court heard and saw the witnesses in the courtroom, observing each as to their demeanor, and made its findings in part on those

observations. We therefore, absent some glaring omission or legal error, rely heavily on the credibility assessment of witnesses by the trial judge. *See In re Marriage of Moore*, 526 N.W.2d 335, 337 (Iowa App. 1994).

After a careful review of the testimony and exhibits, we accordingly agree with the trial court that the appropriate primary physical placement of the children is with their father, Karl.

II. Appellate attorney fees. Mary requests that this court award her attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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 Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We determine the parties must each pay their own appellate attorney fees.

Having carefully considered all issues before us, we affirm the trial court.

AFFIRMED.