IN THE COURT OF APPEALS OF IOWA

No. 0-056 / 99-0934
Filed March 15, 2000

IN RE THE MARRIAGE OF STACIE KATHERINE PROCTOR AND DERRICK PROCTOR

Upon the Petition of
STACIE KATHERINE PROCTOR,
Petitioner-Appellee,

And Concerning
DERRICK PROCTOR,
Respondent-Appellant.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, Richard J. Vogel, Judge.

Respondent-Appellant Derrick Proctor appeals from the decree dissolving his marriage to Petitioner-Appellee Stacie Katherine Proctor. Derrick contends that he not Stacie should have been named the primary physical custodian of their only child Kelsey born on June 16, 1996. Derrick also challenges the district court's award of attorney fees to Stacie. **AFFIRMED.**

Allan C. Orsborn of Orsborn, Bauerle & Milani, L.L.P., Ottumwa, for appellant.

R.E. Breckenridge of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellee.

Heard by Sackett, C.J., and Zimmer and Hecht, J.J.

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SACKETT, C.J.

Respondent-Appellant Derrick Proctor appeals from the decree dissolving his marriage to Petitioner-Appellee Stacie Katherine Proctor. Derrick contends that he not Stacie should have been named the primary physical custodian of their only child Kelsey born on June 16, 1996. Derrick also challenges the district court's award of attorney fees to Stacie. We affirm.

Derrick, born in 1970, and Stacie, born in 1976, were married in late 1995. Derrick who completed high school and a year and a half of college is employed full time at the Excel plant in Ottumwa. Stacie finished eleventh grade and is working towards a GED. At the time of the dissolution hearing she was not employed but had earlier worked at a convience store in Ottumwa.

The district court found the custody issue difficult and we agree. Both parents love their daughter and have had substantial involvement with her care. They both make negative charges against the other yet there is little proof of these charges other than their own statements.

We review de novo. Iowa R. App. P. 4; *In re Marriage of Riggert*, 537 N.W.2d 789, 791 (Iowa App.1995); *In re Marriage of Harris*, 499 N.W.2d 329, 330 (Iowa App.1993).

The critical issue is which parent will do the better job of raising the child over the long term. *See In re Marriage of Weidner*, 338 N.W.2d 351, 359 (Iowa 1983); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974); *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App.1985). The parent who has the ability to do the better job of raising the child during her minority is the parent who should be granted custody. *See In re Marriage of Rodgers*, 470 N.W.2d 43,

44 (Iowa App.1991). We look to the factors set forth in *Winter*, 223 N.W.2d 166-67. We are dealing with the future of Kelsey. Her interests must override those of her parents. *See Halstead v. Halstead*, 259 Iowa 526, 535, 144 N.W.2d 861, 866 (1966).

We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P.14(f)(7). Yet we are not bound by these determinations. *Id.* We base our decision primarily on the particular circumstances of the parties before us. *Weidner*, 338 N.W.2d at 356. The interests of this child are the primary consideration. *See Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa App.1988). We give consideration to each parent's role in child raising prior to a separation in fixing primary physical care. *See In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa App.1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App.1992). Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. *In re Marriage of Crotty*, 584 N.W. 2d 714, 717 (Iowa App. 1998); *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App.1993).

Derrick advances that he spent all the time given to him under the temporary custodial order with Kelsey. He contends when Kelsey is with him he is the person caring for her and she spends the night in his home. He argues that when Stacie has custody of Kelsey she frequently spends substantial periods of day and night time hours in her parents' home and they assist her with the child's care. He recognizes that Stacie's parents are good grandparents, but

he believes that his willingness to make Kelsey his highest priority when she is in his care indicates he will be the better parent.

Derrick presented considerable evidence as to his theory of parenting, and we agree that he is a good parent. He further contends he has shown more stability than Stacie in that he has been employed on a full-time basis since he completed school, while Stacie has shown little stability in employment. He also questions whether she is serious about working towards a GED. He advances that Stacie smokes cigarettes and while she contends that she does not do so around the child, he is of the opinion that she does. He contends the trial court impermissibly considered that Stacie could spend more time with their daughter than he can.

Stacie contends Derrick was controlling and jealous during the marriage. She advances that this attitude followed the parties' separation, and as the district court noted, he took it upon himself to follow Stacie when the child was in her care. Stacie contends that Derrick has not been communicative since the parties' separation and in arranging visitation periods has gone through her mother. She says that she was the primary caretaker during the time the parties lived together. She testified that Derrick worked long hours and was not available to give his daughter substantial care. She says her parents have always had a substantial part in Kelsey's life while Derrick's parents only became involved after the parties separated.

Both parties make a strong case in their claim for primary physical care. The district court observed the parties and made some credibility assessments.

We can find no valid reason to disagree with the district court's custodial decision and affirm it.

Derrick next contends the district court abused its discretion in requiring that he contribute to Stacie's attorney fees. The district court ordered he pay $1,000 towards her fees. Derrick contends he leaves the marriage with substantial debt and Stacie has no debt. He further contends her parents helped her pay her attorney fees. He notes she voluntarily was not employed while he worked long hours during the parties' separation.

Attorney fees are not recoverable as a matter of right but rest within the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. *In re Marriage of Orgren*, 375 N.W.2d 710, 714 (Iowa App.1985); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App.1983). Any award of attorney fees depends on the financial circumstances and earnings of each party. *In re Marriage of Burham*, 283 N.W.2d 269, 278 (Iowa 1979). Considerable discretion is assigned to the trial court in the allowance of attorney fees. The district court did not abuse its discretion in awarding Stacie $1,000 in attorney fees.

Stacie contends that she is entitled to attorney fees on appeal. An award of attorney fees is not a matter of right. *See 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. *See In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App.1981). We recognize that Stacie was required to defend the trial court's decision on appeal. The primary

issue on appeal as to who should have primary physical care of Kelsey is very close. We consider all these factors and award Stacie $250 for appellate attorney fees. Costs on appeal are taxed to Derrick.

AFFIRMED.