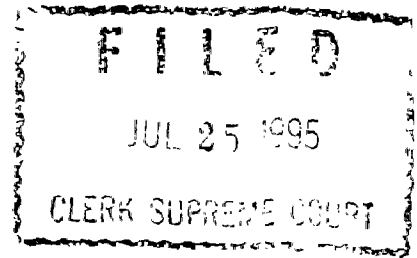


IN THE COURT OF APPEALS OF IOWA

No. 5-362 / 95-0092



IN RE THE MARRIAGE OF DONNAFAE CHAMBERS AND
DAVID CHAMBERS

Upon the Petition of
DONNAFAE CHAMBERS,

Appellee.

And Concerning
DAVID CHAMBERS.

Appellant.

Appeal from the Iowa District Court for Page County, Glen M. McGee, Judge.

David Chambers appeals the decree dissolving his marriage to Donnafae Chambers, contending the court erred in awarding primary physical care of their children to Donnafae. **AFFIRMED.**

James C. Steffes of Steffes, Kenyon and Nielsen, P.C., Creston, for appellant.

Richard H. Davidson of Bailey and Davidson, P.C., Clarinda, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

HUITINK, J.

David and Donnafae Chambers were married on July 12, 1980. They have two children. Allison Beth, born February 28, 1981, and David Anthony, born September 3, 1983. Both David and Donnafae worked full-time throughout most of the marriage, David as a factory worker and Donnafae at nursing homes. Donnafae also was taking classes to achieve an LPN degree. At the time of trial Donnafae was thirty-four, and David was thirty-eight years old.

Donnafae filed a petition for dissolution of marriage. The court awarded her temporary physical care of the children and ordered David to pay temporary child support. Following trial the court awarded joint legal custody but gave Donnafae primary physical care of both children. The court noted Donnafae had often been the victim of physical abuse and David continues to struggle with alcohol. The court then directed David to pay \$241 per month in child support.

David appeals. He contends the court erred in giving Donnafae primary physical care of the children. He maintains the record demonstrates he, not Donnafae, was more often the victim of domestic abuse. He notes that Donnafae is also an alcoholic and claims she still drinks on occasion. He asserts he has been the best disciplinarian and Donnafae does not provide adequate supervision. He alleges that he participates more in the children's activities. He argues the children are exposed to inappropriate behavior at Donnafae's mother's house.

Donnafae responds she was battered on numerous occasions by David, resulting in black eyes and fat lips. She notes David has had at least five OWI's, a public intoxication conviction, and a conviction for indecent exposure. Donnafae asks the court to award her appellate attorney fees and costs.

We review this equitable proceeding de novo. Iowa R. App. P. 4. We consider the facts and the law and determine rights anew from all of the credible evidence on issues properly presented and preserved. *In re Marriage of Lattig*, 318 N.W.2d 811, 812 (Iowa App. 1982). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them.

In determining physical care, the guiding concern is the best interest of the children affected by the dissolution. The court is required to consider the characteristics and needs of the children, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the children, the relationships of the children with each parent, the nature of the proposed environment, and the effect of continuing or changing an existing custodial status. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974).

There is no presumption in favor of either the mother or the father. *In re Marriage of Bower*, 219 N.W.2d 684, 687 (Iowa 1974). The issue is not which parent possesses the greater right to the children, but which parent can minister more effectively to the long-term best interest of the children. The children should be placed

in the environment that is most likely to bring them to healthy physical, mental, and social maturity. *Winter*, 223 N.W.2d at 166.

This is another case in which we must determine which of two hostile parents is the preferred physical caretaker of innocent children caught in the middle of a nasty custody fight. Each has filled the record with evidence of the other's moral failures, poor parental judgment, and abusive behavior. We nevertheless find suggestions of redeeming parental attributes in the parties' sincere expressions of love for their children.

Donnafae was awarded physical care in part because she has been the victim of domestic violence. Although we do not necessarily disagree with this conclusion, or wish to minimize its implications, domestic violence is only one of many factors we consider in our review of the district court's custodial award. We proceed with caution to avoid meritless attributions of parental virtue based on facile generalizations about this provocative circumstance. With this caveat in mind, we turn to the record before us.

The record reveals little information about these children other than their respective ages. There is no evidence about their educational, social, or moral development. Neither parent has expressed his or her aspirations regarding the children's future. We are told the children have been living with Donnafae and her companion, John, who Donnafae describes as "basically a pretty nice guy." There is

also a suggestion David prefers to live with his father, but in the absence of additional evidence about David, we are unable to evaluate the merits of his preference.

Donnafae has provided primary care for the children during the pendency of these proceedings. The district court found she has adequately provided for them, and we find no reason to disagree. Donnafae has a history of alcohol abuse, and there is evidence her supervision of the children has been inadequate. We are, however, encouraged by her acknowledgement of her obligation to preserve the children's relationship with their father.

David has a good relationship with his children. There is evidence he is a hard worker and has been a good provider for his family. He has acknowledged his alcoholism and admits that he, while intoxicated, exposed himself to his sixteen-year-old niece. David does not deny beating Donnafae and giving her a black eye and a fat lip. He seeks to minimize the implications of this behavior by citing an incident during which Donnafae assaulted him and the police officer summoned to intervene. There is also evidence of David's "smack'em up side the head" approach to discipline and his preference for more strict supervision of the children's activities.

We are regrettably required to decide this important issue based on discouraging evidence of parental drunkenness, domestic violence, and indiscretion. Neither parent has inspired our confidence in their custodial ability. We are left with a lingering sense of concern for the future of these children regardless of their placement. The prospect

of either parent raising these children to healthy physical, mental, and social maturity does not appear very promising.

We have often noted a trial judge "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974). In this case, the district court carefully considered the evidence and found Donnafae was the preferred physical caretaker of these children. We, having little else to rely on, and with some resignation, accept the district court's assessment of the parties and accordingly affirm on this issue.

Donnafae has requested an award of appellate attorney's fees. An award of attorney's fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Moore*, 526 N.W.2d 335, 338 (Iowa App. 1994). We consider the needs of the party making the request, the ability of the other party to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 158 (Iowa App. 1981). David's income is greater than Donnafae's. Donnafae was also required to defend the district court's decision. We award Donnafae \$1000 for her appellate attorney's fees.

David shall pay the costs of this appeal.

AFFIRMED.