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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-156 / 92-1628

JAMES ALLEN KLIPPING,

Appellant,

000335

vs.

NANCY ESTHER MEEKER,

Appellee.

Appeal from the Iowa District Court for Grundy County, William G. Klotzbach, Judge.

James Klipping appeals the district court's order placing custody of the parties' children with Nancy Meeker and awarding Nancy Meeker the use of a vehicle. **AFFIRMED.**

Donald B. Redfern of Redfern, Mason, Dieter, Larsen & Moore, Cedar Falls, for appellant.

David H. Correll of Correll & Sheerer, Cedar Falls, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

000336

DONIELSON, J.

James (Jim) Klipping and Nancy Meeker never married, but are the parents of twin boys, born in December 1988. Jim and Nancy briefly dated in 1977 and in 1981. In 1986, they began dating again and in July 1987, Nancy moved in with Jim. In early 1988, Nancy became pregnant with the twins. At that point, Nancy expressed to Jim her desire to marry. However, Jim believed that being born and raised out of wedlock would not adversely affect the twins and he refused to marry Nancy.

During the time Jim and Nancy lived together, their property was mostly kept separate. They had separate checking accounts and separate friends. They never held themselves out as married. In 1991, Jim purchased a new Plymouth Voyager van which Nancy used to transport the children and drive herself back and forth to work.

Jim is employed as a senior manufacturing analyst and receives a net monthly income of about $2530. He also receives about $500 per month from investment income. Jim's affidavit of financial status placed his net worth over $250,000. Nancy works thirty-two hours per week as an acute care coordinator for a hospital and receives a net monthly income of about $1036. At the time of trial, her net worth was approximately $7500.

In the fall of 1991, Nancy asked Jim to participate in counseling. Jim refused and Nancy moved out in early

1992. Nancy purchased a home on contract in Cedar Falls in February 1992.

In March 1992, Jim filed a petition for temporary and permanent custody of the twins. The matter came to trial in May 1992. In August 1992, the district court filed its findings of fact, conclusion of law and judgment. The court found no common law marriage existed. The district court awarded the parties joint custody with primary physical custody given to Nancy. Jim was ordered to pay $205 per week child support and Nancy was awarded the 1991 Plymouth Voyager.

Jim then filed a 179(b) motion. In September 1992, the court entered an order which deleted the provision awarding Nancy the 1991 Plymouth Voyager and instead ordered Jim to furnish Nancy with a "vehicle comparable to a 1991 Voyager" during the twins' minority.

Jim now appeals. He contends he should be awarded primary physical custody of the twins. He also contends the district court had no jurisdiction to order him to furnish Nancy with a vehicle because the parties were not married. Nancy requests appellate attorney fees.

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 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of

witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. **Child Custody.** Jim first contends it is in the twins' best interests that he be awarded primary physical custody.

The criteria for determining custody are the same whether the parents are dissolving their marriage or are unwed. Langner v. Mull, 453 N.W.2d 644, 649 (Iowa App. 1989) (citing Heyer v. Peterson, 307 N.W.2d 1, 17 (Iowa 1981)). 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), in In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983), and in 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. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985). Gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. Id.

We are convinced the best interests of the twins will be better served with Nancy. Throughout the parties'

000339

relationship, Jim consistently placed his own emotional and financial interests above those of not only Nancy, but also above the twins' best interests. Jim's attitude is best reflected in the specific incidents which occurred while the parties lived together. For example, when Nancy and the children wanted to call her parents (the maternal grandparents) in Arizona, Jim told Nancy to either call collect or pay for the call herself. When Nancy worked the night shift at the hospital, Jim often complained because he would have to watch the twins and would be unable to work on his hobby of restoring old cars. A striking example of the ease with which Jim has placed his own interests over those of the twins occurred immediately after the separation. After Nancy moved out, Jim removed the Plymouth Voyager and hid it in some unknown location. Since 1991, the Plymouth Voyager had been used by Nancy to transport the children and drive herself to work. In its place Jim left Nancy and the twins with a station wagon which had some 168,000 miles on its speedometer. Finally, although this court makes no judgment regarding Jim's unwillingness to marry Nancy, we take notice of his cavalier attitude towards the fact the twins were born and have been raised out of wedlock.

We find Nancy has provided much of the nurturing and care of the twins since their birth. Nancy bathed the twins, cooked their meals, took them to the doctor's office, read to them, and played with them. The fact she

000340

purchased a house before she finally moved out of Jim's home and the fact she had arranged for alternative day care reflect Nancy's dedication to providing the twins with a nurturing and stable environment despite the limited means she had available.

In his brief and argument, Jim relied heavily on the testimony of Carol Grooms, the children's day care provider. Carol testified Jim had a greater interest in the twins and their development than did Nancy. Carol believed Jim's work schedule would better establish a regular routine for the twins because Nancy worked some evenings. Jim also presented the testimony of several other witnesses who attested to his parenting ability. On our review, we give considerable deference to the district court's assessment of the credibility of the witnesses:

> There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." . . . In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1934) (citations omitted).

We find it is in the best interests of the twins to award primary physical custody to Nancy. We affirm the district court on this issue.

II. District Court's Jurisdiction to Award a Vehicle to Nancy. Jim also contends the district court was without jurisdiction to order Jim to furnish Nancy with a vehicle comparable to the 1991 Plymouth Voyager van.

In Metten v. Benge, 366 N.W.2d 577 (Iowa 1985), the supreme court found the district court had jurisdiction under its equitable powers to determine the respective property rights between unmarried cohabitants. A court of equity also has the power to determine questions of child custody and support. In re Marriage of Stogdill, 428 N.W.2d 667, 669 (Iowa 1988). Equity jurisdiction allows a court the necessary flexibility to determine the equities between the parties. Farmers Sav. Bank v. Gerhart, 372 N.W.2d 238, 245 (Iowa 1985).

Under Iowa Code chapter 598, "support" is not limited to monetary payments. Iowa Code § 598.1(2) (1991). In other domestic relations cases, this court has approved district court decisions which resulted in the provision of support in a non-monetary fashion. See In re Marriage of Boehlje, 443 N.W.2d 81, 85 (Iowa App. 1989) (father ordered to maintain $300,000 life insurance policy to secure child support and college expenses); In re Marriage of Smith, 351 N.W.2d 541, 543 (Iowa App. 1984) (both parents ordered to pay one-third of children's books, tuition, room and board for college).

In its order, the district court recognized the 1991 Plymouth Voyager "has been used for the transportation of

000342

the minor children of the parties and that it would be in the best interests of the children to have such a vehicle in which they could be conveyed." The provision does not transfer property ownership as the title to the vehicle is to remain in Jim's name. The court required Nancy to reimburse Jim for the costs of licensing and insuring the vehicle. Nancy was also responsible for the maintenance of the vehicle.

We construe the provision "vehicle comparable to a 1991 Voyager" to mean that Jim shall be required to provide Nancy and the twins with a relatively reasonable and dependable vehicle during the twins' minority. Absent some substantial change of circumstances, Jim clearly has been and will continue to be in a better position financially to provide the twins with a reliable vehicle for their transportation. In light of the relative positions of the parents, we find the district court properly acted within its equitable powers in ordering Jim to provide Nancy with a vehicle for the benefit of the twins.

III. Attorney Fees. Nancy requests appellate attorney fees. 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 award Nancy $2500 in attorney fees.

The costs of this appeal are taxed to Jim.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concur)

I concur in part and dissent in part.

I concur with the majority in all respects except I would modify to strike the provision that James furnish Nancy a van. I find such a provision not reasonable because with owner's liability James would have to keep the vehicle insured irrespective of Nancy's driving record.