FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-471 / 90-152

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**IN RE THE MARRIAGE OF KAREN A. CLARK AND JUDSON P. CLARK**

Upon the Petition of

**KAREN A. CLARK,**

Appellee,

And Concerning

**JUDSON P. CLARK,**

Appellant.

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Appeal from the Iowa District Court for Dubuque County, R. J. Curnan, Judge.

Respondent appeals the primary physical placement of the parties' two minor children with petitioner. He also objects to the award of the marital residence to petitioner. Petitioner seeks attorney fees for the appeal. **AFFIRMED.**

David A. Lemanski of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellant.

James Schilling, Dubuque, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

**DONIELSON, P.J.**

Karen Clark and Judson Clark were married in July 1977. Judson had a child by a previous marriage, Heather, who was born in August 1973. Karen adopted Heather in 1979. The parties also had a son, Forrestt, who was born in October 1979.

Karen was thirty-one years old at the time of the trial. She has a high school education and no particularized job skills. Karen has two part-time jobs that require her to work some evenings and weekends. She has a net income of approximately $926 per month. Judson was thirty-seven years old at the time of the trial. He has a college degree and is employed as an electrical engineer for John Deere Dubuque Tractor Works. He works regular hours five days a week. His net income is $2,732 per month.

Karen filed this petition for dissolution, due in part to Judson's romantic affair with a married woman. The district court awarded physical care of Heather and Forrestt to Karen. The court allowed Karen to reside in the marital home until three months after Heather reaches her eighteenth birthday or graduates from high school, whichever occurs later. Judson was ordered to pay child support in the sum of $697 per month so long as there are two children eligible for support and $484 per month so long as only one child is eligible for support. Judson appeals these provisions of the decree of dissolution.

Our review in this matter is de novo. Iowa R. App. P. 4. 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). We are not bound by these determinations, however. Id.

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) and in 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). 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; 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).

Judson contends he should have been awarded physical care of the minor children. Judson claims he has always been the primary parent to the children. He states Karen was not interested in domestic chores and was seldom at home. He also alleges Karen prefers her natural child, Forrestt, over Heather.

Our de novo review of the record casts doubt on Judson's claim of being the primary caretaker. The record indicates both parents have provided care to their children. We adopt the trial court's findings on this issue:

> Attempting to live together during this pending action has created situations testified to by both of the parties in regard to care and concern for the children that do not necessarily reflect either of the party's true abilities or concern in that regard. Each of the parties during the marriage demonstrated an ability to care for the children and to possess the necessary parental skills.

The record also indicates both parents relied heavily on Heather's assistance for housekeeping chores and, perhaps, caring for Forrestt.

Because both parents are similarly capable of caring for their children, we must decide who will better raise them and provide for their well-being. Our review of the record leads us to conclude the trial court was correct in finding that neither child has indicated a preference regarding physical care. The record does not disclose any regular family activities, nor any particular bonding of a child to one parent or the other. We do find support for the placement of the children in Karen's physical care in the following findings of the trial court:

> It is clear from the testimony of all of the parties, including Heather, that Heather's attitude towards [Ms.] Gorenson (with whom Respondent has formed a relationship including some speculation of future marriage) is very negative. It is also clear from Heather's testimony that she does not desire to be separated from her brother, which is in accordance with the Iowa law barring extreme circumstances.

Judson recognizes his daughter's extremely negative attitude toward his new girlfriend but he has no stated intention of terminating the relationship. And, although he has stated that he will not live with or marry this woman if Heather objects, Judson has not been discreet in this relationship--even during the marriage--and his openness in the relationship apparently disturbs Heather a great deal. See In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983) (moral misconduct is one circumstance to be given serious consideration in determining a parent's fitness to have custody of minor children).

This court does not suggest that divorced parents are required to allow their children to dictate to the parent's personal life. However, we do expect parents to consider the effect new relationships have on their children and to be considerate of their children's emotional needs. It appears Judson has put this relationship before his children's well-being. Additionally, it is clear Heather is quite uncomfortable with her father's new relationship. Heather will not have to confront that discomfort as often or as directly in residing with her mother. We find Heather's emotional needs will be better met in placing her with her mother. We certainly find no reason to separate these siblings. We affirm the placement of the children with Karen.

Because we find no reason to modify the primary physical placement of the children we need not address

Judson's remaining contentions (if he is awarded physical care of the children, then he should be granted the right to reside in the marital home and Karen should be required to pay child support).

Karen asks for attorney fees on appeal. 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). With those considerations, we order Judson to pay $600 toward Karen's appellate attorney fees.

Costs of this appeal are taxed to appellant.

**AFFIRMED.**