

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-411 / 89-276

124

Black Hawk County No. 35615,

**IN RE THE MARRIAGE OF WENDY MARIE DESTIVAL
AND BRYAN LEE DESTIVAL**

Upon the Petition of **WENDY MARIE DESTIVAL,**

Appellee,

And Concerning **BRYAN LEE DESTIVAL,**

Appellant.

Appeal from the Iowa District Court for Black Hawk
County, George W. Stigler, Judge.

Appellant appeals certain provisions of the decree of
dissolution entered for the parties in district court.

AFFIRMED.

Gary J. Boveia of the Boveia Law Office, Waverly, for
respondent-appellant.

Craig C. Ament of Olson, Parsons & Ament, Cedar Falls,
for petitioner-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, J.

Respondent appeals certain provisions of the decree of dissolution entered for the parties in district court. He claims the court erred in: 1) placing physical care of the parties' minor child with petitioner; 2) making an inequitable property distribution; and 3) ordering him to pay an excessive amount of child support. Petitioner asks for attorney fees for this appeal. We affirm the trial court.

Bryan asks that physical care of Ryan be placed with him. Bryan argues that he is more stable and mature than Wendy. On occasion Wendy would stay out late at night with her friends. He states that more witnesses testified he should have custody of the child. Bryan points out that gender is irrelevant in custody decisions.

Bryan asserts that the parties had a negative net worth at the time of trial. According to Bryan he was awarded a negative net worth of over \$10,000, while Wendy was awarded a positive net worth of over \$3,000. He asks that Wendy be made responsible for more debt.

Bryan claims that in view of his debt load his child support obligation is excessive. He feels that the amount is particularly excessive in view of the property settlement. Bryan asks that his child support obligation be reduced to \$30 per week.

Wendy Destival and Bryan Destival were married on July 7, 1984. They have one child, Ryan, born November 29, 1984. At the time of trial Wendy worked at McKenna Color Lab as a receptionist where she has a gross income of \$160 per week. Wendy had various part-time jobs during the marriage. Wendy was born on January 4, 1966. Bryan works full time at the Janesville Agri Center. He has a net income of about \$1,000 per month. Bryan was born on December 7, 1964.

The district court awarded the parties joint legal custody and placed physical care of the child with Wendy. The court stated that both parties could adequately care for Ryan, but found that Bryan did not always act in Ryan's best interests when he was angry with Wendy. Twice Bryan denied Wendy access to Ryan because he was angry with her, which was upsetting to Ryan. The court divided the parties' property. The court ordered Bryan to pay \$60 per week in child support.

Our review in cases such as these 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. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

I. Custody. 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).

Bryan argues that he is the proper physical custodian for Ryan. This contention is based on certain actions by Wendy and on the apparent lack of credibility in the witnesses who testified in Wendy's favor. The witnesses who testified for Wendy did have close relationships with her. However, the trial court was certainly aware of this and there is no reason to discount the trial court's conclusion. All of the witnesses for both parties testified that Wendy is a very good mother and Bryan is a good father. The only real difference was the conclusion

reached by each witness as to who should have physical custody. Faced with an apparent stalemate between the witnesses, the trial court very appropriately considered other factors. One of those factors, argued very strongly by Bryan, is Wendy's apparent desire for the single life. Even though this desire does exist, there is no evidence that Wendy has allowed it to interfere with her care for Ryan. The other major factor considered by the district court, Bryan's inability to separate his vindictiveness toward Wendy from Ryan's best interests, is supported by strong evidence. While Bryan is a reasonably good parent, he does not seem to recognize that Ryan is the only one who really suffers when he refuses to allow him to wear shoes and mittens to his mother's house or denies Wendy access to Ryan. There is evidence to show that Ryan has already begun to feel resentment toward his father for this treatment. In a situation where parenting skills are relatively equal, the child's best interests require that he be placed with the parent most concerned with those interests. In this case Wendy is clearly the parent best able to provide for Ryan's best interests.

II. Child Support. Bryan also contends the award of child support was excessive. It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned

according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). The factors to consider are: the financial resources of the child; the financial resources of both parents; the standard of living the child would have enjoyed had there not been a dissolution; the cost of day care; the physical and emotional health needs of the child; and the child's educational needs. Iowa Code § 598.21(4).

The trial court was correct in its award of \$60 per week in child support. The costs of child care alone will eat up most of this award. This leaves Wendy to pay for most of the other expenses associated with raising Ryan. This award will not impose an undue burden on Bryan. His earning capacity is far above Wendy's and, though the property distribution does even things out, the child support award was still warranted.

III. Property Division. The property division in this instance was clearly equitable. The property division could not be changed to reflect an exactly equal distribution due to the nature of the assets. Even taking Bryan's figures as fact, the differences are not that great and if we take the figures offered by Wendy, the property division shifts in Bryan's favor. The trial court provided an equitable distribution and will not be disturbed on appeal.

IV. Attorney Fees. An award of attorney fees ¹³⁰is 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). The parties are in similar situations financially. However, Wendy was obligated to defend this appeal and should be allowed some recompense. Appellant is ordered to pay Wendy \$500 in attorney fees.

AFFIRMED.

Habhab, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

The evidence introduced at the trial and the findings made by the trial court convince me Bryan is the more stable and mature parent. This assessment would cause me to award him physical care.

I would affirm the property division and make no award of attorney fees.

I would remand to determine the amount of child support Wendy should pay.