

IN THE COURT OF APPEALS OF IOWA

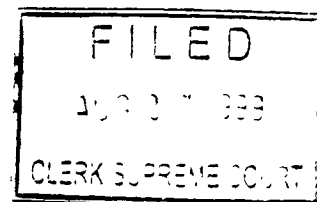
No. 1999-185 (9-409) / 98-1298

Filed August 27, 1999

**IN RE THE MARRIAGE OF JEFFREY MEARL LAING
AND JENNIFER LEE LAING**

**Upon the Petition of
JEFFREY MEARL LAING,**
Petitioner-Appellant,

**And Concerning
JENNIFER LEE LAING,**
Respondent-Appellee.



Appeal from the Iowa District Court for Cedar County, Max R. Werling,
Judge.

Jeffrey Laing appeals from the decree dissolving his marriage to Jennifer
Laing. **AFFIRMED.**

Thomas G. Reidel of Conway & Reidel, Muscatine, for appellant.

Bruce D. Nestor of Tindal, Erdahl, Goddard & Nestor, PLC, Iowa City, for
appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

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MAHAN, J.

Jeffrey Laing appeals from the decree dissolving his marriage to Jennifer Laing. Jeffrey contends the district court erred in entering an order awarding custody to Jennifer even though she had not completed the required children in the middle course. Jeffrey maintains he should have been awarded primary physical care of the children. We affirm.

Jeffrey and Jennifer were married in October of 1986. Prior to the marriage, Jeffrey lived with his parents and his son from a previous marriage, Brandon. After the marriage, Brandon lived with Jeffrey and Jennifer. They have three children: Jesse, born in March of 1987, Justin, born in April of 1989, and Cody, born in May of 1995. Brandon was an adult at the time of the dissolution.

Each of the parties has shortcomings as parents. Jennifer portrayed Jeffrey as sometimes violent. Jeffrey did not deny he had been violent and admitted he called Jennifer names and may have pushed or shoved her during an argument. Jeffrey portrayed Jennifer's use of alcohol as affecting her relationship with the children; Jennifer has consumed alcoholic beverages in front of the children and has been drunk on at least one occasion while the children were in her care. Jennifer explained the three incidents cited by Jeffrey were not as serious as he portrayed.

Jeffrey is involved in the children's activities. However, he has refused to cooperate with Jennifer to provide for the children's welfare. Jeffrey refused to give Jennifer the children's winter clothing, refused to give her a thermometer so she could

take the temperature of one of the children when he was ill, and refused to submit an ambulance bill to his insurance carrier. Jennifer was the primary caretaker of the children during the marriage.

Jeffrey has a close-knit extended family. His mother and sisters would be willing to babysit the children if Jennifer had custody and needed help. Jennifer does not have a "real strong" relationship with her mother. Her father pled guilty to a charge of indecent contact with a child some years ago; the crime involved girls, not boys. Jennifer says she would not allow her father to be alone with the children, but has never told him that and has allowed him to be alone with the children.

Jennifer developed a close relationship with Brandon during the time he lived with them. She still enjoys a close relationship with Brandon. He has a closer relationship with Jennifer than he has with Jeffrey.

The district court concluded awarding primary physical care was "a very, very close call." The district court awarded primary physical care to Jennifer. The district court's judgment was largely based upon Jennifer's and Jeffrey's relationships with Brandon and Jeffrey's refusal to give Jennifer winter clothing and a thermometer for the children. The district court also found Jennifer will support the children's relationship with Jeffrey and Jeffrey's family will continue to offer their support.

Jeffrey appeals.

I. STANDARD OF REVIEW. Our review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings, but we do give them deference

considering its opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

II. “CHILDREN IN THE MIDDLE” COURSE. Jeffrey contends the district court erred in entering an order awarding custody to Jennifer even though she had not completed the required children in the middle course. Jeffrey argues we should consider Jennifer’s “failure, or apparent refusal, to attend the children in the middle course” as a factor in reviewing the award of primary physical care of the children.

We agree the district court did err in entering the final order before it received certification that Jennifer had completed the children in the middle course. Iowa Code § 598.19A(1). However, we disagree that this procedural defect should be a factor in our review of the primary physical care award. Jennifer testified she did not know she was required to attend the children in the middle course. The district court accepted her reason and determined it constituted good cause for delaying her participation in the course. She was ordered to complete the course and file proof of completion of the course within thirty days. Jennifer fully complied with this order. Under these circumstances, we decline to consider this as a factor against Jennifer. However, we strongly advise district courts in the future to fully comply with the mandates set forth in Iowa Code section 598.19A(1).

III. PRIMARY PHYSICAL CARE. Jeffrey maintains the district court erred in awarding Jennifer physical primary care of the children. We disagree.

The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *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). The issue in determining the best interests of the children 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). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Jeffrey argues he should have been awarded primary physical care of the children because he can minister more effectively to the long-range best interests of the children. His arguments basically center on his dispute with the district court's findings of fact, particularly regarding his relationship with Brandon and Jennifer's usage of alcohol. The factual findings and judgment of this case clearly indicate the

district court found Jennifer and her witnesses' testimony more credible than the testimony of Jeffrey and his witnesses. *See In re Marriage of Urban*, 359 N.W.2d 420, 424 (Iowa 1984)(findings of fact show which testimony was found most credible).

We give weight to the findings of a trial court, especially in matters of child custody, *Fritz v. Fritz*, 260 Iowa 409, 421, 148 N.W.2d 392, 399 (1967), because the trial court deciding the dissolution case "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *Urban*, 359 N.W.2d at 423 (citing *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974)); *In re Marriage of Brainard*, 423 N.W.2d 611, 614 (Iowa App. 1994); *In re Marriage of Moore*, 526 N.W.2d 335, 337 (Iowa App. 1994). We will rely upon the district court's findings of fact because our review of the record shows they are supported by substantial evidence. *Urban*, 359 N.W.2d at 424.

However, our reliance upon the trial court's credibility assessments does not relieve us of our duty to adjudicate the parties' rights anew. *Fritz*, 260 Iowa at 421, 148 at 399; *In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997); *see* Iowa Code § 598.41. Each factor, however, does not necessarily impact the decision with equal force. *Daniels*, 568 N.W.2d at 54 (citing *In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa App.1983)). To the

contrary, some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Id.* (citing *Will*, 489 N.W.2d at 397 (each custody decision is based on its own particular facts)).

The parent who has been the primary caretaker of the children during the marriage will not necessarily be designated the primary caretaker at the time of a divorce. *Wilson*, 532 N.W.2d at 495. The role of primary caretaker is, however, critical in the development of children, and careful consideration is given in custody disputes to allow children to remain with the parent who has been the primary care giver. *Id.*

In determining what is in the best interests of the child we can look to a parent's past performance because it may be indicative of the quality of the future care that parent is capable of providing. *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa App. 1992)(citing *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981) (citations omitted)).

In the instant case, each parent has a good work history and income sufficient to support the children and themselves. Each could provide for the children's physical needs and provide stability. Jeffrey is highly critical of Jennifer's alcohol usage. He described three separate incidents of Jennifer drinking while the children were in her care. However, although we do not condone Jennifer's consumption of alcohol around the children, we conclude it has not negatively impacted the children and does not outweigh her role as primary caretaker of the children. The district court

found, and we agree, that determining which parent should be awarded primary physical care is a close call.

We believe, as did the trial court, the determinative factor in this case is the parents' past performances. Jennifer has demonstrated she can successfully raise children while working full-time and running a household. Her relationship with Brandon demonstrates she can establish and maintain a close relationship with a child whereas Jeffrey has not maintained a close relationship with Brandon and may be unable to communicate effectively with him. We agree with the district court that Jennifer has established by the slimmest margins that she is the parent who is better able to raise the children. We defer to the decision of the district court and conclude the court did not err in awarding primary physical care of the children to Jennifer.

For these reasons, we affirm.

AFFIRMED.