

IN THE COURT OF APPEALS OF IOWA

No. 8-847 / 08-0835
Filed December 17, 2008

IN RE THE MARRIAGE OF BETH ANN EIDEN AND MATTHEW PETER EIDEN

Upon the Petition of
BETH ANN EIDEN,
Petitioner-Appellee,

And Concerning
MATTHEW PETER EIDEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Cherokee County, John P. Duffy,
Judge.

Father appeals the custody provisions of a dissolution decree.

AFFIRMED.

Brian B. Vakulskas of Vakulskas Law Firm, P.C., Sioux City, for appellant.

William Cook of Herrick, Ary, Cook, Cook, Cook & Cook, Cherokee, for
appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

In February 2008, the dissolution decree entered for Beth and Matthew Eiden provided they would have joint legal custody of their three young children and Beth would provide physical care. Matthew appeals the decree's custody provision seeking physical care of the children. We affirm.

Beth and Matt were married in August 1997. Matt has a college degree and is director of Christian education at a local church. Beth has some college credits and has worked as a hospital CNA. In April 2007, Beth petitioned for dissolution of the marriage. When the parties separated, Beth and the children remained in the Iowa house and Matt moved to Omaha. Eventually, Beth and the children moved to Kansas to be closer to her family and Matt returned to the Iowa house. Beth now works part-time as a CNA at a Kansas hospital while taking classes for a nursing degree. Beth utilizes a family member for child care and expects to be employed as a nurse in three years.

At the dissolution hearing both parties sought physical care of the children. In granting physical care to Beth, the court ruled:

Both parties have issues that bear on their respective capabilities to be the primary caretaker of the three children. The phrase "what you see is what you get" does not apply here. Each party has a "dark side" that this court must consider in deciding who should have the primary care of the three minor children. . . . A complete recitation of the facts will serve no purpose, other than to cause a possible publication of the demeaning acts by both parties. . . . The inappropriate conduct of the parties causes some concern for the court, . . . [however], the inappropriate activities, of both parties, do not involve the minor children of the parties. Their actions do not appear to affect the minor children.

Matt appeals the court's custody decision arguing he should be awarded physical care because he was the primary caretaker prior to the separation. In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinehart*, 704 N.W.2d 677, 680 (Iowa 2005). Because the trial court has a firsthand opportunity to hear the evidence and view the witnesses, we give weight to its fact-findings, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

The sole issue is whether Beth or Matt should be awarded physical care. "Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). Therefore, in determining physical care, our overriding consideration is the children's best interests. Iowa R. App. P. 6.14(6)(o). In assessing which physical care arrangement is in the children's best interests, we utilize the factors in Iowa Code section 598.41(3) (2007), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate goal is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We do give consideration to placing the children with the historical primary caregiver. *In re Marriage of Decker*, 666 N.W.2d 175, 178-80 (Iowa Ct. App. 2003). However,

“no one criterion is determinative” and our courts apply a multi-factored test. *Hansen*, 733 N.W.2d at 697.

While Matthew was a caregiver before the separation, the “fact a parent was the primary caretaker prior to separation does not assure he or she will be the custodial parent.” *Decker*, 666 N.W.2d at 178. We note some of Matthew’s caretaking was necessitated by Beth’s efforts to keep working while also recovering from two, one-time events: a surgery and an automobile accident. Further, by agreeing Matt could have the children for the 2007 summer, Beth has shown the ability to see that the children keep in contact with Matt. Unlike Matt, Beth also has had the insight to shelter the children from the conflict between their parents. We agree with the district court’s stated concerns about both parties’ inappropriate behavior and, like the district court, decline to specify incidents. The district court concluded: “it would appear that [Matt’s] conduct is more detrimental to the children than [Beth’s] conduct.” After our de novo review, we accept the district court’s determination, after its opportunity to observe the parties’ demeanor, that Beth should be awarded physical care.

Noting she was obligated to defend the district court decision on appeal, Beth seeks an award of appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). We conclude equity requires Matt to pay \$2000 of Beth’s appellate attorney fees. Costs are taxed to Matt.

AFFIRMED.