

**IN THE COURT OF APPEALS OF IOWA**

No. 0-596 / 10-0443  
Filed November 24, 2010

**IN RE THE MARRIAGE OF JOHN P. MANN AND JESSICA M. MANN**

**Upon the Petition of**

**JOHN P. MANN,**  
Petitioner-Appellee,

**And Concerning**

**JESSICA M. MANN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Winneshiek County, John Bauercamper, Judge.

Jessica Mann appeals from child custody provisions of the decree dissolving her marriage to John Mann. **AFFIRMED.**

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C., Decorah, for appellant.

Andrew P. Nelson of Meyer, Lorentzen & Nelson, Decorah, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

**TABOR, J.**

Jessica Mann appeals from child custody provisions of the decree dissolving her marriage to John Mann. She contends the court erred in granting John physical care of their two children. In weighing the factors outlined by our supreme court and the legislature, we agree with the district court's assessment that this custody determination is a difficult one to make. But we conclude the children's long-term best interests are better served by granting John physical care. Accordingly, we affirm.

***I. Background Facts and Proceedings.*** John and Jessica were married on April 26, 2002. They have two minor children: Allen, born in December 2002, and Carly, born in November 2005.<sup>1</sup> Carly was born prematurely and suffers from a genetic disorder known as otopalatodigital syndrome. She has a tracheotomy<sup>2</sup> and a feeding tube, and requires between twelve and fourteen hours of outside nursing care daily. Both John and Jessica are trained to care for her.

John was born in 1978 and is in good health. He has a high school degree and obtained one year of community college training in plumbing and heating. Since May 2009, he has been employed at Mracek's Plumbing where he earns \$11.25 per hour. Jessica was born in 1982 and has no health concerns. She has some education toward a nursing degree, but left the

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<sup>1</sup> The parties also had a child, Heath, who was born between Allen and Carly. He was born with severe health problems and died approximately one year before the parties separated.

<sup>2</sup> The record shows Carly's respiratory status has improved and at the time of the hearing, she had a cap over the tracheotomy tube which allows her to breathe normally. When she has difficulty breathing she still requires the assistance of oxygen.

program to care for her children. She works fifteen to sixteen hours per week as a community trainer for Goodwill Industries. She chooses not to work more than that because it would restrict her ability to maintain Title XIX insurance for Carly.

The parties separated in November 2006. John moved into his mother's home, where both his mother and sister reside. His mother works as a medical aide. His sister, Patty, works as a registered nurse for the home health organization that administers Carly's medical services. Patty provides nursing services to Carly when the child is in John's care, but not when the child is in Jessica's care. Jessica remained in the marital home with the children.

Following their separation, the parties began a visitation schedule with John receiving visitation every other weekend. Jessica filed a dissolution petition, which was later dismissed. In that action, a temporary order was entered in October 2007 to grant John visitation on alternate weekends and overnights on Wednesdays of the weeks he did not have weekend visitation. The parties continued to follow that visitation schedule through trial in this matter.

The same order required John to pay Jessica child support in the amount of \$335 per month. After dismissal of the action, John stopped paying the child support. The Child Support Recovery Unit issued an administrative support order requiring John to pay \$396 per month in child support, with which he has complied.

Prior to the parties' separation, John's job required him to work out of town during the week, leaving the majority of the child-rearing responsibilities to Jessica. After separating, John obtained employment that enabled him to have a

more active role in the children's lives. But Jessica continued to be primarily responsible for taking Carly to her regular doctors' appointments. Jessica estimated she took Carly to approximately forty visits over the three-year period after separation, while John took her to only one. John also relies on his family members to assist with visitation exchanges; John works from approximately 7:30 a.m. until 5:30 p.m. and looks to his mother (and sometimes his girlfriend) to pick up or drop off the children.

After separating, both parties began relationships with other people. John has been dating Erin, a nursing student at Luther College. John and Erin live together and plan to marry; Erin is trained to care for Carly. Jessica lives with her boyfriend, Chris.

Since the parties separated, the Department of Human Services (DHS) has investigated Jessica's home at least four times. In May 2007, the DHS investigated an allegation that Jessica failed to provide adequate shelter based on the children's exposure to pet urine and feces in the home, as well as the failure to pick up small objects that presented a choking hazard for Carly. The social worker showed Jessica what needed to be corrected and Jessica eliminated the problem by the second visit. In January 2010, DHS investigated Jessica's home following an allegation that she again failed to provide adequate shelter due to the strong odor of pet urine and the presence of dog feces in areas accessible to the children. The DHS listed the report of denial of critical care and failure to provide adequate shelter as "founded." The report details the unsafe and unsanitary conditions as follows:

CPW observed the home and found conditions unsafe for the children. There was dog feces on children's clothing on the floor in the kitchen, numerous piles of dog feces on the floor in the children's bedroom and in a second room upstairs and a strong odor of feces and dog urine in the home. There were also piles of clothing and other items around each room. There were bags of garbage stacked in and around the waste basket in the kitchen and dishes and other items filling the sink and covering the kitchen counter. There [were] also numerous small items on the floor including a coin and decorative light bulb that could present a choking risk to Carly. In addition the home was being heated entirely by space heaters. CPW spoke with Carly's nurse, who reported finding dog feces in the home on numerous occasions. CPW also spoke with the children's physician, who reported dog feces presented health risks for both children. The conditions existing in the home are such that they would have accumulated over time rather than existing due to a crisis or disaster situation. In this situation, Jessica failed to provide for adequate shelter for these children.

Because the gas heater in the home was not functioning, the kitchen pipes had been frozen for about one week before the DHS conducted its investigation.

During the summer of 2009, Jessica applied for Supplemental Security Income (SSI) benefits for Carly. She now receives approximately \$575 per month from Social Security, though the exact amount fluctuates in relation to her earnings. Jessica did not inform John of her application and receipt of the benefits. She also has never provided John with a copy of Carly's insurance card.

On April 17, 2009, John filed a petition for dissolution seeking temporary and permanent physical care of the children. In her answer on May 15, 2009, Jessica sought temporary and permanent physical care of the children.<sup>3</sup>

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<sup>3</sup> Neither party requested joint physical care of the children.

The district court held trial on February 4 and 5, 2010. In its February 12, 2010 decree dissolving the marriage, the district court granted John physical care of the children with the following analysis:

Both parties are appropriate caretakers for the children. The respondent has been their primary caretaker in the past. Both parents receive the same amount of intensive in-home nursing care for their special needs child. Some basic needs have been neglected in the respondent's home. Communication and the sharing of information between parents is not at an acceptable level.

The placement decision in this case is close. However, the evidence persuades the court that petitioner is the superior parent, because he can administer most effectively to the long-term best interests of the children, place them in an environment that will foster healthy physical and emotional development, and promote contact with both parents. Therefore, primary placement of the children should be awarded to the petitioner.

Jessica appeals.

**II. Scope and Standard of Review.** We review a custody order de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. See *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50-51 (Iowa 1999). It is significant that the "trial court had the opportunity to observe the parties, listen to them and watch them in person. Although we are not bound by the trial court's findings, in a case such as this we give them weight." *Jacobs v. Jacobs*, 216 N.W.2d 312, 314 (Iowa 1974).

**III. Analysis.** The best interest of the children is our standard for deciding child custody. Iowa R. App. P. 6.14(6)(o); *Murphy*, 592 N.W.2d at 683. Our objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683. In

considering what custody arrangement is in the best interest of the children, we consider statutory factors. Iowa Code § 598.41(3) (2009). All these factors bear upon the “first and governing consideration” as to what will be in the best long-term interest of the child. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). These statutory factors and the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974), are appropriately considered in determining the award of physical care. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992).

The factors enumerated in *Winter*, 223 N.W.2d at 166-67, are:

1. The characteristics of each child, including age, maturity, mental and physical health.
2. The emotional, social, moral, material, and educational needs of the child.
3. The characteristics of each parent, including age, character, stability, mental and physical health.
4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
5. The interpersonal relationship between the child and each parent.
6. The interpersonal relationship between the child and his or her siblings.
7. The effect on the child of continuing or disrupting an existing custodial status.
8. The nature of each proposed environment, including its stability and wholesomeness.
9. The preference of the child, if the child is of sufficient age and maturity.
10. The report and recommendation of the attorney for the child or other independent investigator.
11. Available alternatives.
12. Any other relevant matter the evidence in a particular case may disclose.

Jessica first argues we should give her role as the children’s primary caretaker significant weight on review. Iowa Code section 598.41(3)(d) lists

“[w]hether both parents have actively cared for the child before and since the separation” as one of the ten factors the court is to consider in making a best interest determination. One of the factors enumerated in *Winters* is the “effect on the child of continuing or disrupting an existing custodial status.” The role of primary caretaker is critical in the development of children, and careful consideration is given in custody disputes to allowing children to remain with the parent who has been the primary caregiver. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). But the fact a parent was the primary caretaker does not assure he or she will be the custodial parent. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003).

Jessica was the primary caretaker for the children prior to the parties’ separation. John traveled extensively for work, which left the child care largely to Jessica. During the separation, Jessica continued as the children’s primary caretaker, with John receiving visitation alternate weekends and Wednesdays. Jessica also took primary responsibility for attending Carly’s medical appointments during this time, with John taking her to only one doctor’s appointment by himself. This factor militates in favor of granting Jessica physical care.

Jessica also argues John relies too heavily on his mother, sister, and girlfriend to attend to the children’s needs, particularly Carly’s medical care. Jessica makes much of the fact John continues to reside with his mother and sister and that they transport the children for visitation while he is at work. But the record does not suggest John is incapable of handling the child care without



such assistance. The children's contact with extended family is a benefit—not a detriment—to their well-being. See *In re Marriage of Burkle*, 525 N.W.2d 439, 442 (Iowa Ct. App. 1994) (finding it appropriate to consider whether environment offered by custodial parent will include extended family members). John's mother, sister, and girlfriend all have medical backgrounds that enable them to assist with Carly's special needs. Plus, the evidence shows John is trained to care for his daughter and nothing in the record suggests that he cannot do so on his own.

The tipping factor for the district court—and for our court—is the evidence of the DHS investigations, the last of which resulted in a founded denial of critical care one month prior to the start of trial. One of the factors driving custody determinations articulated by our supreme court is “the nature of each proposed environment, including its stability and wholesomeness.” See *Winter*, 223 N.W.2d at 166-67. Here, we find that John's home offers a more stable and wholesome environment. Jessica claims the district court overemphasized this evidence and argues her lax housekeeping should not have outweighed the fact she was the children's primary caretaker before and during the separation. But the evidence shows that over the years there have been serious concerns about Jessica's ability to maintain a safe and healthy home for the children. The concerns include her failure to remove dog feces from the floor as well as other small objects that could present a hazard to young children. The house reeked of pet urine and feces when the DHS investigated in both 2007 and 2010. The

January 2010 report details not an isolated failure to remove dog waste, but what the investigator classified as unsanitary conditions that accumulated over time.

Jessica also failed to properly heat her home. The central heating system was inadequate and Jessica relied on space heaters. At the time of the January 2010 DHS investigation, the kitchen pipes were frozen and the children were sleeping in the living room because their bedrooms were too cold. A nurse who provided Carly's care informed the worker she wore layers of clothing when in the home in an attempt to keep warm.

The district court had an opportunity to observe the parties and their witnesses. With regard to the subject matter of the DHS investigations, it found that "Jessica has minimized the seriousness of the situation and her need for services" and that "[s]ome basic needs have been neglected" in Jessica's care. We give credence to the court's implicit credibility determination.

We agree with the district court that this case is a close one. However, when weighing the factors in *Winter* and those set forth in section 598.41(3), we find the balance tips in John's favor. Both parents are devoted to their children. Both are capable of caring for Carly's medical needs. But the concerns that existed in 2007 and led to a DHS investigation continued to exist just weeks before trial. While factors involving maintenance of the existing custodial status and primary caretaker weigh in favor of granting Jessica physical care of the children, concerns about her ability to safely parent the children outweigh those factors. We conclude John is better able to provide for the children's needs.

Accordingly, we affirm the portion of the decree granting John physical care of the children.

**AFFIRMED.**