

IN THE COURT OF APPEALS OF IOWA

No. 0-746 / 10-0362
Filed December 22, 2010

**IN RE THE MARRIAGE OF CHRISTINE ANN ELDRED
AND JOSEPH ALAN ELDRED**

**Upon the Petition of
CHRISTINE ANN ELDRED,**
Petitioner-Appellant,

**And Concerning
JOSEPH ALAN ELDRED,**
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill,
Judge.

Christine Eldred appeals from the child custody, visitation, and support
provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Mark Fisher, Cedar Rapids, and Monty L. Fisher, P.L.L.C., Fort Dodge, for
appellant.

Thomas S. Viner of Jacobsen, Johnson & Viner P.L.C., Cedar Rapids, for
appellee.

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

DANILSON, J.

Christine Eldred appeals the custody and visitation provisions of the parties' dissolution decree. Both parents are capable and willing to provide physical care. In light of Christine's sudden, month-long absence, we find no reason to disturb the court's award of physical care to Joseph. However, we modify the visitation provisions of the decree.

I. Background Facts and Proceedings.

Joseph and Christine were married in 1998. Unable to have children of their own, they adopted a newborn daughter in 2004. This was a private adoption, and the infant came to live with them shortly after her birth. Christine, who was working full-time before the adoption, became a stay-at-home mother. She did continue to work during the tax seasons however. Joseph has worked in retail management for about ten years, which entails working many hours, holidays, and weekends. Both parties have support from their extended families.

Joseph and Christine were presented with an opportunity to again adopt in 2008. They were experiencing some marital difficulties but nonetheless decided to proceed to adopt a second child (born in June 2008) and work on the issues in their marriage. The adoption was finalized, but the couple separated shortly thereafter.

On September 19, 2008, Joseph returned from an out-of-town work trip to find Christine had had a visit from Ryan Harding, a man with whom she had been corresponding by telephone and the Internet for "the last year," but whom she had not previously met in person. Joseph told Christine she needed to make arrangements to leave the family home. Christine left that day with Harding and

drove to Utah. Joseph was required to make childcare arrangements quickly, but he did so and continued to maintain his employment.

Christine called Joseph from Utah to say that she had arrived and to talk to their daughter. Christine also called on a number of other occasions to speak with their daughter. She returned to Iowa with little notice on October 22, 2008. Upon her return, Christine lived with various family members, visiting and providing routine care for the children during the day.

From January to April 15, 2009, Christine worked forty-five to sixty hours per week as a tax preparer. By agreement, Christine moved into the marital home in mid-February 2009. She filed a petition for dissolution of marriage on February 26, 2009, and moved into her own apartment in April 2009. Until the end of tax season, the children were in Joseph's care the majority of the time. From mid-April 2009 until August 2009 Joseph had the children four overnights each week, and Christine had them three.

On August 18, 2009, Christine's "Application for Temporary Custody and Support" came before the court. Both parties sought physical care of the children. Based on affidavits and arguments of counsel, the court entered an order granting the parties joint legal custody and Christine temporary physical care. Joseph was granted visitation Wednesdays from 4:30 to 8:00 p.m. and every other weekend from Friday at 4:30 p.m. until Sunday at 5:00 p.m.

Trial was held December 16-17, 2009, after which the district court found "both parties are willing and capable of providing primary physical care for the

children and both parties' request to be awarded primary physical care is based upon their sincere devotion to the children."¹ The district court wrote:

While in Utah, Christine got a part-time job and occasionally called to check on her children Christine claims this trip was a pre-planned vacation and that she went with her friend 'Ryan' only because he was going to take her hunting. The Court finds Christine's story to be incredible and her attempt to convince the Court this was simply a vacation raises serious questions about her overall credibility. Moreover, Christine has maintained throughout this case that Joseph cannot adequately care for the needs of [the children]. Christine's leaving the children with Joseph for what was at the time an undetermined amount of time, without making any arrangements for their care, is inconsistent with this assertion. On the other hand, if Christine truly believed Joseph was incapable of providing adequate care for the children, her leaving the children for a month without making any arrangements for others to assist in their care suggests a serious disregard for their well-being.

. . . .

After carefully considering the credible evidence presented in this case, the Court finds awarding the parties joint legal custody and primary physical care to Joseph is in the best interests of the children. Christine will be awarded liberal visitation. The decision as to the primary physical placement of the children was a close call for the court. There is more to being a parent than simply earning an income or keeping watch over the kids. Ultimately, the Court finds Joseph will best attend to the physical, emotional, educational, and social needs of the children as they grow. Christine's spontaneous trip to Utah in September 2008 played a significant role in the Court's decision. Not only was Christine's characterization of this trip as a vacation unbelievable, it called her overall credibility into question with the Court. By awarding Joseph primary physical care of [the children], the Court is not punishing Christine for this conduct; rather, the Court finds this conduct was not consistent with the best interests of the children.

The district court set forth a visitation schedule, which included Wednesdays from 4:30 p.m. to 8:00 p.m., overnights every other weekend, and

¹ The court also noted that neither party had requested joint physical care and thus such an award would not be made. See Iowa Code § 598.41(5) (2009) ("If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents *upon the request of either parent.*" (emphasis added)).

two weeks of summer visitation. Christine now appeals the custody and visitation provisions of the dissolution decree.

II. Scope and Standard of Review.

Because this is an action in equity, our review is de novo. Iowa R. App. P. 6.907. We are not bound by the district court's findings of facts, but we give them deference because the district court has a firsthand opportunity to view the demeanor of the parents and evaluate them as custodians. Iowa R. App. P. 6.904(3)(g); *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004); see *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003).

III. Physical Care.

On appeal, Christine argues the court's award of physical care to Joseph is a result of the court's "desire to punish Christine for what it perceived as misconduct," rather than a proper analysis of the relevant factors. She contends that as the historical primary caregiver, she should have been awarded physical care. She also emphasizes that she was awarded physical care in the temporary order concerning custody and support.²

The primary consideration in any physical care determination is the best interests of the children. Iowa R. App. P. 6.904(3)(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) (2009), as well as the factors identified in *In re*

² We note, "[t]emporary orders awarding physical custody create no presumption that parent is the preferred parent in a final custody decision." *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998); see also *In re Marriage of Denly*, 590 N.W.2d 48, 52 (Iowa 1999) (noting "which party is awarded custody of the couple's child or children on a temporary basis is not a factor that the district court is to consider in determining the final custody arrangement").

Marriage of Weidner, 338 N.W.2d 351, 355–56 (Iowa 1983), and *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). The objective is to place the children in the environment most likely to bring the child to healthy physical, mental, and social maturity. See *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37–38 (Iowa Ct. App. 1996).

Here, we agree with the district court that both parents are “willing and capable of providing primary physical care for the children.” Both parents have suitable homes. Both parents also have the love and support of their parents, the children’s grandparents, who have proved ready and able to assist in the care of these children.

Nonetheless, the court is required to determine which parent can minister most effectively to the children’s long-term interests.³ *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). To reach such a determination, we consider the emotional and environmental stability each parent offers. *Id.* at 762. And as much as Christine argues otherwise, her decision to leave the children without notice for more than a month, so she could travel out-of-state in the company of a person she had just met, is a relevant consideration.

First, her sudden departure negatively affected her children, particularly her daughter, who “was extremely upset when her mother left home.” Christine

³ We do not consider Christine’s suggestion that we award joint physical care because neither party requested joint custody. Iowa Code § 598.41(2)(a) (“On the application of either parent, the court shall consider granting joint custody”) Christine did not seek joint custody until *after* the district court filed its decision; we agree with the district court that such a filing comes too late.

exercised very poor judgment in leaving the state with a person she had just met. In doing so, she also put her own interests before those of her children. Moreover, Christine's decision to leave the children in Joseph's sole care belies her claim now that Joseph is not an able caregiver. She was willing to entrust her children in Joseph's care when she left the state, and after consideration of all the evidence, we believe there is no convincing reason why we cannot place this same responsibility upon Joseph at this time.

Both parties accused the other of improper behavior, and Christine asserts the district court failed to consider specific accusations against Joseph. The district court did not fail to consider her claims, but found "insufficient proof to establish these accusations." We agree there was insufficient proof of Christine's allegation that Joseph left the baby unattended while walking the dog on one occasion. We are also unconvinced that Joseph has failed to support Christine's relationship with the children. He unwisely refused Christine additional visitation on Halloween, but after Christine's return from Utah, he allowed Christine to immediately resume a role in the children's caretaking notwithstanding Christine's actions.

However, contrary to the district court, we believe Christine has presented sufficient evidence that Joseph has been involved in pornography on the Internet; lacked credibility in respect to his use of pornography; has struggled with his finances; and at times his home has been in disarray. These concerns give cause to hesitate in our decision but are outweighed by Joseph's stability and Christine's lack of concern for the emotional well-being for her children shown by her abrupt move to Utah.

We find no reason to disturb the district court's award of physical care to Joseph. With Joseph as the physical caregiver, the children will continue to live in the family home, and continue to be near extended family. We affirm the award of physical care to Joseph.

On appeal, Christine contends that in the event we do not disturb the trial court's custody decision, we should allow more liberal visitation. We agree. Given Christine's past role as the primary caretaker, we think more liberal visitation is appropriate. We modify the visitation provisions to the following extent: Christine shall have the care of the minor children every Wednesday from 4:30 p.m. to Thursday at 9:00 a.m. Christine shall be entitled to six weeks of visitation in the summer to be exercised in two week intervals. Like the district court, we note the visitation schedule is the minimum required. The parties are free to reach an agreement to allow more expansive visitation and are encouraged to rely upon each other to provide the care for their children in the other's absence. It is impossible to fashion a decree to predict future special or important family events. We agree with the district court and cannot overemphasize that the parties should strive to be flexible so the children can be present at all of the special events of both families. All other visitation terms not modified shall remain in effect.

IV. Appellate Attorney Fees.

Both parties seek an award of appellate attorney fees. We enjoy broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In exercising this discretion, we consider several factors: the financial needs of the party seeking the award, the ability of the other

party to pay, and the relative merits of the appeal. *Id.* We decline to award appellate attorney fees to either party.

Costs of this appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.