

**IN THE COURT OF APPEALS OF IOWA**

No. 0-847 / 10-0455  
Filed February 9, 2011

**IN RE THE MARRIAGE OF TROY ALAN HOFER AND AIMEE MARIE HOFER**

**Upon the Petition of**

**TROY ALAN HOFER,**  
Petitioner-Appellant,

**And Concerning**

**AIMEE MARIE HOFER,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

Troy Hofer appeals from the custody provisions of the decree dissolving his marriage to Aimee Hofer. **AFFIRMED.**

Joseph E. Halbur, Carroll, for appellant.

Mark Rasmussen, Jefferson, Joseph G. Basque, and Andrea Smith, legal intern, Iowa Legal Aid, Council Bluffs, for appellee.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

**TABOR, J.**

Contending he is the more stable parent, a father seeks physical care of his eight-year-old son. The district court found both parents would be suitable caretakers, but concluded from the parents' conduct during their separation that the boy's mother would be more diligent in fostering the father's relationship with their son than the father would be in supporting the mother's access to the child. Given the district court's well-reasoned appraisal of the evidence, we affirm the grant of physical care to the mother.

***I. Background Facts and Proceedings***

Troy and Aimee were married on February 4, 1995 in Redfield, South Dakota. They have one son, J.H., who was born in September 2002. Aimee has one child from a prior relationship, Z.H., who was born in November 1993. Aimee has custody of Z.H., who is mildly autistic.

Troy was born in April 1975. He is in good health and lives in Lanesboro, Iowa, where he rents a three-bedroom home. He was serving in the Air Force in North Dakota when he met and married Aimee. For the past three years, he has worked at a corn processing plant near Glidden. His mother lives in Glidden and is able to care for J.H. while Troy works. Troy has other extended family in the vicinity. He has not dated since his separation from Amy.

Aimee was born in December 1974. She is in good health but suffers from post traumatic stress disorder as a result of abuse suffered during her childhood. She has been seeing a therapist since 2008. Around the time the parties married, she developed an interest in the tattoo business. She has

worked in tattoo parlors as well as performing various other jobs. At the time of the trial, Aimee was employed at Annie B's Candy and lived in Wabasha, Wisconsin. Her mother and extended family live approximately an hour and one-half away. Aimee has dated several men since her separation from Troy, but has not cohabitated with any of them.

When J.H. was seven months old, Aimee learned she was pregnant with a second child. Two weeks later, she miscarried and slipped into a deep depression. During this time, Aimee went out drinking with her co-workers several times a week.

One night in February 2004, Aimee had been out drinking and when she returned home, she and Troy argued. Aimee reports Troy put her in a strangle hold, punched her in the side of the head, and shoved her down the hallway into a closet. As a result of the incident, Troy was charged with assault, but the prosecutor dismissed the case when he could not contact Aimee. Aimee claims she was never informed of the trial date.

Aimee asserts the physical violence was not an isolated incident, but that Troy had on other occasions held her down on the bed, thrown her across the bed and into a heating register, and thrown her down stairs. As a result of the February 2004 incident, Aimee filed for an order of protection and the couple separated. The order required Troy to leave the parties' home. The order granted Aimee temporary custody of J.H. and required Troy to pay child support.

Both Troy and Aimee have a history of marijuana use. Troy's friends introduced the couple to the drug shortly after they were married and they

smoked it together. Troy received a general discharge from the Air Force in 1997 after a drug test indicated he had used marijuana. Troy also was fired from employment with his uncle in June 2006 when he tested positive for marijuana in a workplace drug test. He attended drug treatment at that time and claims he no longer uses marijuana nor drinks alcohol.

In March 2008, Aimee was arrested for marijuana possession. She pled guilty and received three years probation. The court ordered her not to use alcohol or drugs during her probation and she is tested for these substances when she sees her probation officer. Initially, she met with her probation officer monthly, but at the time of trial only met every three months. She testified she last used marijuana in February 2009 and has not tested positive for any illegal substances since that time. She was not ordered to receive substance abuse treatment but sees a therapist regularly. At the time of the trial, Aimee was seeing a man named Derick, who was convicted of drug charges in 2003, but testified he has been clean since 2004.

Aimee had custody of J.H. until June 2008. In the wake of her criminal charges and finding herself unemployed, she asked Troy to care for both J.H. and Z.H. for one year. Troy agreed to take both boys, but claims there was no agreement for him to return them to her care after a year. He does admit he knew Aimee believed the boys would be returned to her care in June 2009. Aimee agreed to refund Troy's child support payments to him while J.H. was in his care, but she only did so for five months. She did not pay any support for J.H. during this time.

In June 2009, Aimee asked Troy to return the boys to her care. Troy returned his stepson Z.H. to Aimee's care, but refused to return J.H., claiming it was because the younger boy was participating in tee-ball. Troy then filed a petition to dissolve the marriage on June 8, 2009. Aimee kept in contact with J.H. by telephone, but communication between the parties deteriorated and in September 2009, Troy stopped returning Aimee's telephone calls. The parties could not agree on temporary care or visitation, and Aimee did not see J.H. from June 2009 until a temporary visitation agreement was worked out for the Christmas holiday.

The parties stipulated to all matters except physical care of J.H. and the district court held a trial on January 5, 2010, to determine that issue. On February 16, 2010, the district court entered its decree, granting Aimee physical care of J.H. The court concluded that "each party appears to presently have the interest and capacity of providing [J.H.] with an appropriate home," but that the factors in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974) "point to Aimee as the parent who should have responsibility for [J.H.'s] physical care."

The court continued:

[J.H.] and [Z.H.] have a close relationship, and accordingly, even though [Z.H.] is substantially older than [J.H.], their relationship is entitled to substantial consideration in awarding physical care. Even more important in this court's view, is the fact that Aimee, as the physical care provider, is more likely to support Troy's relationship with [J.H.] than Troy would be to support Aimee's relationship with [J.H.] if he were awarded physical care.

The court chronicled Aimee's efforts to maintain contact between Troy and the children during the couple's separation, and compared that to Troy's conduct:

During the five and one half years following the parties' separation Aimee supported [J.H.'s] relationship with Troy and never attempted to deny Troy contact with [J.H.]. Moreover, when she believed that Troy could better provide for [J.H.], she unselfishly relinquished care to Troy. On the other hand, even though Troy knew that Aimee understood that he was going to care for the children for only one year to allow her to get a residence, a job, and to deal with criminal charges, he chose not to disclose to her that he was considering not returning the children until she asked to have them returned. He then restricted her contact with [J.H.] during these proceedings. Troy's conduct since June 2009 has been consistent with the controlling conduct that Troy exhibited while the parties were together. Accordingly, the "custody award . . . which will assure [J.H.] the opportunity for the maximum continuing physical and emotional contact with both parents" is an award that places responsibility for [J.H.] with Aimee.

Troy appeals from this ruling.

## ***II. 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). In doing so, we give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. *Id.* at 51.

## ***III. Analysis***

Our objective in this case, and all cases involving the question of physical care, is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *See Murphy*, 592 N.W.2d at 683. In considering what custody arrangement will be most beneficial to the child, 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); see also Iowa R. App. P. 6.904(3)(o). These statutory factors and the factors identified in *Winter*, 223 N.W.2d at 166-67, are appropriately considered in determining the grant 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, include:

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 its 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.

Troy argues he is a more suitable custodian. He claims he is more stable and mature, citing Aimee's frequent moves and changes in employment. He also notes Aimee is a cigarette smoker and alleges she still uses marijuana. Although Troy acknowledges placement with Aimee allows J.H. to have contact with his half-brother, he urges us to give little weight to the sibling relationship. Troy

argues Z.H. is nearly an adult and not likely to continue living with Aimee. Additionally, the father claims that J.H. finds it difficult at times to be around Z.H.

**1. Stability.** The evidence does show Troy has been more stable in terms of residence and employment than Aimee. Aimee argues that as a single mother, she frequently had difficulty retaining employment because, for instance, she would need to be absent to care for a sick child. She also cites to the economic downturn.

Although the evidence shows Troy has been more stable, there is no evidence that Aimee's frequent moves or job changes have been detrimental to J.H.

**2. Drug Use.** Both parties have a long history of using marijuana. Both claim to have stopped smoking the drug. Troy claims Aimee is still using the controlled substance. He also points out that Aimee's boyfriend, Derick, was convicted of a drug offense. Aimee claims she has not used marijuana since approximately February 2009. Although she did not attend substance abuse treatment, the drug testing she has submitted to as part of her probation has not revealed marijuana use. Derick testified he was addicted to methamphetamine for nine years and was convicted on a methamphetamine-related charge in 2003, but went through substance abuse treatment and has been drug-free since 2004.

Troy claims that when he picked up J.H. from the Christmas visitation, the boy referred to a pipe his mother would smoke when he and his brother were not in the room:

Well, I asked him, you know, if mom had smoked in the car with him and he said yeah, but he said that she didn't smoke the



pipe around him that she only did it when [Z.H.] and he were in a different room.

Q. Okay. What significance does a pipe have to do with anything? A. He realized the difference between the cigarettes, the smell of cigarettes and the smell of marijuana. He was distinguishing that he didn't stink like marijuana saying that she didn't smoke that around him, that she did it in a different room than he was in at the same time.

Q. Did he tell you where she keeps this pipe? A. Yeah, right away he said that she keeps it in a little box underneath the chair next to her desk.

Aimee testified that she does not own a marijuana pipe anymore.

The only credible evidence verifying Aimee's drug use—the results of her probation-required tests—supports her claim that she is not using the controlled substance. Both she and her boyfriend testified she had stopped smoking marijuana. Any statement by J.H. regarding a pipe could be attributed to the time when he was living with Aimee before her arrest and abstention from marijuana.

**3. Sibling Relationship.** Troy also argues the half-sibling relationship with Z.H. does not warrant granting Aimee physical care of J.H. Iowa law recognizes a strong interest in keeping half siblings together. *Yarolem v. Ledford*, 529 N.W.2d 298, 298 (Iowa Ct. App. 1994). But if circumstances arise which demonstrate that separation may better promote the long-term best interests of the children, the court may depart from the rule. *Id.*

At the time of trial, Z.H. was sixteen and J.H. was seven. Troy argues that because Z.H. was nearly grown and would likely be moving out of Aimee's home, no consideration should be given to the sibling bond. Troy contends there is no evidence of an exceptionally close bond between the siblings. He also notes he

acted as a father to Z.H. for most of the boy's life and therefore Z.H. would likely maintain a strong relationship with him and J.H. in the future.

Troy testified he believed it was in the boys' best interests to be separated. He stated that while Z.H. dislikes stress and wants his environment to be calm, controlled, and stable; J.H. is the opposite. J.H. is always on the go and can be "hyper," wanting his older brother to play with him, which can sometimes bother Z.H. When Troy returned Z.H. to Aimee's care in June 2009, he told her he thought Z.H. needed a break from his younger brother.

Aimee's account of the brothers' relationship is quite different. She testified that prior to June 2009, "[Z.H.] never needed a break from [J.H.] before." She also testified that Z.H. was having a hard time without his brother.

He's devastated. He's absolutely devastated. He has nightmares every night. He's having a hard time going to school. I hear about [J.H.] endlessly all day long. [Z.H.] was not happy. He was surprised [J.H.] wasn't coming home.

Aimee also testified, "[J.H.] doesn't want to be away from his brother at all. He wants to be home with him."

Z.H. testified at trial. He said he was "so anxious" to get his brother home and that he missed him terribly every day and every week. He stated that he really cares for his brother and his brother really cares for him.

The truth probably lies somewhere between Aimee's claim that Z.H. has nightmares and asks about his brother constantly, and Troy's claim that Z.H. needs a break from J.H. Because he is mildly autistic and prefers stability and a calm environment, it is likely that there are times that being around J.H. can be trying to Z.H. At the same time, his desire for consistency probably makes it

difficult for Z.H. to be apart from his brother after being together for J.H.'s entire life. The evidence does not support Troy's claim it is not in the boys' best interests to live together. The inference therefore supports placing J.H. with Aimee to maximize contact with his half-brother. But even if we were to disregard the sibling relationship, there are other compelling reasons to grant Aimee physical care of J.H.

**4. Primary Caregiver.** Although it was not discussed by the district court, 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 to consider in making a best-interest determination. The factors enumerated in *Winter* include the “effect on the child of continuing or disrupting an existing custodial status.” The role of the primary caretaker is critical in children's development, and we give careful consideration 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 guarantee he or she will be the custodial parent. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003).

J.H. was in Aimee's care from the time of the parties' separation in February 2004 until she voluntarily placed him in Troy's care in June 2008, which was supposed to be for a one-year period while she got back on her feet. Troy cared for J.H. for the year and one-half leading up to trial. Notwithstanding the most recent eighteen months of care by Troy, the long-view of the evidence points to Aimee as the child's primary caretaker.

**5. Domestic Abuse.** This court has recognized domestic abuse is a factor in determining which parent should be granted child custody. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). This is because domestic abuse can have “ravaging and long-term consequences” on children. *Id.* at 54–55. Spousal abuse discloses a serious character flaw in the batterer and an equally serious parenting flaw. *Id.* at 55.

Consequently, we believe evidence of untreated domestic battering should be given considerable weight in determining the primary caretaker, and under some circumstances even foreclose an award of primary care to a spouse who batters. Domestic abuse is, in every respect, dramatically opposed to a child’s best interests.

*Id.*

Aimee obtained a protective order against Troy following the February 2004 altercation. That altercation also resulted in peace officers responding to the scene and arresting Troy. The police report states as follows:

[Aimee] stated they argued verbally for a short time and then Troy grabbed her around the neck and shook her around. She stated he punched her in the arm. She also stated that he took her and banged her head against the wall. . . . Aimee had a scratch from her jaw along her cheek. It was not a very deep scratch, but it was completely visible. I took pictures of this scratch. She also showed me a scrape on her right hip bone. I asked her how that had happened and she stated that when she tried to walk away from Troy, he pushed her down into the closet door down the hallway towards the bedroom and she scraped her hip on the closet. Aimee stated that this went on either verbally or with him hitting her, pushing, her, choking her between the time she got home at approximately 0400 hrs. to about 0600 hrs. when she fell asleep. She did say that she was scared and fearful that he would do more when I asked her why she did not call the police. I asked Aimee if this has ever happened before and she stated it did a few months prior in late fall. She stated a similar incident happened where Troy had hit her and that while she was laying across the hood of their vehicle, he drove and knocked her off the vehicle.

Aimee testified that on other occasions their arguments escalated to physical violence: “Oh, I’ve been held down on the bed until I see things his way. I’ve been thrown across the bed into the heating register one time and down the steps until I see it his way.”

While the record contains only one reported incident of domestic abuse, that encounter was serious enough that the court granted Aimee a protective order which prohibited Troy from returning to the family home. She also testified to a pattern of abusive and controlling behavior by Troy. The district court found Aimee’s claim to be credible given its finding that “Troy’s conduct since June 2009 has been consistent with the controlling conduct that Troy exhibited while the parties were together.” Even if there is not sufficient evidence of Troy’s domestic violence, his controlling behavior weighs in favor of granting Aimee physical care.

**6. Supporting the other parent’s relationship.** Iowa Code section 598.41(3)(e) requires the courts to consider whether each parent can support the other parent’s relationship with the child when making custody determinations. As the district court found, the record here shows Troy at times has not supported Aimee’s relationship with their son, which weighs heavily against granting him primary care of J.H.

Aimee voluntarily placed J.H. in Troy’s care in June 2008, believing he would be returned to her after a year, once she had regained stability. In June 2009, Troy stated he would return J.H. after tee-ball was over, but instead filed dissolution papers. During Aimee’s telephone visits with J.H., Troy put the

telephone on speaker to monitor their conversations. He also recorded conversations. He did not allow Aimee physical visitation with J.H. and stopped returning her telephone calls in September 2009, claiming she was not following the directives of the Children in the Middle program. Aimee finally received visitation with J.H. over the Christmas holiday, but only after engaging the services of an attorney.

Conversely, when Aimee cared for J.H. and the protective order was in place, she arranged for her sister to keep in contact with Troy so he could stay in touch with J.H. because Troy was not allowed to call the house directly. Aimee attempted to amend the protective order to allow Troy to call the house so he could visit with J.H. and eventually bought a cell phone for J.H. so Troy could call him directly. She allowed Troy to visit J.H. whenever he wanted, including a few weeks in the summer.

The evidence shows Troy has not supported their son's relationship with Aimee. Aimee is the party most likely to encourage J.H.'s relationship with the noncustodial parent. Not only did Troy not encourage a relationship between Aimee and their son, he thwarted it. This factor weighs most heavily in favor of granting Aimee physical care. As noted in *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984):

This court has long recognized the need for a child of divorce to maintain meaningful relations with both parents. See *Bolin*, 336 N.W.2d at 445 (father's conduct in trying to alienate child from his mother found to "reflect adversely on his custodial ability"); *Burham*, 283 N.W.2d at 276 ("In fixing custody in the past, this court has considered the willingness of each party to allow the children access to the other party."); *Petition of Ferguson*, 244 N.W.2d 817, 819 (Iowa 1976) ("balance tips toward [father]" because with him

child would have a better chance of substantial contact with both parents).

After weighing the factors set forth in section 598.41(3) and those enumerated in *Winter*, we affirm the district court's grant of the child's physical care to Aimee.

**AFFIRMED.**