

**IN THE COURT OF APPEALS OF IOWA**

No. 3-034 / 12-1390  
Filed February 13, 2013

**IN RE THE MARRIAGE OF CHRISTINA FITZGERALD  
AND TODD FITZGERALD**

**Upon the Petition of  
CHRISTINA FITZGERALD,**  
Petitioner-Appellant,

**And Concerning  
TODD FITZGERALD,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson,  
Judge.

Christina Fitzgerald appeals from the physical care provisions of the  
decree dissolving her marriage to Todd Fitzgerald. **AFFIRMED.**

Gordon E. Allen of the Drake Legal Clinic, Des Moines, for appellant.

William E. Sales III of Sales Law Firm, P.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

**POTTERFIELD, J.**

Christina Fitzgerald appeals from the physical care provisions of the decree dissolving her marriage to Todd Fitzgerald. We affirm.

Christina and Todd were married in October 1998. They are the parents of three children whose custody is at issue here: T.F., born in July 1997; C.F., born in December 2000; and T.F., born in February 2006. Christina has two other children: a son, born in 1994; and a daughter, born during the parties' marriage, but Todd is not her biological father.

The parties' marriage was tumultuous, and the parties had at least one prior separation. Both have been convicted of assaults upon the other. Both have violated no contact orders.

Todd left the family residence in May 2010. Pursuant to a stipulated protective order filed June 14, 2010, Christina was awarded temporary physical care of the children. She filed a petition for dissolution of marriage in October 2010.

Todd moved to Illinois in February 2011, where he continues to reside with his paramour and her three children. During the pendency of the dissolution action, Christina was involved in three child protective investigations, all of which resulted in findings that the children were "safe."<sup>1</sup> In April 2011, during a child

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<sup>1</sup> One investigation was due to Christina having left the three children at issue in the care of her older son and her niece for three days. Christina's oldest son has special needs. The adult niece was living with Christina at the time and had had her own children removed from her care due to neglect. The Department of Human Services (DHS) determined the niece was not a suitable caregiver, but because DHS had never told Christina or the niece she was not allowed to provide care to Christina's children, and the children were determined to be safe, the report was "not founded." Another investigation occurred because Christina and her sister, with whom Christina and the children were then living, had gotten into an argument. During that argument, the sister

protective investigation, Christina sent the children to live with Todd, though she did not inform DHS that she had done so. She demanded the children's return in May, which led Todd to seek temporary care. Trial was then scheduled for September 2011. The court noted it had "no information" about Todd's girlfriend, her children, or the school the children were attending. The court noted Todd's "cramped" living conditions with six children and Christina's larger duplex. The court wrote:

It is difficult to determine the best interests of the children based on the scant record before the court. However, the court concludes that the children should be returned to their mother after the end of the school year.

Todd brought the children to Christina after the end of school in May 2011 and, while he was here in Iowa, the two had sex. Christina later learned she was pregnant.<sup>2</sup> The parties sought a continuance of the dissolution trial until after Christina gave birth.

Following the June 6-7, 2012 trial, the court found:

Both parties repeatedly displayed extraordinarily immature, narcissistic behavior coupled with excessive amounts of poor judgment. Both of them had inconsistencies in their testimony and both of them lacked credibility; however[,] Todd seemed less inclined to minimize his struggles and appeared to be making efforts to create a more stable life for himself and his children.

The court granted the parties joint custody and placed the children in Todd's physical care. The district court considered the parties' history of violence in its ruling, observing that "[v]iolence seems to be an ongoing issue for Christina in a great number of her relationships," including her relationships with sister, brother,

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threw a glass jar or vase and shattering glass hit the older child. This investigation resulted in a founded abuse report against the sister.

<sup>2</sup> Paternity testing showed Todd was not the biological father.

the putative father of her newborn child, and her fourteen-year-old son. In contrast, the court noted that since separation from Christina, “Todd has continued to gradually and increasingly stabilize his life and eliminated incidences of violence.” Finding that “one way to stop the cycle of dysfunction and violence is through education,” the court concluded it was in the children’s best interests to be placed in Todd’s physical care because “[t]he record is undisputed that the children attend school regularly when in Todd’s care and sporadically when in Christina’s care.”

Upon our de novo review, see Iowa R. App. P. 6.907, we affirm. We acknowledge that Christina has been the primary caregiver. However, “[g]reater primary care experience is one of many factors the court considers but it does not ensure an award of physical care.” *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996); see Iowa Code § 598.41(3) (2011) (listing factors to be considered in determining custody arrangement).

We also acknowledge that the older son has expressed a desire not to live with his father. The preferences of a child, while not controlling, are relevant. *McKee v. Dicus*, 785 N.W.2d 733, 738 (Iowa Ct. App. 2010). One of the factors a court must consider in determining what physical custody arrangement is in the best interests of a child is “whether the custody arrangement is in accord with the child’s wishes or whether the child has strong opposition, taking into consideration the child’s age and maturity.” Iowa Code § 598.41(3)(f). “In determining the weight to be given to a child’s wishes, we consider the following factors: (1) the child’s age and educational level; (2) the strength of the child’s preference; (3) the child’s relationship with family members; and (4) the reasons

the child gives for his decision.” *McKee*, 785 N.W.2d at 738. Here, the fifteen-year-old did not testify at the trial and we cannot determine when he expressed his preference, how strong his opposition is to the physical care arrangement, or his level of maturity. His counselor testified that the boy “is having a pretty typical reaction. I would categorize it as typical, based on kind of this history that he has with—his father and his parents separating.” The child’s preference here does not sway our decision.

There is no purpose in repeating the parties’ shortcomings. We have reviewed the record and agree with the trial court that the best interests of the children here are served by placing them in the physical care of the parent who ensures the children’s attendance to school and who has not continued to be involved in physical confrontations.

**AFFIRMED.**