

**IN THE COURT OF APPEALS OF IOWA**

No. 6-851 / 06-0639  
Filed December 28, 2006

**JOHN TRACY MOORE, III,**  
Petitioner-Appellant,

**vs.**

**AMANDA S. LUKASZEWICZ,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Linn County, William L. Thomas,  
Judge.

John Tracey Moore III appeals from an initial child custody determination.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Frank J. Nidey of Nidey, Peterson, Erdahl & Tindal, P.L.C., Cedar Rapids,  
for the appellant.

Linda Hansen Robbins, Cedar Rapids, for the appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**SACKETT, C.J.**

John Tracey Moore III appeals from an initial child custody determination. He contends that he, not his two children's mother, Amanda Cooper, should have been granted primary physical care or that he and Amanda should have shared care on a week-to-week basis. We affirm in part, reverse in part and remand.

The controlling consideration in determining custody is the interest of the child. Iowa R. App. P. 6.14(6)(o). In deciding this question, we review the record de novo. Iowa R. App. P. 6.4. We give weight to the findings of the trial court, but are not bound by them. See *In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). There is no inference favoring one party as opposed to the other in deciding which one should have custody. See *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can administer more effectively to the long-range interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). "The critical issue is determining which parent will do better in raising the child; gender is irrelevant, and 'neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding.'" *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985) (quoting *Bowen*, 219 N.W.2d at 689). The criteria governing custody decisions are the same regardless of whether the parties are dissolving their marriage or are unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

At the time of trial, John was twenty-eight years old and Amanda was twenty-six. John is in good health. Amanda was diagnosed with multiple sclerosis in 2003 and takes medication. John and Amanda first met and

established a relationship when Amanda was fourteen. In 1996, at age sixteen, Amanda became pregnant and gave birth to the parties' first child, a daughter. She lived with her parents while she finished high school and at eighteen she and the child moved in with John. The three lived in the same residence for several years, separated and then reunited. Amanda became pregnant with the parties' son, who was born in January of 2002. The parties' relationship ended in September of 2002.

The parties have both been attentive to their children. However, both have had difficulties, have been guilty of indiscretions, and have created at times a chaotic situation for the children because of their apparent inability to work together for the children's benefit.

At the time of the custody hearing, John was employed although he had recently taken a lesser paying job contending he had done so to have more time with his children. His wife is gainfully employed and her child lives with the couple in a four-bedroom home. John's wife had a good relationship with the children and their home seemed relatively stable.

Amanda also is gainfully employed and recently had an advancement and increase in pay. She too is married. She married her husband while he was incarcerated in the Linn County jail. He subsequently was incarcerated in the Fort Dodge, Iowa, correctional facility. He is now released, and at the time of the hearing was looking for work. He apparently had an earlier job which he contends he lost because he was sick.

The district court found Amanda had been the children's primary caretaker during their lifetimes. The court found the children were cared for, prospering,

and healthy, and that both parents had been attentive to the children and should continue to have substantial involvement with them. The court voiced concern about the stability of Amanda's relationship with her husband and John's voluntary reduction in income as a possible prejudice to the children.

John contends the district court should be reversed and he and Amanda should share primary care or that he should be named the primary care parent. John contends Amanda has not been the primary care parent but he too has assumed substantial care for the children during their lifetimes. John is concerned about the children's relationship with Amanda's current husband, her financial instability, the two pit bulls in her home, her numerous traffic offenses, her failure to be attentive to the children's medical needs, and her conviction of operating a motor vehicle while intoxicated. He points out she was driving with the children while her license was under suspension, ran a red light and was hit by another car. He contends their daughter, who was not wearing a seat belt, was injured and Amanda failed to seek medical care for the child and failed to inform John of the accident. He said when he learned of the incident he took the child to the emergency room and found she had a head injury. John also contends Amanda failed to obtain treatment for their daughter's serious case of athlete's foot. He argues he has been more attentive to the children's medical needs than has Amanda.

Amanda argues she has been the primary care parent. She says John has physically abused her and his current wife and that he assaulted another person. Amanda is unhappy that John reduced his income by about \$20,000 a year. She contends the children have an excellent relationship with her new

husband who had lived in her home for about three months prior to the custody hearing. She further contends that John does not support her position with the children.

We agree with the district court that both of the parties have been substantially involved in their children's lives and that at times Amanda has been the primary care parent.

As both parties have remarried we recognize their spouses will have substantial relationships with the children. Amanda and John's wife have a hostile relationship with each other which is not in the children's interest. Each seeks to blame the other for the problems. John's wife testified Amanda pushed her into a car door and there is evidence that exchanging the children has become so difficult that it is done at a neutral site and not at either parties' home.

We do find, however, that John's wife is a stable figure in the household and contributes substantially to the financial well-being of her family. She acknowledged that early in her relationship with John police were called because of a dispute. She testified the couple sought counseling and their relationship has been good. Furthermore, there is no evidence of any use of physical force on John's part since he and his wife sought counseling.

We cannot be as positive about Amanda's husband. They married while he was in jail awaiting a probation revocation hearing. He had a substantial record of convictions including possession of marijuana, absence from custody, a drug stamp tax violation, operating a motor vehicle while intoxicated, assault causing bodily injury, escape, a revocation of probation, driving while his license was under suspension, and criminal trespass. During his incarceration at the

Fort Dodge facility he took parenting classes and he had substance abuse treatment, but he has failed to participate in aftercare since his release. At the time of trial he was unemployed. He has three daughters by three different women. One child is seven, and the other two are four. He pays minimal support for his children. The children do visit in his home every other weekend.

As did the district court, we have problems with Amanda's choice of a husband. His failure to seek aftercare for his addiction is of serious concern. He did take a parenting class and there is no evidence he has been abusive to these children, however, his time with them at the time of trial was limited. Other than the short times he spent in their home, his exposure to them came when Amanda took the children with her for visits at the correctional facility.

"[I]f a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the child[ren] becomes a significant factor in a custody dispute." *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003).

There are two reasons for this: (1) because of the place the companion will have in the child or children's lives, and (2) not less significantly, because the type of relationship the parent has sought to establish and the manner he or she has established it is an indication of where that parent's priority for his or her children is in his or her life.

*Id.*

Amanda's husband has a long history of disregard for the law and substance abuse issues. We cannot on this record determine that his history will not repeat itself. In the time since his release from the correctional facility he has failed to become gainfully employed for any reasonable period. He is not

involved with aftercare. While he claims to have reformed and we hope he has, we cannot dismiss our concern that he may put these children at risk.

John first contends that there should be joint primary physical care. While we appreciate his willingness to keep Amanda substantially involved in the children's lives, we fail to see that sharing the children on a week-to-week basis or other sharing of primary care will be successful. Both parents need to work to improve their communication that involves the children. The hostility that exists in this situation prevents us from considering joint primary physical care as an option. We affirm the district court's denial of joint primary physical care.

John next contends that he should be the primary custodian. Amanda clearly loves her children and has in many instances been attentive to their needs and we commend her for this. We also commend her for being gainfully employed and having been promoted at her job. However, at this time, we find the record supports a finding that John's home is more stable and offers the children the better opportunity. As we have discussed, we have our concerns about Amanda's husband and question the role model he presents the children. We also note that prior to her association with him Amanda had another questionable relationship. We also share John's concern about Amanda's decision to keep two pit bulls in her home with young children. We reverse the denial of John's petition for primary physical care and we modify to name John the primary care parent. We remand to the district court to fix child support and appropriate visitation. We award no attorney fees. Costs on appeals are taxed one half to each party.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**