

IN THE COURT OF APPEALS OF IOWA

No. 7-104 / 06-0965

Filed May 23, 2007

**IN RE THE MARRIAGE OF PENNY LYNNE GRANT
AND BRIAN GRANT**

**Upon the Petition of
PENNY LYNNE GRANT,**
Petitioner-Appellee,

**And Concerning
BRIAN GRANT,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn Pille, Judge.

A father appeals from the physical care provisions of the parties' dissolution decree. **AFFIRMED.**

David L. Brown and Alexander E. Wonio of Hansen, McClintock & Riley, Des Moines, for appellant.

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Brian Grant appeals from the physical care provisions of the parties' dissolution decree. He contends the district court should have awarded him primary physical care of the parties' children. Upon review of the record, we affirm the district court's decree.

I. Background Facts and Proceedings

Brian and Penny Lynne Grant were married in 1995. The parties have three children: Kirsten, born in 1996; Kylie, born in 1999; and Brian Nicholas (Nick), born in 2003. Penny has worked as a mail handler for the United States Postal Service since 1994. Brian does computer work at Communications Data Services. He has also worked as a musician and music teacher.

Penny filed a petition to dissolve the parties' marriage in December 2003. Soon after her petition was filed, Penny filed a petition for relief from domestic abuse. A judge granted her a temporary protective order and scheduled a hearing to determine whether a permanent protective order should be issued. Following an evidentiary hearing held January 13, 2004, the court dismissed Penny's petition for relief from domestic abuse after concluding Penny had failed to prove the allegations of her petition.

Before her petition for relief from domestic abuse was dismissed, Penny took Kylie to Blank Children's Hospital because the child had cuts on her leg allegedly caused by Brian.¹ Shortly thereafter, Penny removed the children from

¹ When Kylie was examined at the hospital, a doctor observed a two-centimeter superficial linear abrasion on her left knee and a three-centimeter superficial linear abrasion on her right inferior buttocks.

the family home and took them to the Family Violence Center. She and the children remained at the center for nearly four months.

The juvenile court became involved with the Grant family after Penny informed the Iowa Department of Human Services (Department) that Brian had injured Kylie. Following an investigation, a Department investigator entered a confirmed report of abuse by Brian against his daughter. On March 23, 2004, the State filed a child in need of assistance (CINA) petition pursuant to Iowa Code section 232.2(6)(b) (2003) (parent has physically abused or neglected child or is imminently likely to do so). At that point, the Polk County Juvenile Court assumed exclusive jurisdiction of the Grant children. On May 9, 2004, the juvenile court ordered Brian to vacate the family home so Penny and the children could live there.

The juvenile court adjudicated the children CINA in an order filed August 18, 2004. The court concluded the children were in need of assistance because their parents were so polarized by the breakdown of their marriage that their behavior was adversely affecting their children's emotional health. However, the court found there was insufficient evidence to support a finding that Brian ever intentionally abused the children. Although the court expressed some concern about Penny's credibility, it awarded physical care of the children to Penny under Department supervision.

The court ordered Penny and Brian to participate in a variety of services, but they continued to have conflicts with one another that caused their children considerable stress. For instance, in April 2005 Penny filed a report with the police alleging Brian had rushed by her and knocked her to the side. As a result

of her report, an assistant county attorney filed a preliminary complaint alleging a violation of a no-contact order, and a warrant was issued for Brian's arrest. After Brian became aware of the warrant, he chose not to address it. Instead, he advised the children of its existence and the fact he might have to go to jail. Brian was arrested in the children's presence when the warrant was served in December 2005. The preliminary complaint was later dismissed without Penny's consultation.

The juvenile court conducted a final review hearing regarding the children in March 2005. The record reveals the juvenile court closed its files regarding the children on June 30, 2005.

When the juvenile court's involvement ended, the district court issued an order regarding temporary matters in the pending dissolution proceeding following a contested hearing. The court awarded Penny temporary physical care of the children pending trial.

Penny's petition to dissolve the parties' marriage was tried in district court in March 2006. At the time of trial, Penny was still residing in the family home with the children, and Brian was residing in Hartford, Iowa. During a three-day trial, both parties detailed their allegations of inappropriate conduct by the other. We find it unnecessary to repeat those allegations in this opinion. On May 11, 2006, the court granted the parties joint legal custody and awarded physical care of the children to Penny. Among other things, the court concluded the evidence was insufficient to support a finding that either party has ever intentionally physically abused their children. The court did find "some basis" existed for each party's negative perception of the other.

Brian has appealed from the court's decree. He contends he should have been named as the children's physical caretaker. Brian also contends the district court erred in ordering each party to pay his or her own trial attorney fees.

II. Scope and Standard of Review

We review the district court's decision de novo. Iowa R. App. P. 6.4. We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the district court had a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Physical Care

Brian claims it is in the best interests of the children to place physical care with him. He contends Penny fabricated allegations of domestic abuse and child abuse because she made no allegations against him until after he contested the issue of physical care. Penny responds that her testimony at trial describes several incidents which would constitute an assault against her under Iowa law. She also contends she can minister more effectively to needs of the children, and she argues she has demonstrated she is willing to support the children's relationship with their father.

When joint physical care is not warranted, the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights. See generally Iowa Code § 598.41(1)(a), (5). Our primary consideration in custody or physical care determinations is the best interests of the children. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). In determining which

physical care arrangement is in the children's best interests, we consider the factors set forth in Iowa Code section 598.41(3), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue is which parent will do better in raising the children; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). 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. With these principles in mind, we address the parties' contentions regarding physical care.

Our de novo review of the record reveals the relationship between Penny and Brian has indeed been tumultuous. Both parties have engaged in some inappropriate behavior. It is fair to say the parties have focused on themselves to the detriment of the children on a number of occasions. Both parents have inappropriately placed the children in the middle of their disputes in an effort to better their own positions.

Fortunately, despite the parties' acrimonious relationship, it appears Penny and Brian are both suitable caretakers for the children. It is clear both parents love their children, and the children love each parent. Each parent has demonstrated the ability to provide for the physical well-being of the children.

Faced with a difficult decision, the district court carefully considered conflicting evidence and ultimately concluded it was in the best interests of the children to be placed with Penny.² In reaching this conclusion, the court

² Although Penny will have physical care of the children, the court's decree provides that Brian will be able to see the children every weekend and every Wednesday night during

considered a number of factors, including, but not limited to: (1) a thorough and thoughtful report by the children's guardian ad litem that recommended placement with Penny; (2) Kirsten's therapist's recommendation that physical care be placed with Penny; (3) Brian's refusal to acknowledge the children's need for therapy and his lack of involvement with the children's therapists; (4) Brian's refusal to follow through with the recommendations from his psycho-social evaluation and to learn stress and anger management skills; and (5) Penny's flexible work schedule. The court also concluded Penny has "indicated and shown a willingness to be supportive of the children's relationship with their father."

After careful review of the record, we find no reason to disagree with the district court's ultimate conclusions. When the parties first became embroiled in the divorce process, Penny was not supportive of Brian's relationship with the children; however, both the district court and the children's guardian ad litem concluded that by the time of trial, she had a realistic understanding of how these proceedings and her actions had affected the children. The district court stated:

[T]he Petitioner has also been regularly involved in individual therapy for approximately two years. Her therapy has focused on the issues identified in her psycho-social evaluation report, among other things. It appears to the Court that she has progressed in putting her differences with the Respondent aside for the sake of supporting his relationship with the children. In that regard, the record reflects and the Court finds that she has been flexible with the visitation schedule for the Respondent and has on a number of occasions agreed to alter the schedule or provide the Respondent with extra time with the children. She appears to keep him informed of medical needs, the educational status of the children, and any schedule changes that might affect his visitation.

the school year. Additionally, Brian will have the children on alternating holidays and four weeks in the summer.

On the other hand, Brian does not seem to be able to overcome his bitterness toward Penny or recognize he has any parenting deficiencies. The district court expressed concern that “he fails to see some important needs of his children.” Giving due deference to the court’s assessments of the evidence, we affirm the district court’s decision to designate Penny as the children’s primary physical caretaker.

IV. Attorney Fees

Brian contends the district court should have awarded him trial attorney fees. We conclude the district court did not abuse its discretion in ordering Penny and Brian to pay their respective trial attorney fees.

V. Conclusion

We affirm the trial court’s decision to award primary physical care of the parties’ children to Penny.

AFFIRMED.