

**IN THE COURT OF APPEALS OF IOWA**

No. 8-459 / 07-1687  
Filed July 16, 2008

**Upon the Petition of  
SCOTT S. BLUM,**  
Petitioner-Appellee,

**And Concerning  
ALICIA KRUGER,**  
Respondent-Appellant.

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

Alicia Kruger appeals from the custodial and visitation provisions of the trial court's decree awarding Scott Blum physical care of their child, Ethan Blum.

**AFFIRMED.**

Kathryn Miller, Des Moines, for appellant.

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, and Timothy G. Pearson of Laden & Pearson, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**HUITINK, J.**

Alicia Kruger appeals from the custodial and visitation provisions of the trial court's decree awarding Scott Blum physical care of their child, Ethan Blum. We affirm.

**I. Background Facts and Proceedings**

Scott and Alicia are the unmarried parents of five-year-old Ethan. Alicia also has an eight-year-old daughter, Sophia, from another relationship. Ethan has resided with Alicia and Sophia since he was born.

In 2003 Scott and Alicia signed and filed a stipulation that provided for joint custody of Ethan. Their stipulation further provided Alicia would have physical care of Ethan, subject to Scott's liberal visitation privileges. Scott also agreed to pay Alicia monthly child support. For reasons not entirely clear from the record, the stipulation was not approved by the court. On July 20, 2006, Scott filed an application requesting the court to establish Ethan's paternity, award the parties joint custody of Ethan, and place Ethan's physical care with Scott, subject to Alicia's liberal visitation privileges. The trial court's August 11, 2006 temporary order awarded the parties joint physical care of Ethan and an alternating visitation schedule, resulting in each party having physical care approximately fifty percent of the time. That order also required the parties to provide alternating transportation incident to their visitation schedule and directed the parties to enroll Ethan in the Ankeny school district for the 2006-07 school year. The court appointed Dr. Sheila Pottebaum to conduct a custody evaluation and submit a report.

In the court's August 28, 2007 decree entered following trial on the merits of Scott's application, the trial court found Scott "has a superior ability to care for the best interest of the minor child and thus a material and substantial change in circumstances now exists . . . ." The trial court noted it "has relied considerably upon the child custody investigation reports of Dr. Shelia Pottebaum" in reaching its decision. The court accordingly awarded the parties joint custody of Ethan and placed him in Scott's physical care, subject to Alicia's specified visitation privileges.

On appeal, Alicia claims: (1) the trial court erred in finding Scott had a superior ability to care for the best interests of Ethan and a material and substantial change in circumstances existed to transfer physical care, and (2) alternatively, the visitation ordered is inadequate to maintain the mother-child bond and the sibling bond between Ethan and his sister, Sophia.

## **II. Standard of Review**

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial 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).

### III. Custody

As a preliminary matter, we must decide whether this case is an original custody action or a modification action. As noted earlier, the parties' 2003 stipulation regarding custody and visitation was not approved by the court or incorporated in an enforceable decree. We accordingly consider this case an original custody proceeding. See *In re Marriage of Von Glan* 525 N.W.2d 427, 430 (Iowa Ct. App. 1994) (stating the enforceability of extrajudicial agreements depends on court approval); cf. *Heyer v. Petersen*, 307 N.W.2d 1, 7 (Iowa 1981) (holding the custody issue was an original determination because the original decree was a nullity).

If joint legal custody is ordered but not joint physical care, the court must choose one parent to be the primary caretaker and award the other parent liberal visitation rights. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). In awarding primary physical care, "[t]he parent who can administer most effectively to the long-term best interests of the child[ ] and place [him or her] in an environment that will foster healthy physical and emotional lives is chosen as [the] primary physical care giver." *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998). "The critical issue . . . is which parent will do better in raising the child; 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). The court must consider the factors set forth in Iowa Code § 598.41(3) (Supp. 2005) and in *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974). *In re Marriage of Williams*, 589 N.W.2d 579, 761 (Iowa Ct. App. 1998). Our supreme court has recently stated that "the factors of continuity, stability, and

approximation are entitled to considerable weight.” *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007).

The record includes evidence of the following: At the time this case was filed in 2006, Alicia, Sophia, and Ethan were living with Alicia’s sister and niece in Ankeny. Alicia was not working. Her only source of income was child support and food stamps. By the time this case was tried in 2007, Alicia was employed full-time at the Boys and Girls Home in Des Moines, had moved into her own apartment, and was engaged to Yashua Winters.

The record also indicates Scott married Cara Stilley in March 2005. They live in Waukee where Scott is employed as a school teacher. Cara is employed at Iowa Lutheran Hospital. Their combined income exceeds \$80,000 per year.

Scott’s stated reasons for requesting physical care include the parties’ inability to resolve visitation issues, as well as Alicia’s alleged failure to respect his role as Ethan’s joint custodian. Alicia claims Scott’s concerns are overstated and his real motive is to reduce or eliminate his child support obligation.

After a thoughtful and thorough evaluation of the parties’ circumstances, Dr. Pottebaum recommended that Ethan’s physical care be awarded to Scott. In her November 6, 2006 custody evaluation, Dr. Pottebaum noted the following:

At the present time, . . . it is clear that Scott has established a stable lifestyle for himself and that his wife is also a stable individual. Scott and Cara are both readily able to define their future life goals. Alicia’s current circumstances appear to be more precarious as she has yet to define a path toward sustainable employment for herself; she has, however, been able to create a stable living situation for her children with her sister. It is the uncertainty Alicia presents about her future that creates a sense of doubt about her ability to sustain independent stability. Alicia appears to gravitate toward a somewhat less structured approach

to defining goals for herself that may prove workable for the short term yet may also create difficulties in the long run.

.....  
Many of the criteria necessary for joint physical care to lead to a viable living arrangement for a child are not met in this situation. The parents have had difficulty sharing their parenting time in a positive manner. This difficulty seems to stem primarily from Alicia's choices to disregard the parenting schedule and to expect Scott to be willing to adapt to her schedule.

.....  
There was no evidence brought to light during this evaluation that Scott has difficulty prioritizing Ethan's needs. Concerns were evident, however, relative to Alicia's pattern of being late for Ethan's transitions between homes, not enrolling him in a preschool program as mandated in the court order, not providing transportation as mandated, and potentially demonstrating a pattern of being remiss about issues related to Ethan's health and safety.

Dr. Pottebaum accordingly recommended "Scott be given the role of providing primary physical care for Ethan while Alicia's time with Ethan remains consistent and ample."

In her July 16, 2007 "Child Custody Evaluation Follow-Up Report," Dr. Pottebaum addressed changes in the parties' circumstances since her initial custody evaluation was completed.

Alicia has recently moved to a new apartment within the same complex as she had been residing with her sister. Some confusion about the reason for the move existed. Scott reported that Alicia had previously indicated to him that the purpose of the move was due to her engagement to Yashua Winters (Alicia said this engagement occurred in February 2007) and that the two planned to move into an apartment together, along with Sophia and Ethan. During today's meeting, Alicia reported that Yashua had secured his own residence (though she did not contest Scott's description of Yashua simply "staying" with friends) and that she planned to reside in the apartment by herself. She did not give a clear answer regarding the timeline for Yashua to move into the apartment, though she verified the two were still planning to marry. Scott indicated that Yashua is present at Alicia's apartment on a very frequent basis, as observed during exchanges with Ethan. An unstated, but obvious hypothesis is that Alicia may be reticent to

discuss living arrangements involving Yashua at this time due to the many voiced concerns about his history. Clearly, whether or not Yashua is actually living with Alicia at this time, his history is vitally important to recommendations about future living arrangements for Ethan.

The concerns Dr. Pottebaum refers to include Yashua's substance abuse, founded physical abuse of his child, resulting in termination of his parental rights, as well as criminal convictions for assault and operating while intoxicated.

Dr. Pottebaum's updated recommendation was as follows:

Based on the results of the joint interview with the parents, the review of the documents provided, and knowledge of Ethan's family based on an earlier lengthy study, this evaluator continues to recommend that Scott be given the role of primary caregiver for Ethan. There were a number of clear concerns related to Alicia's parenting style during the initial study; the time period since that study has not only resulted in increased stability for this mother but has resulted in more concerns about her personal choices. A review of these concerns with the parents showed Alicia to reject most of these issues as valid parenting concerns and to demonstrate no clear desire to develop paths of co-parenting to make certain that Ethan's needs are held as a highest priority.

We find Dr. Pottebaum's custody evaluation and recommendations persuasive. Our de novo review of the record confirms the factual basis supporting her evaluation and recommendations. We are especially concerned about Alicia's relationship with Yashua, manifest indifference to the trial court's temporary order, as well as her unrelenting hostility towards Scott and Cara. As noted by Dr. Pottebaum, the negative implications for Ethan's welfare and the parties' joint custodial relationship weigh against awarding Alicia physical care of Ethan. For essentially the same reasons, we reject Alicia's arguments concerning the potential diminution of Ethan's relationship with his sister Sophia,

as well as Alicia's complaints concerning the adequacy of the visitation schedule ordered by the trial court.

We accordingly affirm the custodial and visitation provisions of the trial court's decree. Costs shall be shared equally by the parties.

**AFFIRMED.**