

IN THE COURT OF APPEALS OF IOWA

No. 8-651 / 07-0333
Filed September 17, 2008

**IN RE THE MARRIAGE OF MICHELLE RENEE BAIN
AND CHRISTOPHER ROBIN BAIN**

**Upon the Petition of
MICHELLE RENEE BAIN,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
CHRISTOPHER ROBIN BAIN,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dubuque County, John Bauercamper, Judge.

Michelle Bain appeals and Christopher Bain cross-appeals from the physical care provisions of the trial court's decree dissolving their marriage.

AFFIRMED AS MODIFIED AND REMANDED.

Robert Murphy, Dubuque, for appellant.

Robert Day, Dubuque, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

HUITINK, P.J.

Michelle Bain appeals and Christopher Bain cross-appeals from the physical care provisions of the trial court's decree dissolving their marriage.

I. Background Facts and Proceedings.

Chris and Michelle Bain were married in November 1993 in California. Michelle gave birth to their son, Austin, in October 1993, shortly before the marriage. They had a second child, Mark, in May 2001. Chris worked full-time during the marriage, and Michelle worked part-time in order to stay home with the children, returning to college in 1998. Chris moved to Dubuque, Iowa, in early 2004 due to a job transfer, and Michelle and the boys moved six months later, after selling their home in California.

Michelle filed for divorce on March 16, 2006. By the time the case was tried, the parties had established separate residences in Dubuque. Michelle was living with Mark and her fiancé, Jon. Austin was living with Chris. Both parties requested physical care of the children. The trial record includes the parties' conflicting testimonial versions of the other's alcohol abuse, illegal drug use, domestic violence, harassment, and infidelity. According to Chris's version of the evidence, Austin refused to visit or reside with Michelle as long as Jon was living with Michelle. Michelle testified that Chris interfered with her relationship with Austin and was responsible for his alienation. The trial court's resulting ruling provides:

Throughout the marriage, Michelle has been the children's primary caretaker, because she has worked less than Chris. Both parents are appropriate and qualified caretakers for the children.

Austin is estranged from his mother over her affair with another man and the breakup of his parents' marriage. He has a

strong preference to live with his father and would be uncooperative with placement in his mother's home.

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Joint legal custody for the minor children is appropriate.

Primary placement of Austin with his father is appropriate, because shared care would be unworkable due to his estrangement from his mother, and his father is the parent best able to provide for his needs under these circumstances.

Shared care for Mark by both parents is appropriate and workable, due to the parents' ability to communicate, closely located residences, and good relationships with Mark.

Visitation should be scheduled to provide maximum contact with both parents and all of the children, taking into account the distance between them.

The trial court accordingly granted the parties joint custody of their children.

Chris was awarded physical care of Austin. Chris and Michelle were awarded joint physical care of Mark.

On appeal both parties contend they should have been awarded physical care of both children and the trial court erred by concluding otherwise. Neither requests joint physical care of one or both of the children.

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). Prior cases have little precedential value, and we must base our decision on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Merits.

When a district court dissolves a marriage involving a minor child, the court must determine who is to have legal custody of the child and who is to have physical care of the child. “Legal custody” carries with it certain rights and responsibilities, including, but not limited to, “decision making affecting the child’s legal status, medical care, education, extracurricular activities, and religious instruction.” Iowa Code § 598.1(3), (5) (2005). When parties are awarded “joint legal custody,” “both parents have legal custodial rights and responsibilities toward the child” and “neither parent has legal custodial rights superior to those of the other parent.” *Id.* § 598.1(3).

“If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent.” Iowa Code § 598.41(5)(a). “Physical care’ means the right and responsibility to maintain a home for the minor child and provide for the routine care of the child.” *Id.* § 598.1(7). Similar to joint custody, “joint physical care” means both parents are awarded physical care of the child. *Id.* § 598.1(4). Under this arrangement, “both parents have rights and responsibilities toward the child, including, but not limited to, shared parenting time with the child, maintaining homes for the child, [and] providing routine care for the child.” *Id.* “[N]either parent has physical care rights superior to those of the other parent” when joint physical care is awarded.” *Id.*

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). Under this arrangement, the parent with primary physical care has the responsibility to maintain a residence for the child and has the sole right to make decisions concerning the child's routine care. *See generally id.* § 598.1(7). The noncaretaker parent is relegated to the role of hosting the child for visits on a schedule determined by the court to be in the best interests of the child. Visitation time varies widely and can even approach an amount almost equal to the time spent with the caretaker parent. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007).

Split physical care occurs when each parent has physical care of one child. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). It is generally disfavored because it deprives siblings of the benefit of continuous association with each other. *Id.* Split physical care is appropriate, however, where it promotes the long-range best interests of the children. *Id.* at 245-46.

Our focus is on what is in the best interests of the children, not on the perceived fairness to the parents. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 1997). "The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *Id.* at 695-96.

In making this determination, our supreme court recently devised a nonexclusive list of factors to be considered whereby no one factor is determinative. *Id.* at 697. The factors are whether one parent was the primary caregiver, "the ability of the spouses to communicate and show mutual respect,"

the degree of conflict between the parents, and “the degree to which the parents are in general agreement about their approach to daily matters.” *Id.* at 696-99.

Where the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In such cases, “stability and continuity of caregiving are important factors. . . .” *Id.* at 696. These factors favor a parent who was primarily responsible for physical care of the children. *Id.* Also relevant are the factors listed in Iowa Code section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974). *Id.* at 696. We must examine the unique facts and circumstances of each case. *Id.* at 700.

Drug use and alcohol abuse are factors considered in making a physical care determination. *In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993). Moral misconduct is also a factor considered and is weighed most heavily where the misconduct has occurred in the presence of the children. *In re Marriage of Stom*, 226 N.W.2d 797, 799 (Iowa 1975). Additionally, if a parent seeks to establish a home with another adult, that adult’s background and his or her relationship with the children becomes a significant factor in our physical care determination. *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). The parent’s companion will have an impact on the children’s lives and the type of relationship the parent has sought to establish, and the manner in which it was established is an indication of the parent’s priorities. *See id.* Custody and physical care decisions, however, are not matters of reward or punishment for parental misconduct. *In re Marriage of Kliest*, 538 N.W.2d 273, 277 (Iowa 1995). The question is whether the parent’s conduct or lifestyle poses

an actual threat to the children's well-being; not whether the court approves or disapproves of a parent's lifestyle. *Id.*

Although not controlling, we consider the child's preference as to which parent the child wants to live with. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). In assessing the child's preference, we consider the child's age, educational level, the strength of their preference, relationship with family members, and the reasons given for the preference. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985).

After considering the foregoing factors, we conclude the record does not support an award of joint physical care. Neither party requests joint physical care, and both are expressly opposed to it on appeal. Moreover, the parties' joint history of domestic abuse, conflict, and incivility are incompatible with the effective communication and mutual respect essential to a successful joint physical care experience.

Because joint physical care is not an option, we must decide which parent will be responsible for the children's physical care. Unfortunately, neither presents a very compelling case.

Chris's unresolved alcohol abuse, recent use of illegal drugs, and abusive behavior toward Michelle weigh against awarding him physical care. Moreover, he is clearly the less experienced primary care provider, and his interest in primary care is recently acquired. Similarly, Michelle's indifference to the negative effects of her relationship with Jon on the children and abusive behavior toward Chris weigh against awarding her physical care.

We nevertheless find Michelle's greater and generally successful primary care experience distinguish her as the parent best equipped to provide for the children's physical care. Awarding physical care to her advances the children's interests in stability and continuity of caregiving.

In reaching this conclusion, we have not ignored Austin's preference to reside with Chris. We, however, find the reasons given for his preference are insufficient. Placing Austin with Chris would enable rather than resolve Austin's ill feelings toward Michelle. Moreover, any benefits derived from placing Austin with Chris are outweighed by the actual threat to his well-being posed by Chris's alcohol and drug abuse. We accordingly modify the trial court's decree by awarding physical care of both children to Michelle. Because our decision requires modification of the decree's child support and visitation schedule, we remand those issues to the trial court for resolution in view of the parties' current circumstances.

The trial court's decree is affirmed as modified and remanded for further proceedings in conformity with our opinion. Costs are taxed equally to both parties.

AFFIRMED AS MODIFIED AND REMANDED.