

**IN THE COURT OF APPEALS OF IOWA**

No. 8-681 / 08-0203  
Filed October 1, 2008

**IN RE THE MARRIAGE OF DAWN RENEE POMMER  
AND JEFFREY ALLEN POMMER**

**Upon the Petition of  
DAWN RENEE POMMER,**  
Petitioner-Appellant,

**And Concerning  
JEFFREY ALLEN POMMER,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Webster County, William C.  
Ostlund, Judge.

Petitioner appeals from the trial court's dissolution decree awarding  
respondent physical care of the parties' daughter. **AFFIRMED.**

Dan McGrevey, Fort Dodge, for appellant.

Kurt Pittner, Fort Dodge, for appellee.

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

**HUITINK, P.J.**

Dawn Pommer appeals from the trial court's dissolution decree awarding Jeffrey Pommer physical care of their daughter, Madison.

**I. Background Facts and Proceedings**

Jeff and Dawn Pommer were married in June 2004. They have one child, Madison, born in April 2006. Prior to their separation in May 2007, Dawn and Jeff lived and worked in Fort Dodge.

Dawn filed for divorce on May 24, 2007. On June 29, 2007, the trial court entered a temporary order granting the parties shared physical care of Madison. By the time the case was reached for trial, Dawn moved to Algona and had accepted employment as a registered nurse at a medical clinic in Garner. Jeff continued to reside with his mother in Fort Dodge.

At trial both requested physical care of Madison. The trial record includes the parties' conflicting testimony on a number of issues. Both claimed to be Madison's primary care provider during the marriage. Dawn testified that Jeff has a volatile temper and that he repeatedly threatened to harm her. She also testified that Jeff has and will be unable to provide for Madison's primary care needs without the assistance of his mother and other family members.

Jeff denied threatening Dawn, as well as her claims concerning his temperament. The record includes testimony by a clinical psychologist who examined Jeff and found "no signs that [Jeff] is aggressive or hostile nor does [Jeff] appear to be more likely than the average person to behave with hostility, anger or actions against others."

Jeff testified that Dawn abused alcohol. He cited several instances of Dawn's abusive and indiscrete behavior while she was intoxicated, including dancing topless at a bar in Fort Dodge. The trial court's January 3, 2008 decree includes the following findings of fact:

The Court was initially struck by the notion that this may well have been a setting that would lend itself to a joint custody arrangement. This could have been particularly effective until Dawn moved to Garner. However, the unwillingness of either parent and the geography makes a permanent placement necessary. The Court reiterates its belief that both parents will provide proper care for Madison while she is in their home.

As is the case in most instances, both parties appear to be flawed. The Court believes that both have exhibited angry and inappropriate behavior on occasion, the likely result of their frustration in their own relationships. The court must ultimately decide where the truth lies. It cannot be overstated that credibility affects all allegations and testimony. The Court finds Jeff to be more credible. While the Court believes that the [topless dancing] incident itself may not be determinative, the truth is significant. The Court believes that the incident did occur and finds those impartial witnesses who testified as to its accuracy to be credible. Unfortunately, Dawn's testimony, allegations and character are tainted by this perception. It ultimately becomes more a matter that it is not the deed but the denial.

The Court finds that Jeff can provide a warm and nurturing home. The Court is somewhat concerned as to the possible over involvement of his extended family and would caution them to neither interfere with Jeff's parenting nor the relationship between Madison and Dawn. This circumstance is likely to improve when Jeff gets his own residence this spring. In short, the Court finds that while Jeff may have demonstrated some poor judgment and irresponsible behavior in the past, the record reflects that he is a stable and forthright parent. It is imperative that the parties unite in a concerted effort of communication and cooperation to see that Madison grows and prospers during her journey to adulthood.

The court accordingly granted the parties joint custody of Madison. Jeff was awarded physical care subject to Dawn's right to visitation as provided in the decree. On appeal, Dawn contends she should have been granted physical care of Madison and the trial court erred by concluding otherwise.

## **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) (2007). 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).

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. 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.

Domestic abuse, alcohol abuse, and moral misconduct are factors considered in making a physical care determination. *In re Marriage of Hynick*, 727 N.W.2d 575, 578 (Iowa 2007); *In re Marriage of Stom*, 226 N.W.2d 797, 799 (Iowa 1975); *In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993). Custody and physical care decisions are not, however, matters of reward or punishment for parental misconduct. The question is whether the parent’s conduct or lifestyle poses an actual threat to the child’s well being, not whether the court approves or disapproves of a parent’s lifestyle.

Like the trial court, we find both parents are capable of providing for Madison’s primary care needs. We are confident that she will thrive in the care of either parent. After considering all of the foregoing factors, we are convinced that this case is a “prime example of a close custody case where we should defer to the trial court’s detailed fact-findings and credibility assessments.” *In re Marriage of Fennele*, 737 N.W.2d 97, 101 (Iowa 2007). The trial court had the opportunity to observe the witnesses and concluded primary care should be awarded to Jeff. We agree and accordingly affirm the trial court’s decree awarding Madison’s physical care to Jeff.

**AFFIRMED.**