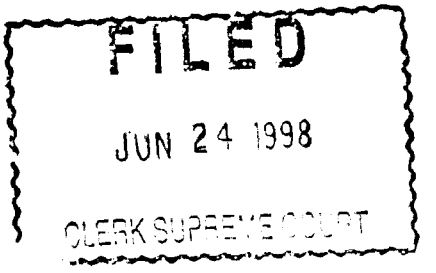
IN THE COURT OF APPEALS OF IOWA

No. 7-492 / 97-0568



IN RE THE MARRIAGE OF MARLA MAY GILBERT AND CHARLES RAY GILBERT

Upon the Petition of
MARLA MAY GILBERT,
Appellee,

And Concerning
CHARLES RAY GILBERT,
Appellant.

Appeal from the Iowa District Court for Ringgold County, Dale B. Hagen, Judge.

Charles Gilbert appeals from the decree dissolving his marriage to Marla Gilbert. **AFFIRMED AS MODIFIED.**

Martin L. Fisher of Fisher, Fisher & Fisher, P.C., Adair, for appellant.

Arnold O. Kenyon III, Creston, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

CADY, C.J.

Charles Gilbert appeals from the decree dissolving his marriage to Marla Gilbert. He claims the district court erred by splitting custody of the parties' children. Marla also requests an award of appellate attorney fees. We affirm as modified.

Charles and Marla Gilbert married on January 3, 1981. They had two children. Christopher was born October 30, 1981, and Ronald was born April 27, 1985.

Marla was the primary care giver during most of the marriage. Charles, however, did serve as the primary care giver for a fourteen-month period while Marla worked at two jobs.

The parties dissolved their marriage on March 21, 1997. During the dissolution proceedings, Christopher resided with Charles and Ronald resided with Marla. Charles and Marla resided approximately ten miles from each other. The children attended different school systems.

In its decree, the district court determined either party would be capable of parenting the children. The trial court noted, however, Christopher preferred to live with Charles, while Ronald preferred to live with Marla. The district court awarded joint legal custody, but provided Charles would have primary physical care of Christopher and Marla would have primary physical care of Ronald. The visitation schedule allowed the children to see each other every weekend and all holidays. No child support was required from either party.

On appeal Charles maintains the district court erred by awarding split physical care of the children. He claims he should have received primary physical care of both children.

I. Primary Physical Care

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

In resolving child custody issues, the best interests of the children is the first and governing consideration. *See In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41. *See* Iowa Code § 598.41 (1997). The critical issue in determining the best interests of the children is which parent will do better in raising the child. *See In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). Gender is irrelevant in a custody determination and neither parent should have a greater burden in attempting to gain custody. *See Fynaardt*, 545 N.W.2d at 892-93. The objective should always be to place the children in the environment most likely to bring them healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

Although not controlling, we give weight in deciding the issue of primary care to which parent served as the primary caretaker during the marriage. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). Additionally, a child's express preference, while not controlling, is entitled to consideration in matters of custody. *Fynaardt*, 545 N.W.2d at 893.

Split physical care occurs when each parent has physical care of at least one child. *Pundt*, 547 N.W.2d at 245. Only in rare cases is this separation of siblings appropriate. *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). There is a presumption siblings should not be separated because it deprives children of the benefit of constant association with one another. *Pundt*, 547 N.W.2d at 245. The rule is not ironclad, however, and circumstances may exist indicating separation may better promote the long-term best interests of children. *Id.* Good and compelling reasons must therefore exist for a departure. *Id.*

Charles contends he is more able to provide the structure and discipline Christopher and Ronald require. He claims both children engaged in delinquent behavior when living with Marla and she has a passive parenting style. As an example of this delinquent behavior, Charles points out Ronald has been involved in truancy and experienced disciplinary problems while living with Marla. He also expresses concern that Ronald's behavior is being negatively influenced by cousins living near Marla. He further points to a custody evaluation preformed by Dr. Thomas Haley recommending primary physical care should be awarded to him.

Marla maintains the circumstances in this case warrant a split physical care arrangement. She points out the children are each established in their respective school districts, they have expressed their preferences for the physical care arrangement, and the parties live close enough for visitation. She also emphasizes the relationship between the boys is strained and Charles has a problem controlling his anger.

On our de novo review, we conclude the best interests of the children are not served by a split physical care arrangement. The record indicates Charles is better able to provide structure and discipline for the children. As evidenced by Ronald's truancy and discipline problems while living with Marla, he needs a more structured disciplined environment.

Because Ronald has been living with Marla, we have the opportunity to observe how well the arrangement has been working. The record reveals Ronald has had problems with truancy, participated at some level in an assault, and stayed out from 1:30 a.m. until 6:30 a.m. on one occasion. In addition, Marla purchased a large switch blade knife inappropriate for a child. While both parents are capable of providing primary physical care, we believe Charles is better able to meet Ronald's disciplinary needs. Moreover, no compelling reason exists to disregard the strong public policy of keeping siblings together. Consequently, we modify the portion of the district court decree awarding Marla primary physical care of Ronald to provide Charles as the primary physical care provider for both children.

We further modify the decree to require Marla to pay monthly child support under the uniform guidelines in the amount of $348.91. This amount shall be paid on the first day of each month after issuance of the procedendo to the clerk of court as provided by Iowa Code section 598.1. Once only one child is subject to the support obligation, the monthly amount shall be reduced to $261.69. The district court shall retain jurisdiction to determine the contributions to college expenses in the event a child continues his education beyond high school.

We further modify the decree to give Marla visitation on alternating weekends under the terms specified in the decree, as well as summer vacation and holidays as set forth in the decree.

II. Attorney Fees

An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. *Id.*

Considering both parties' need and ability to pay, we find both parties should pay their own attorney fees. Costs divided equally.

AFFIRMED AS MODIFIED.