**IN THE COURT OF APPEALS OF IOWA**

No. 1-029 / 00-0597
Filed February 28, 2001

**IN RE THE MARRIAGE OF JUDITH ANN SHEELY AND MARK EUGENE SHEELY**

**Upon the Petition of**
**JUDITH ANN SHEELY,**
Petitioner-Appellee,

FILED
FEB 2 3 2001
CLERK SUPREME COURT

**And Concerning**
**MARK EUGENE SHEELY,**
Respondent-Appellant.

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Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Mark Sheely appeals from the child custody provisions of the decree dissolving his marriage to Judith Sheely. **AFFIRMED.**

Michael L. Mollman of Mollman Law Office, Cedar Rapids, for appellant.

David G. Thinnes of Thinnes & Liesveld, Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

**MAHAN, J.**

Mark Sheely appeals from the child custody provisions of the decree dissolving his marriage to Judith Sheely. He contends the district court erred in refusing to award joint physical care of the parties' children. We affirm.

Mark and Judith (Judy) were married in Cedar Rapids on July 27, 1985. It was the second marriage for both parties. The parties' first marriages ended in divorce. Travis, Mark's son from his first marriage, was of age at the time of trial. Mark and Judy had two children: Renee, born in January 1987, and Mitchell (Mitch), born in August 1992.

Judy has worked as a dispatcher for the City of Cedar Rapids for the past five years. During the marriage, she worked the evening shift, five days on, two days off, five days on and three days off. Her work schedule did not quite add up to a full forty hours per week. Prior to trial, she took a slight demotion to become a dispatcher on the day shift, from 7 a.m. to 3 p.m., which she thought would be better for the children.

Mark has worked as a deputy sheriff for Linn County for the past twenty-two years. He has never been promoted or advanced. He works a flexible schedule from approximately 7 a.m. to 3:30 p.m., serving civil paperwork for the sheriff's department. In addition to his employment, Mark was elected to the College Community School Board and served as the mayor of Fairfax during the parties' marriage.

During the marriage, Judy did all the cleaning, shopping, and household chores for the family. She fixed the children's meals, and made sure there was

food in the house and the children had clean clothes to wear. She helped the children with homework and played ball with them. Judy and Mark coached the children's softball team and attended school conferences. Mark cared for the children after school and during the evenings, due to Judy's work schedule. He gave a presentation about his job to Mitch's class. He took the children to softball, basketball, and track practice, went on field trips with them, and helped with various school-related activities.

Mark demonstrated emotional and psychological difficulties prior to and during the pendency of the dissolution. Witnesses at trial testified Mark would often yell and scream at Judy in front of the children. He disciplined the children by yelling at them or grabbing them by the arm. He would often lose his temper. In December 1998, during a fight between the parties, Mark threatened, in front of the children, to shoot himself. On the day Judy moved out of the house, Mark made suicide threats and looked for his gun. Mark's suicidal ideations led him to commit himself to Mercy Medical Center for a three-day period in January 1999. He continued in an intensive outpatient program following his discharge. He threatened to harm himself several times during the pendency of the dissolution. He was not under a psychologist or psychiatrist's care at the time of trial, but was taking medication for depression.

Members of the Cedar Rapids Police Department and the Linn County Sheriff's Department testified on Judy's behalf at trial. Sgt. Mark Andries of the Cedar Rapids Police Department, a friend of both parties, disagreed with Mark's characterization of suicide threats as "figures of speech." Sgt. Andries testified

he considered himself Mark's best friend at one time. He took Mark's suicide threats seriously, and asked Mark for names, addresses, and phone numbers of his next of kin. He expressed concern about Judy's safety due to Mark's threats against her. Sgt. Carol Currans of the Linn County Sheriff's Department testified she personally responded to three or four emergency calls at the Sheely residence in 1999. She presented evidence to show the sheriff's department went to the Sheely residence on approximately seven to nine occasions, usually when Judy was attempting to pick up the children from Mark.

Judy filed a petition for dissolution in January 1999. In March 1999, the district court granted temporary custody to Judy and arranged a visitation schedule between the parties. In August 1999, the district court entered an order finding the visitation schedule was not being applied correctly, was being ignored, and on one occasion was intentionally disregarded by Mark. The court noted law enforcement had intervened at the parties' residence on at least five occasions. After continued difficulties between the parties, the district court entered an order delineating further the visitation schedule in November 1999. On February 29, 2000, following several days of trial, the court entered its findings, conclusions, and decree of dissolution of marriage. The decree granted the parties joint legal custody and gave Judy primary physical care of the children. Mark appeals.

**Standard of Review.** We review child custody determinations de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). In assessing a custody order, we give considerable weight to the judgment of the district court,

which has had the benefit of hearing and observing the parties first-hand. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). Prior cases have little precedential value, and we must base our decision on the particular circumstances of the parties in this case. *In re Marriage of Liebich*, 547 N.W.2d 844, 848 (Iowa Ct. App. 1996).

**Child Custody.** Mark contends the district court erred when it failed to find an award of joint physical care would be in the best interests of the children. Specifically, he contends: (1) the court failed to take into account the legislature's fundamental change to the Iowa Code approving awards of joint primary care; (2) the court failed to take into account a joint primary care arrangement was working between the parties immediately prior to trial; and (3) the court failed to take into account the children's clear expressed preference for joint physical care.

In a custody action, the best interest of the children is the primary consideration. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). The objective is to place the children "in the environment most likely to bring [the children] to healthy physical, mental and social maturity." *Murphy*, 592 N.W.2d at 683 (quoting *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995)).

The court considers several factors in determining the long-term best interests of the child. *See* Iowa Code § 598.41(3) (1999); *Ford*, 563 N.W.2d at 631. A parent's denial of visitation without just cause is a significant factor in determining the proper custody arrangement. Iowa Code § 598.41(1)(c); *In re Marriage of Daniels*, 568 N.W.2d 51, 56 (Iowa Ct. App. 1997). We also consider

moral misconduct in the presence of the children. *In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983). In addition, violent tendencies of a parent adversely impact on the fitness of that parent to be the primary caretaker of a child. *See In re Marriage of Snyder*, 241 N.W.2d 733, 734 (Iowa 1976); *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994).

Prior to 1997, our case law stated joint physical care was strongly disfavored. *See Brainard*, 523 N.W.2d at 614. In 1997, the legislature proclaimed joint physical care a viable disposition of a custody dispute if in the best interests of the children. *See* 1997 Iowa Acts ch. 175, § 199; *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The new law, Iowa Code section 598.41(5) provides, in pertinent part:

> Joint physical care may be in the best interest of the child, but joint legal custody does not require joint physical care. When *the court* determines such action would be in the best interest of the child and would preserve the relationship between each parent and the child, joint physical care *may* be awarded to both joint custodial parents or physical care may be awarded to one joint custodial parent. . . .

Iowa Code § 598.41(5) (emphasis added). We disagree with Mark's characterization of the change in the law as "fundamental." The law leaves the determination whether joint physical care would be in the best interest of the children with the court. It provides joint physical care *may* be awarded, but only if in the best interest of the children. We consider the law neither a ringing endorsement of joint physical care, nor a mandate for courts to grant joint physical care in every situation. If the parents of the children are able to cooperate and respect each other's parenting and lifestyles, a joint care

arrangement can work. *Walton*, 577 N.W.2d at 870. The record reveals such cooperation and respect are not present in this case.

We conclude the district court properly named Judy primary physical caretaker of the children. After an extensive review of the testimony presented at trial, the district court found Mark "has engaged in a pattern of emotionally controlling behavior and has intentionally and directly inserted his children into the dissolution." We agree. Mark referred to Judy as "sick" and the "mother who left her children" in front of the children. He tried to coerce Renee about where she wanted to live. He asked her to remove her mother's diary notes from her computer. Mark videotaped custody exchanges. Mark instructed Mitch to "act out," and asked Renee to "throw a fit" at the time of custody exchanges. Mark told Renee about contempt proceedings, showed her custody affidavits, and called the school to tell Renee that Judy walked out of a marital counseling session. He wrote a letter to Judy and gave it to Renee to copy it into her handwriting. He would not let the children remove their personal items out of the home and take them to Judy's during her visitation with the children.

In addition, Mark denied Judy access to the children during the pendency of the dissolution. He advised Mitch to take the school bus home when Judy was on her way to pick him up. Mark would invite Renee's friends to stay overnight when it was Judy's custodial time. Mark claims the joint primary care arrangement put in place immediately before trial was working. Yet, the record reveals Mark was unable to follow the court's visitation schedule until a *third* temporary visitation order laid out a concrete, specific schedule. It is clear from

the record the parties, specifically Mark, would not be able to follow a joint physical care arrangement, and such arrangement would not be in the best interests of the children.

Finally, Mark contends the district court failed to take into account the children's "clear expressed preference" for joint physical care. In considering what custody arrangement is in the best interest of the children, we are to consider "whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity." Iowa Code § 598.41(3)(f). Renee testified at trial, over Judy's objections. She indicated a fifty-fifty shared-care arrangement would be "easier," but offered no further explanation. We find Mark's constant coercion and manipulation of Renee and Mitch during the pendency of the dissolution weighs heavily against Renee's expressed preference during her testimony.

In addition, we disagree with Mark's characterization of the children's attorney's testimony and report to the court. Mark claims the children's attorney, Richard Boresi, indicated a joint physical care arrangement was "preferred." In his initial report to the court, filed in October 1999, Boresi indicated Mark has a "short fuse," and was very critical of Mark's behavior. Boresi concluded, "Due to the findings set forth above, the undersigned does not believe that a shared-care arrangement can work in this particular case, despite the fact that the children want such an arrangement very badly." Boresi told the court a shared-care arrangement "probably will not work," but asked the court to give some deference to the children's desire and preference. At trial, Boresi continued to express

reservations about whether a shared-care arrangement would work in this case "based on the severity and the extent of the conflict that has occurred between the parties over the past twelve months," but as an advocate for the children, Boresi requested "that a shared-care arrangement be duly considered by the Court." When asked if his opinion had changed since filing his report in October 1999 and testifying in January 2000, Boresi indicated his position "had softened a little bit based on what [the children] have told me." We do not interpret Boresi's testimony or report as a clear statement of "preference" for joint physical care in this case.

We agree with the district court that "[t]he court file is an excellent indicator about the parties' level of communication and cooperation." Our de novo review of the record reveals Mark's inability to cooperate or communicate with Judy in dealing with their children. The children's attorney termed the level of communication and cooperation between the parties as "horrible." Mark has interfered with Judy's rights to the children. He does not promote the children's respect or affection for Judy. *See Walton*, 577 N.W.2d at 870.

Government cannot micro-manage peoples' lives. *Walton*, 577 N.W.2d at 871. We are convinced by the record before us micro-management would ultimately result from a joint physical care arrangement in this case. We refuse to promote such a result. We agree with the district court and affirm its decision to award primary physical care of the children to Judy.

**Appellate Attorney Fees.** Judy requests appellate attorney fees. A successful party does not have a vested right to appellate attorney fees. *In re*

*Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). Rather, the court exercises its discretion in determining whether an award is appropriate. *Id.* 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. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We grant Judy's request for appellate attorney fees, and order Mark to pay $750 of Judy's appellate attorney fees.

We tax the cost of this appeal to Mark.

**AFFIRMED.**