

IN THE COURT OF APPEALS OF IOWA

No. 1999-101 (9-288) / 98-1787

Filed May 26, 1999

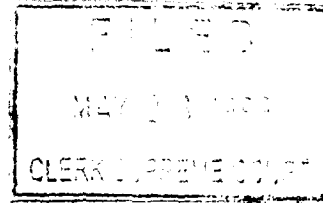
**IN RE THE MARRIAGE OF KELLEY D. COONEY
AND JAMES R. COONEY**

**Upon the Petition of
KELLEY D. COONEY,**

Petitioner-Appellant,

**And Concerning
JAMES R. COONEY,**

Respondent-Appellee.



Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Petitioner appeals the child custody and visitation provisions of the parties' dissolution decree. **AFFIRMED AND REMANDED WITH INSTRUCTIONS.**

Stephen B. Jackson and Stephen B. Jackson, Jr. Cedar Rapids, for appellant.

John M. Maher of Maher & Nidey Law Firm, Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

MAHAN, J.

Kelley Cooney appeals the child custody and visitation provisions of the parties' dissolution decree. Kelley contends the district court erred in its award of primary physical care of the children and in establishing the visitation schedule. We affirm and remand with instructions to correct the scrivener's errors in the dissolution decree.

James ("Jay") and Kelley Cooney were married in 1995. They have two children: Casey Noel, born January 5, 1989, and Dakota James ("Cody"), born September 20, 1992. Kelley also has a child from a previous marriage, Kaylin, born May 15, 1985.

The relationship between Kelley and Jay has been unstable from the beginning. They met in Texas in 1988 when Kelley went to Jay's apartment to purchase drugs from his roommate. Both parties were using methamphetamine and cocaine at that time. Jay admits he also sold drugs for a short time to finance his drug use. After Kelley became pregnant, the parties moved to Iowa. It is undisputed that both quit using "hard drugs" at that time, but continued to use marijuana and alcohol.

Jay's drug use stopped completely in 1992 when he began employment with Tri-State Tours, where he is subject to random drug screens. His serious alcohol problem continued until June of 1997 when he stopped completely and entered a rigorous substance abuse program through AA. The record is clear he has abstained from the use of alcohol since that time and is still regularly involved with AA.

Kelley has never had a serious alcohol problem. However, she has had great difficulty controlling her addiction to marijuana. She testified at the dissolution trial in May 1998 she had quit using marijuana five or six months prior to trial. When asked to describe her use before quitting, the following colloquy took place:

Q. And prior to that time, how would you describe your marijuana use? A. I would describe it as occasional.

Q. And by occasional, what do you mean by that? A. Well, if I had it, it would be probably every evening. And if I didn't, I wouldn't.

Q. And could you explain to the Court why it was you began to abstain from that five or six months ago? A. I was afraid of it being used against me in a court of law.

Q. In this case? A. Yes.

Kelley's testimony that she quit using marijuana before trial is questionable. Casey testified to being absent from school in late February 1998¹ and running errands with Kelley, which included purchasing marijuana from Kelley's drug dealer.² Casey reported seeing "green stuff" in a sandwich bag exchanged between the two.³ Kelley insisted at trial the "green stuff" was actually a pencil sharpener and two erasers she had placed in a sandwich bag and was returning to her friend. Jay testified that in March 1998 he had smelled marijuana in Kelley's home and had observed her bong, pipe poker, and scraping knife in the bathroom.

¹ This absence on February 24, 1998, was confirmed by Casey's teacher.

² Casey could identify Kelley's drug dealer because she had lived with Kelley and the children for a period of six weeks during the separation.

³ Casey testified he had seen similar "green stuff" around the house prior to this time.

There have been incidents of abuse on the part of both Jay and Kelley. Jay admitted he broke things at Kelley's mother's house in December of 1988. In addition, Jay admitted striking Kelley in the eye in July of 1991. According to Kelley, the parties had been fighting over bills, and a shoving match ensued with Jay punching her. Kelley testified at trial this was the only time Jay injured her intentionally. Kelley also filed a child abuse complaint against Jay on December 9, 1997, alleging he had struck Kaylin across the back with a board or a stick in November 1995.⁴

Kelley was arrested for domestic abuse in July of 1997 for allegedly choking Jay. She pleaded guilty to a lesser charge. The record also disclosed a morning argument between Kelley and Kaylin over what television program they were going to watch. Kelley testified she "tossed" the remote to Kaylin. The remote struck Kaylin above her eye and stitches were required to close the wound.

A founded child abuse report was made against Kelley in 1994 for leaving Casey alone at home for a period of approximately two hours while running errands. Casey was five years old at the time. Kelley testified she left him because he was "being rebellious, not letting me get him dressed, refusing to go with me." She testified further, "I misjudged Casey, I think. He's always -- he's always acted fairly

⁴ This incident is suspect in that it was not reported to DHS or mentioned to anyone for a period of two years after it allegedly occurred. It was reported apparently in retaliation for Jay reporting to DHS that Kelley kept a shotgun and ammunition in her home within reach of the children. In addition, Casey testified at some point he heard Kaylin say the incident was a dream.

grown up and older and responsible. My five-year-old now, I would never even consider leaving home."

The evidence also established Casey missed ten days of school without any good reason while in Kelley's care following the separation. Kelley works the night shift at St. Luke's Hospital which causes the boys to spend an average of six to ten nights away from home each month. In addition, Kelley has run out of heating fuel on three occasions while the children were in her care.

The district court awarded primary physical care of Casey and Cody to Jay. Kelley appeals.

I. STANDARD OF REVIEW. Our review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings, but we do give them deference considering its opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

II. PRIMARY PHYSICAL CARE. Kelley contends the district court erred in designating Jay as the primary physical caretaker of Casey and Cody. We disagree.

The critical issue before us is the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This must, of necessity, be the first and controlling consideration in our discussion. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41; *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The issue in determining the best interests of the

children 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 attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Winter*, 223 N.W.2d at 167. The objective should always be to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

The district court found both Kelley and Jay love their children and have the necessary skills to meet the children's everyday needs. The district court concluded, however, Jay's home environment is more stable than Kelley's. The court also concluded Jay will foster the children's relationship with Kelley, while questioning Kelley's ability to do the same. The district court was specifically troubled by the fact Kelley stopped providing transportation for visits, interfered with activities initiated by Jay, was not supportive of the counseling Jay arranged for the boys, and threw away notices and homework assignments from school instead of sharing them with Jay.⁵

⁵ The evidence established Jay contacted Casey's teacher and arranged for a duplicate set of school notices and assignments to be sent directly to him.

Kelley further asserts the district court failed to consider the effect of separating Casey and Cody from Kaylin. We disagree.

Divided physical care is strongly disfavored in child custody proceedings, except in the most unusual circumstances. *In re Marriage of Roberts*, 545 N.W.2d 340, 342 (Iowa App. 1996). These same principles apply when half-siblings are involved. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986); *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa App. 1994). In order for a court to depart from this general rule, it must appear that separation "may better promote the long-range interests of children." *Orte*, 389 N.W.2d at 374 (quoting *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981)). There is insufficient evidence in the record to support a finding that Casey and Cody have a "very close" relationship with Kaylin. Therefore, we find sufficient evidence has been presented to defeat the strong interest in not separating half-siblings.

After review of the record, we find the evidence overwhelmingly shows it is in the boys' long-range interests to award primary physical care to Jay. He has demonstrated an interest in the boys' education and interests; he has rehabilitated himself while Kelley has not; he will foster the boys' relationship with Kelley; and he can provide more stability.

III. VISITATION. Kelley contends the visitation schedule is not in the boys' best interests. Kelley further argues she has not been granted any visitation rights at all. We disagree.

First, we find there is a mere scrivener's error in the dissolution decree; Kelley was awarded visitation. Page six of the decree needs to be corrected as follows:

1. By substituting the word "Petitioner" for the word "Respondent" in paragraph 3.A.
2. By substituting the word "Petitioner" for the word "Respondent" in paragraph 3.B.
3. By substituting the word "Respondent" for the word "Petitioner" in paragraph 3.C.

Second, we conclude the visitation schedule spelled out by the district court is fair and reasonable. This is a minimum schedule, but we note Jay has stated on the record his willingness to extend the schedule further to accommodate Kelley. We trust he will do so.

For these reasons, we affirm and remand with instructions to correct the scrivener's errors in the dissolution decree.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.

No. 98-1787. [1999-101 (9-288)] IN RE MARRIAGE OF COONEY

Appeal from the Iowa District Court for Linn County, Larry J. Conmeyer, Judge.
AFFIRMED AND REMANDED WITH INSTRUCTIONS. Heard by Huitink, P.J.,
and Streit and Mahan, JJ. Sackett, C.J., takes no part. Opinion by Mahan, J.

(8 pages \$3.20)

Kelley Cooney appeals the child custody and visitation provisions of the parties' dissolution decree. Kelley contends the district court erred in its award of primary physical care of the children and in establishing the visitation schedule. Jay and Kelley were married in 1995. They have two children: Casey, born in 1989, and Cody, born in 1992. Kelley also has a child from a previous marriage, Kaylin, born in 1985. The relationship between Kelley and Jay has been unstable from the beginning. They met in Texas in 1988; both parties were using methamphetamine and cocaine at that time. After Kelley became pregnant, the parties moved to Iowa. It is undisputed both quit using "hard drugs" at that time, but continued to use marijuana and alcohol. Jay stopped using drugs in 1992 and alcohol in 1997. The record is clear he has abstained from the use of alcohol since that time and is still regularly involved with AA. Kelley has had great difficulty controlling her addiction to marijuana. Kelley testified she quit using marijuana five or six months prior to trial; however, this testimony is questionable in light of other evidence showing her use of marijuana has continued. There have been incidents of abuse on the part of both Jay and Kelley. Kelley testified the only time Jay injured her intentionally was in July 1991. Kelley was arrested for domestic abuse in July 1997 for allegedly choking Jay. Kelley filed a child abuse complaint against Jay in December 1997, two years after he allegedly physically abused Kaylin. A founded abuse report was made against Kelley in 1994 for leaving Casey, then five years old, alone at home for approximately two hours. Jay works a day shift which allows him to be home with the boys after school. Kelley works a night shift which causes the boys to spend an average of six to ten nights away from home each month. Kelley has also allowed Casey to miss ten days of school without any good reason and has run out of heating fuel on three occasions while the children were in her care. **OPINION HOLDS: I. Primary Physical Care.** There is insufficient evidence in the record to support a finding that Casey and Cody have a "very close" relationship with Kaylin. Therefore, we find sufficient evidence has been presented to defeat the strong interest in not separating half-siblings. After review of the record, we find the evidence overwhelmingly shows it is in the boys' long-range interests to award primary physical care to Jay. He has demonstrated an interest in the boys' education and interests; he has rehabilitated himself while Kelley has not; he will foster the boys' relationship with Kelley; and he can provide more stability. **II. Visitation.** First, we find there is a mere scrivener's error in the dissolution decree; Kelley was awarded visitation. Second, we conclude the visitation schedule spelled out by the district court is fair and reasonable. This is a minimum schedule, but we note Jay has stated on the record his willingness to extend the schedule further to accommodate Kelley. We trust he will do so.