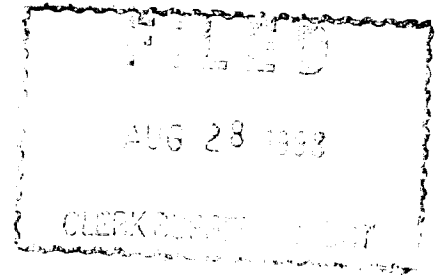


IN THE COURT OF APPEALS OF IOWA

No. 8-223 / 97-1432

Filed August 28, 1998



**IN RE THE MARRIAGE OF COLETTE S.
PATTON AND DAVID W. PATTON**

Upon the Petition of
COLETTE S. PATTON,
Appellant,

And Concerning
DAVID W. PATTON,
Appellee.

Appeal from the Iowa District Court for Buena Vista County, Michael S.
Walsh, Judge.

The petitioner appeals the child custody provisions of the parties' dissolution
decree. **AFFIRMED.**

Jill Southworth Rolek of Rolek Law Office, West Des Moines, for appellant.

Michael R. Bovee of Montgomery, Barry & Bovee, Spencer, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

Colette Patton appeals the award of primary physical care of her four boys to their father. Because joint physical care is not within the boys' best interests and David can provide the boys continuity and stability in their lives, we affirm the trial court's award of physical care to David.

I. Background Facts & Proceedings.

David and Colette Patton married in 1984. They had four children: James, 13; Andrew, 12; Thomas, 7; and Joseph, 5.

Shortly after the marriage, the couple left Iowa by moving to Richmond, Virginia. David began working for a Richmond law firm, eventually becoming a partner. His work at the firm required him to work day and evenings hours and nearly every weekend. Colette began attending the Theological Seminary School full-time in Richmond, but after James was born she reduced her class load to part-time. After Andrew was born, the couple had in-home day care which allowed Colette to finish her seminary studies and David to continue his law practice. Colette was the primary caregiver of the children until 1991.

In 1991, the Pattons moved back to Storm Lake. David opened a law office and Colette sought employment as a minister. Because Colette could not find a permanent position, she served as a "supply preacher" with the Presbyterian church, filling in as pastor for vacant pulpits. This job often required her to be gone from Storm Lake for several days. David and Colette shared parental duties quite equally

after the parties moved to Storm Lake. On the occasions Colette would be out of town, David was the boys primary caregiver.

David and the boys have developed strong ties to each other and to Storm Lake. In addition to his law practice, David participates in his parents' rental business, often spending time remodeling apartments. He has become intensely involved in the Storm Lake community. He was the chairperson and grant writer of the Trees Forever Program, he is a board member of the Buena Vista Work Activity Center, he is a board member of the Buena Vista Historical Society, a member of Kiwanis, a member of city council, and a coach for the boys' soccer and little league teams.

David's parents are lifelong residents of Storm Lake. David and the children spent considerable time at the grandparent's acreage on the edge of town. They spent most of every Sunday with his parents, gathering for family dinners and recreation with other extended family. The companionship of David's parents has become an important part of the boys' lives.

Colette did not become engaged in the community with David and her sons. Her job was in Ida Grove, which required her to be gone, frequently for days at a time. David was the primary and sole caretaker of the children while Colette was gone. Colette became involved with a funeral director in Ida Grove. The Ida Grove church asked Colette to only have contact with the funeral director on a professional basis. She did not honor this request and gave up her position with the church.

Colette's family lives in Davenport, Iowa. Her male friend lives in Iowa City, Iowa. Colette has frequently expressed an interest in moving to eastern Iowa or Illinois.

Despite the conflict between their parents, the boys have stable lives and are well adjusted. They perform exceptionally well in school and participate in athletics.

At trial, Colette argued David isolated her from the boys, demeaned her, and was unsupportive of her career. She maintained she was the boys' primary caretaker. David argued he was the primary caretaker of the boys and that Colette was immature and unstable. A psychologist testified David could best meet the children's psychological, social, and material needs. The district court agreed and granted physical care of the children to David. The court ordered Colette to pay David \$368 per month in child support. Colette appeals. She argues she should be awarded primary physical care of the boys or, in the alternative, joint physical care of the boys.

II. Standard of Review.

Review of the primary physical care provision of a dissolution decree is de novo. Iowa R. App. P. 4. An appellate court considers the facts anew, but gives weight to the findings of the trial judge. Iowa R. App. P. 14(f)(7).

The governing consideration in a custody determination is the best interests of the child. Many statutory factors have been identified for courts to consider in determining the child's best interests. See Iowa Code § 598.41(3)(1995). Additionally, our prior appellate decisions have offered other factors. See *In re*

Marriage of Ford, 563 N.W.2d 629, 631 (Iowa 1997). The critical issue is which parent will do the better job in raising the child. *Id.*

III. Joint Physical Care.

Colette argues the court should have ordered joint physical care¹ of the children in the divorce decree. Although there is a multitude of case law stating joint physical care is strongly disfavored, *see, e.g., In re Marriage of Roberts*, 545 N.W.2d 340, 342 (Iowa App. 1996); *In re Marriage of Brainard*, 523 N.W.2d 168, 171 (Iowa App. 1994), the legislature recently proclaimed joint physical care a viable disposition of a custody dispute if in the best interests of the children. 1997 Iowa Acts Ch. 175, § 199. If the parents of the children are able to cooperate and respect each other's parenting and lifestyles, a joint care arrangement can work. *In re the Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa App. 1998).

These parents cannot cooperatively raise their boys. The two were not able to co-parent successfully. They do not agree on how to resolve situations and events. They have different discipline styles and do not agree with the style of the other parent. David thinks Colette acts irrational in dealing with the children. He does not

¹ Joint physical care means:

[A]n award of physical care of a minor child to both joint legal custodial parents under which 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, providing routine care for the child and under which neither parent has physical care rights superior to those of the other parent.

respect her values. Colette thinks David is too harsh with his discipline. She does not respect his values. Joint physical care is not in the best interests of the boys under these circumstances. Also Colette's geographic uncertainty would work against effective joint physical care.

Because we determine it is not in the best interests of the children to be in a joint physical care relationship with their parents, one of the parents must be selected as the primary physical caregiver.

IV. Primary Physical Care.

A. Primary Caregiver During the Marriage. The task of the court is to select the parent who can minister most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

The facts of this case are unusual in that both Colette and David, at different times, played the role of primary caregiver to the boys. The boys have the strong bond children have with a primary caregiver to both parents. Colette was the primary caregiver to the boys from 1985 to approximately 1993 and David was the primary caregiver of the boys after that time. Because both parents have exercised the role of primary caretaker during the marriage, we look to other factors to make a determination of which better is better suited to have physical care.

B. Characteristics of Parents. The other factors considered are the characteristics of the parents and the capacity and desire of each parent to provide for

the needs of the children. *In re Marriage of Daniels*, 568 N.W.2d at 54. Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Id.*

In this case, the stability of the parties has weighed heavily upon the custody determination. David is stable. He has a dependable job. He is strongly tied to the Storm Lake Community, which the boys have known as home for the last six years of their short lives. David has the avid support of his extended family. The extended family has become very close to the boys. The children have prospered in this environment.

Colette is not stable at this point in her life. She does not have a steady job or a salary. She is ambivalent in her ties to any community. It cannot be said with certainty, if she were awarded primary physical care of the boys, where they would live. Colette is at a transition point in her life, and compared to David, she cannot offer her boys a certain and stable lifestyle.

Indicative of the transitional phase Colette is going through is her choice to have a relationship outside her marriage. Moral misconduct is a factor in determining which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d at 54. Extramarital affairs may be given greater weight when they impact the children. *See In re Marriage of Grandinetti*, 342 N.W.2d 876, 879 (Iowa App. 1983)(extramarital affair was given greater weight when the affair occurred in front of the children). There is no evidence the affair occurred in

front of or directly affected the children. However, the decision Colette made concerning her friend eventually led to her job loss and her geographic instability. In that way, the boys have been adversely affected by her decision.

For these reasons, it is in the boys best interests for David to have primary physical care and for Colette to exercise liberal visitation. David is in a better position to provide the boys a stable life. The custody determination and child support provisions of the decree are affirmed.

V. Appellate Attorney Fees.

In deciding whether Colette is to be awarded fees on appeal, 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 trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). Attorney fees are not awarded as a matter of right, but rest within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994).

In light of the circumstances, each party is required to pay his or her own attorney fees. Costs of this action are assessed one-half to each party.

AFFIRMED.