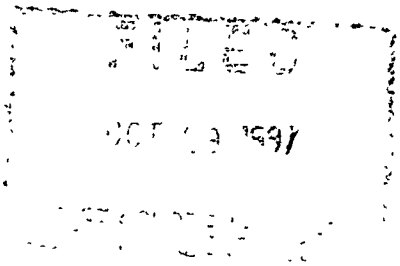
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IN THE COURT OF APPEALS OF IOWA

No. 7-468 / 96-1732
Filed 10/29/97



IN THE INTEREST OF CARISSA SIZEMORE, A Minor,

Upon the Petition of
MICHAEL SIZEMORE,
Appellant,

And Concerning
MARY WACHAL,
Appellee.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Michael Sizemore appeals from a district court ruling in a custody dispute between unmarried parents. **AFFIRMED AS MODIFIED.**

Harold J. DeLange, II, Davenport, for appellant.

Paul Macek of Dircks, Ridenour & Macek, Davenport, and Robert C. Meyer, Davenport, for appellee.

Considered by Sackett, P.J., and Streit and Mahan, JJ.

STREIT, J.

Michael Sizemore appeals the district court order granting physical and sole legal custody of his daughter, Carissa Sizemore, to Carissa's mother, Mary Wachal. He argues he should be awarded sole physical custody because he can better administer to Carissa's needs and Mary is an inadequate parent. We affirm the trial court's award of physical custody to Mary, but modify to award Michael joint legal custody. We affirm as modified.

I. Background and Facts.

Michael and Mary are the unwed parents of Carissa Sizemore, born June 22, 1993. In 1996, Michael filed a paternity petition seeking primary physical custody of Carissa. The parties stipulated Michael was Carissa's biological father. After hearing, the district court ruled Mary would be given sole custody of Carissa.

Michael is twenty-two years old and lives with his mother and her boyfriend in Davenport. He works at Blackhawk Foundry, earning a net income of $92.20 per week. He also receives $225 per week in temporary workers' compensation benefits due to his amputated right foot.

Mary is twenty-one years old and lives in Bettendorf. She is not a high school graduate and has been sporadically employed. She is engaged to be married to a man other than Michael, and has plans to obtain her high-school diploma. The court found Mary has provided appropriate care for Carissa and giving Mary sole custody with

reasonable visitation by Michael would be in Carissa's best interests. Michael appeals.

II. Custody of Carissa.

Child custody determinations are decisions in equity and we review de novo. Iowa R. App. P. 4. While not bound by the district court's determination of factual findings, we will give them considerable weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

In child custody cases, our first and governing consideration is the best interests of the child. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995). There is no presumption in favor of the mother or the father. *In re Marriage of Bowen,* 219 N.W.2d 684, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but does not ensure an award of physical care. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa 1995). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. The objective should always be to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *See In re Marriage of Winter,* 223 N.W.2d 165, 167 (Iowa 1974); *In re Marriage of Rodgers*, 470 N.W.2d 43, 45 (Iowa App. 1991).

After review of the record, we find it was in Carissa's best interests to give Mary primary physical of Carissa. Carissa was clean and appropriately dressed,

Mary's discipline of her is positive and appropriate, and Mary is a nurturing parent. Mary has provided almost the entire care for Carissa during the year and one-half the parties lived together and after the parties separated.

In contrast, Michael has not proven he could better administer to Carissa's needs than Mary. Michael provided little care for Carissa while the parties lived together. When Mary left Carissa with him, he would call her and tell her to come home and watch Carissa. He fails to place Carissa's best interests before his own. For example, on several occasions when he lived with Mary and Carissa he chose to spend time with his friends rather than with Carissa and Mary. At least some of his time with friends was spent drinking and smoking. Much of his time when he was around the house was spent watching T.V., rather than watching Carissa. Michael made no efforts to help cook meals or clean the house. After the parties separated and Carissa was visiting Michael, Michael sometimes did not return Carissa after visitations. After visits with Michael, Carissa swears, is hyperactive, tired, and demands candy. Carissa's best interests are served by placing her physical care with her primary caregiver–Mary.

The court did err, however, in awarding sole legal custody of Carissa to Mary rather than awarding Mary and Michael joint custody. The district court reasoned the parents continually fight back and forth and are unable to communicate about issues affecting their child. "Joint custody" is an award of custody under which both parents

have equal rights and responsibilities toward their child. *See* Iowa Code § 598.1(3) (1997); *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). These equal rights and responsibilities include, but are not limited to, equal participation in decisions affecting a child's legal status, medical care, education, extracurricular activities, and religious instruction. *See* Iowa Code § 598.41(5)(1997). Although Iowa's legislature has not created a presumption joint custody is in the best interests of the child, Iowa statutes do express a preference for joint custody over other custodial arrangements. *In re Marriage of Miller*, 350 N.W.2d 596, 598-99 (Iowa 1986).

The foremost consideration in determining custody is the best interests of the child, but when a parent requests joint custody, the specific factors listed by the legislature in section 598.41(3)[1] are also considered. *Id.* The best interests of a child include the opportunity for a continuous relationship with both parents. *Id.*

It is in Carissa's best interests to award Michael joint custody. There may be situations in which the parents' lack of communication and mutual support may

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[1] Those factors are whether each parent would be a suitable custodian for the child, whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents, whether the parents can communicate with each other regarding the child's needs, whether each parent can support the other parent's relationship with the child, whether the custody arrangement is in accord with the child's wishes, whether one of the parents is opposed to joint custody, the geographic proximity of the parents, whether the safety of the child will be sacrificed by ordering joint custody, whether the parent seeking joint custody has a history of domestic abuse. Iowa Code § 598.3 (1997).

overcome the preference for joint custody. *See, e.g., In re Marriage of Miller*, 390 N.W.2d at 601. In this case, however, that factor is not enough to refuse Michael joint custody. The conflict which exists between Mary and Michael is not unusual. Although Michael is not a perfect parent, there is no contention Carissa's safety will be sacrificed by awarding Michael joint custody and Michael has no history of domestic abuse. Michael and Mary are awarded joint legal custody of Carissa, with Mary, as the primary caregiver of Carissa, awarded physical custody.

AFFIRMED AS MODIFIED.