

IN THE COURT OF APPEALS OF IOWA

No. 7-487 / 96-2241

000283

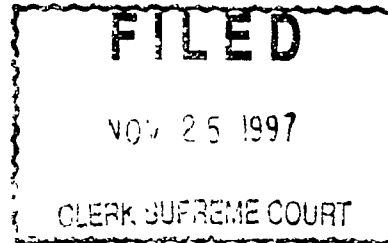
**IN RE THE MARRIAGE OF MELINDA S. SHOOK
AND RICHARD E. SHOOK**

**Upon the Petition of
MELINDA S. SHOOK,**

Petitioner-Appellant,

**And Concerning
RICHARD E. SHOOK,**

Respondent-Appellee.



Appeal from the Iowa District Court for Floyd County, Gilbert K. Bovard,
Judge.

Petitioner appeals from the entry of the dissolution decree. **AFFIRMED AS
MODIFIED.**

Kristy B. Arzberger of the Arzberger Law Office, Mason City, for appellant.

Russell Schroeder, Jr. of the Schroeder Law Office, Charles City, for appellee.

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

MAHAN, J.

Petitioner Melinda S. Shook appeals that part of the decree of dissolution which granted primary care of the parties' two children to respondent Richard E. Shook. She also appeals the failure of the trial court (1) to award her a dependent's exemption and (2) to determine the transportation responsibility of the parties for purposes of visitation. We affirm as modified.

Melinda and Richard were married on June 14, 1986. They have two sons, Cale born May 30, 1987, and Daniel born May 13, 1991. Melinda was the primary caretaker of the children during the marriage. However, due to Richard's seasonal employment, he also undertook some of the caretaking responsibilities. The parties separated on January 19, 1996. Melinda filed a petition for dissolution of marriage shortly thereafter. The children resided with Melinda in the family home from the date of separation until the time of trial on October 31, 1996.

Melinda was thirty-one years old and Richard was thirty-eight years old at the time of trial. Melinda was employed full time at Interstate Power Company and Richard was employed at Northern Cedar Service as a roofing foreman. His employment was seasonal.

The major issue at trial was primary physical care of the two children. Melinda presented evidence of Richard's health problems. She testified he suffers from severe headaches and stomach problems. She also presented evidence of

domestic violence upon herself, the children, and a niece who was sixteen months old at the time. She also testified concerning Richard's poor money management, infrequent time spent with the children, threats of suicide, and substance abuse problems involving both drugs and alcohol. Richard presented testimony of Melinda's extramarital relationships during the marriage and after separation. Richard contended Melinda placed her social relationships above the welfare of the children.

The court entered its decree on November 18, 1996, granting Richard primary physical care of the children. The court stated in its findings:

Each party has legitimate complaints as to identifiable improprieties on the part of the other. However, this court does not believe it beneficial to rake over the coals in an effort to determine which party "wronged" the other the most. Both have crossed the boundary of what can be considered acceptable or even forgivable by the other.

In discussing child custody, the court found and concluded:

Obviously, the most important "property" these parties have are their two children. The parties stipulated and the court concurs joint legal custody is appropriate. There is no suggestion by either party or basis in the record for separating the two children. Consequently, the court is faced with the unhappy task of deciding which parent will best provide for the children's interests as physical custodian. To their credit, both parties acknowledge the sincerity of each other as far as love and affection for the children. Melinda believes she is the more qualified physical provider citing alleged instances of lack of patience, over zealous disciplining and substance abuse on the part of Richard in the late '80s. Richard, on the other hand, contends he can provide a stronger more cohesive family relationship and expresses his concern that Melinda's priorities are self-centered around romantic relationships rather than maternal responsibilities.

Nothing expressed by the court in this opinion is intended to be critical. Both parties are human beings and exhibit human frailties. Richard has had substance abuse problems in the past but they do not

rise to the level that causes the court to believe his parenting abilities are now adversely affected. He works a seasonal job that allows him a substantial amount of time in the off season. For the most part, he is satisfied to draw unemployment benefits. To some extent this is explained by the fact that he has worked himself into a foreman position and when weather allows, it is necessary for him to be "on call" for off-season jobs. Within the context of the physical custody analysis, the off-season interim provides Richard a greater opportunity to fulfill the responsibilities of a single parent. While he does not have the income production level achieved by Melinda, he does have appropriate earning capacity. Richard's poor money management skills, as previously noted, causes serious concern to the court. Offsetting this is the close knit family support group readily available to him.

Melinda claims academic and intellectual capabilities superior to Richard's and, as noted, has had the greater role as provider. She has a better grasp of economic management. Richard's inability to manage financial affairs is a serious concern to the court. On the other hand, Melinda's relationships during the course of the marriage, which exceeded platonic levels, exhibit poor judgment on her part.

The children apparently enjoy the company of each of their parents. Both parents do things with the children, participate in their activities and show every indication of being willing and able to continue to do so. The record, however, causes the court to believe Richard has been the more serious in dedicating his time and efforts towards the children's activities to the exclusion of his own purposes than has Melinda. The court is mindful of Richard's hobby of auto racing but believes he is willing to minimize his activities along those lines in the future rather than taking time from the children to follow even a limited race circuit. The court believes the record established Melinda's present primary concern is to satisfy her own quest for a meaningful adult relationship and as a result, the children's welfare may at times be given secondary priority. Because of the present location of both parents in the community of Rockford, the children are able to enjoy maximum contact opportunities with both parents. The strong family ties and relationships existing in the local area with Richard's family is a positive benefit for the children. The court is not totally convinced Melinda will remain in the community should opportunity for future liaisons occur, but at present gives her the benefit of that doubt.

Since the parties' separation, the children's primary physical custody has been with Melinda. In addition to the always expected emotional turmoil caused to children by the dissolution process, an adverse aspect of that placement is such as may arise from Melinda's adult associations. Of concern to the court is the fact that while in all likelihood she has not flaunted the relationships in the presence of the children, they have obviously been aware of her activities and disapprove of them. In that context, her testimonial comment that there "would be no marriage to [a particular individual]" was informative. Her reason, in substance, was "[H]e isn't for me. I'm not ready to be a mom for four kids." The court feels Melinda is not fully ready to be a mom for two children under her present allocation of priorities.

On balance, the court concludes the best interests of the children will be served by placing them in the physical custody of Richard.

I. SCOPE OF REVIEW. Our review in this case is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). However, we are not bound by them. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

II. PRIMARY PHYSICAL CARE. 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; *Weidner*, 338 N.W.2d at 356; 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. 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. *Winter*, 223 N.W.2d at 167. Each custody decision is based on its own particular facts. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

The trial court did not discuss the allegations of domestic abuse. We have previously recognized domestic abuse as a factor in determining the custodial parent. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997); *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995); *In re Marriage of Brainard*, 523 N.W.2d 611, 614-15 (Iowa App. 1994); *see also* Iowa Code § 598.41 (1995). There are several allegations of domestic violence on the part of Richard in the record. Some are contested and some are not. Even more important are the admissions and reference to domestic abuse made by Richard himself.

Melinda testified to several instances of domestic violence inflicted upon her by Richard. Richard contested most of these allegations, but did admit to holding Melinda down on the floor and admitted to several instances of shoving her. Melinda also testified to an incident which occurred in the parties' Blazer approximately one year prior to trial. The boys were being "rambunctious" and Richard wanted them to

sit down. He then reached around and hit "all three of us and left red marks on all three of us." She and the boys stayed in the Blazer after Richard got out clinging to each other and crying. Richard admitted the incident occurred and that he was very upset at the time. However, he testified he only slapped the boys and did not hit them. The incident with the sixteen-month-old niece occurred while Richard was babysitting her and Cale. Melinda, her sister Lisa, and Richard's mother Florence came to the home unaware of the incident. They were sitting around the table when Richard started crying. He admitted to them that he had become upset when the sixteen-month-old child would not eat. He removed her diaper and struck the child with his hand. All three of the women observed a black and blue mark that was left on the child's bottom. The record does not reflect any denial of this abuse by Richard.

In addition to the above allegations by Melinda, the record consists of domestic violence admissions on the part of Richard. Trial court exhibit thirteen is a handwritten question and answer exercise drafted in Richard's handwriting during his substance abuse recovery program. The questions and answers are as follows:

5. Give five examples of how powerlessness (loss of control) has revealed itself in your own personal experiences.

- (1) No money left over.
- (2) Physical abuse to myself and spouse.
- (3) Lost feeling of love.
- (4) Lost feeling of caring; thoughts of suicide.
- (5) Loose contact with the world and God.

6. What type of physical abuse has happened to you or others as a result of your chemical usage?

- (1) Battered wife.
- (2) Battered dogs.
- (3) Battered car and myself.

The record also supports Melinda's allegations of substance abuse involving both drugs and alcohol. Richard admitted to the use of both during his treatment program. He admits in trial court exhibit thirteen to "buying dope all the time" and that the substances altered him from a nice guy to "mean and macho." He also testified he did not use alcohol from 1988 to January 1996, but admitted use in 1995 when later cross-examined. He testified he started to drink again in January 1996 but only on a few occasions. He also testified to using illegal drugs as recently as January 1996.

We have taken into consideration all of the factors previously outlined and now conclude the trial court's award of primary physical care to Richard should be modified. Primary physical care of the children will be granted to Melinda, who was the primary care giver of the children during the marriage and from the time of separation in January 1996 to the time of trial in October 1996. The trial court concentrated primarily on Richard's money management abilities. We find the domestic violence issue and continued use of both alcohol and illegal drugs to be of more critical importance. The trial court worried enough about Melinda's relationships to grant primary physical care of the children to Richard. But, we find the record

devoid of any evidence of misconduct in front of the children. *In re Marriage of Grandivetti*, 342 N.W.2d 876, 879 (Iowa App. 1993) (extramarital affair given greater weight when misconduct occurred in presence of children). Additionally, we find no evidence in the record showing Melinda intended to move the children to Alaska or away from Richard. Most importantly, there is no credible evidence of domestic violence or substance abuse on the part of Melinda during this marriage. Indeed, she testified at trial her employment requires a drug test and she has never tested positive. We accordingly modify the trial court decree to grant Melinda primary physical care of the children.

III. VISITATION AND TRANSPORTATION. The liberal visitation granted to Melinda in the trial court decree shall be granted to Richard. The transportation responsibilities and costs for purposes of visitation shall be shared equally between the parties.

IV. CHILD SUPPORT. Our decision necessitates the modification of the child support provisions of the trial court decree. This court does not favor prolonging litigation. However, a thorough search of the record leaves it unclear what income figures were used by the trial court in setting child support. In addition, the financial circumstances of the parties may have changed. Accordingly, we remand the issues of child support and dependency exemptions to the district court. We do not retain jurisdiction.

We affirm the decision of the district court and modify it to reflect a grant of primary physical care to Melinda with liberal visitation to Richard. We remand the issues of child support and dependency exemptions to the district court for determination.

AFFIRMED AS MODIFIED.