

IN THE COURT OF APPEALS OF IOWA

No. 7-178 / 96-1440

**IN RE THE MARRIAGE OF KEVIN L. ATWELL
AND MELODY A. ATWELL**

Upon the Petition of
KEVIN L. ATWELL,
Petitioner-Appellee,

And Concerning
MELODY A. ATWELL,
Respondent-Appellant.

Appeal from the Iowa District Court for Wapello County, Dan F. Morrison,
Judge.

Melody Atwell appeals the custody provisions of the decree dissolving her
marriage to Kevin Atwell. **AFFIRMED.**

R.T. Starken of Alexander & Starken, Ottumwa, for appellant.

C. Jean Pendleton of Charnetski, Olson, Lacina, Pendleton & Garland,
Grinnell, for appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ., but decided en banc.

HUITINK, J.

Melody Atwell appeals the custodial provisions of the decree dissolving her marriage to Kevin Atwell. We affirm.

I. Background Facts and Proceedings.

Melody, age thirty-one, and Kevin, age thirty, were married in July 1990. They have two children, Richard, born December 30, 1988, and Amanda, born February 25, 1991. Kevin adopted Richard who is Melody's child from another marriage. Kevin has parented Richard since Richard was ten months old.

Kevin initiated these proceedings in December 1994. Melody was awarded temporary custody in January 1995. Trial commenced in March 1996 and was completed in June 1996.

The district court's July 1996 decree awarded the parties joint custody. Kevin was awarded physical care and Melody was awarded substantial visitation. Melody was ordered to pay child support of \$495 per month.

In this appeal Melody contends the district court should have awarded her physical care of the children. She cites her greater primary care experience, alleged sex abuse of the children while in Kevin's care, and Kevin's lesser commitment to parenting. Kevin denies Melody's allegations of misconduct and disputes her characterizations of his parenting priorities. He cites the Department of Human Services' determination that Melody's allegations of sexual abuse were unfounded.

Kevin also argues Melody's custodial judgment is suspect because of her unilateral decision to introduce Richard to his biological father, her persistent disruption of the parties' visitation schedule, and a founded child abuse report implicating Melody in the physical abuse of her boyfriend's five-year-old child.

Our review in this case is de novo. Iowa R. App. P. 4. 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). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

The critical issue is not which parent possesses the greater right to the children, rather the controlling consideration must be the best interests of the children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). 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). The court should also consider the characteristics and needs of each child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the children, the relationship of the children with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status. *Id.*

There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care experience is one of the many factors the court considers but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Insofar as is reasonable and in the best interests of the child, the court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. *See Iowa Code* § 598.41(1) (1995). To effectuate that policy the court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

The district court was aided in its custodial analysis by professional custodial evaluations and psychological reports. The court's findings include this observation:

The American Home Finding report (Petitioner's exhibit 5B) submitted by Susan Hargen found that the children would be safer with Kevin. Ms. Hargen felt that Melody had handled the issue of Richard meeting his biological father poorly and has had problems with Melody's credibility. Although this home study is not up to the usual standards used by this court, it does indicate that the findings are based on observations of both parties at times when they were not interacting with the children.

Melody also submitted a favorable recommendation from a custodial evaluator.

However, the district court gave less credit to this report because Melody's evaluator

had no contact with Kevin before formulating the conclusions recited in the report. The court also noted Melody's failure to inform the evaluator of the founded child abuse report implicating her.

The district court's decree also states:

The court finds that of the parties the Petitioner [Kevin] is more stable and has his priorities in better focus than Respondent [Melody]. The court also finds that Petitioner is more credible than Respondent. It is clear that both parents can raise the children. Both parents will keep the children safe and provide for their physical needs.

Our de novo review of the record confirms the district court's assessment of the parties' respective custodial skills. We, like the district court, are concerned about Melody's custodial judgment. Her unilateral decision to re-establish a relationship between Richard and his natural father raises substantial doubts about her ability to constructively parent in a joint custodial environment. Similarly, Melody's interference with Kevin's visitation while she had temporary custody conflicts with fundamental joint custodial objectives of shared parenting.

In making this determination, we have not ignored Melody's greater primary care experience. However, successful parenting following a dissolution implicates far more than a parent's ability to attend to the daily details of raising a child. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa 1996). The parent awarded physical care must also possess those parental attributes that are consistent with the obligations inherent in a joint custody arrangement. *Id.* Melody's failure to appreciate the

importance of these added parental duties minimizes the advantages of her primary care experience.

Moreover, the fact that Melody will no longer provide primary care does not necessarily imply the children will lose the benefit from her parenting experience. *See In re Marriage of Kunkel*, 555 N.W.2d at 254. As a joint custodian, Melody has the right to continuing physical and emotional contact with the children and is entitled to share in the rights and responsibilities of raising them. Iowa Code § 598.41 (1995). These rights and responsibilities include decisions affecting the children's legal status, medical care, education, extracurricular activities, and religious instruction. *See Iowa Code § 598.41(5); In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Melody's faithful exercise of these rights will ensure the children the continued benefit of her parenting experience.

To a large extent, the district court's impressions of the parties and the resulting custodial award were based on its negative assessment of Melody's credibility and the sincerity of the parties' testimonial assertions. The trial court had the parties before it and was therefore better able to observe their demeanor and was in a better position to evaluate them as custodians. These determinations are entitled to considerable deference on appeal. *See In re Marriage of Forest*, 201 N.W.2d 728, 730 (Iowa 1972).

We conclude the statutorily prescribed custodial objectives and the best interests of the children are advanced by awarding physical care of these children to Kevin. We affirm the judgment of the district court.

Each party shall pay their own attorney fees. Melody shall pay the court costs of this action.

AFFIRMED.