

FILED
OCT 23 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF DEBRA SUE McDONALD AND DWIGHT ABNER McDONALD

Upon the Petition of	)		329
DEBRA SUE McDONALD,	)		
Petitioner-Appellee,	)	Filed October 23, 1984	
And Concerning	)		
DWIGHT ABNER McDONALD,	)		
Respondent-Appellant.	)	<u>4-347</u> 84-628	

Appeal from the Iowa District Court for Marshall County - Dale E. Ruigh,
Judge.

Respondent appeals the dissolution decree placing the parties' four children
in the sole custody of the petitioner. **AFFIRMED AS MODIFIED.**

James C. Ellefson of Lundy, Butler & Lundy, Eldora, Iowa, for respondent-
appellant.

Richard N. Carlson of Fairall, Fairall, Kaplan & Condon, Marshalltown,
Iowa, for petitioner-appellee.

Heard by Donielson, P.J., Schlegel, and Sackett, JJ.

Respondent, Dwight McDonald, appeals the dissolution decree placing the parties' four children in the sole custody of the petitioner, Debra McDonald. We modify and grant the parties joint custody.

I. Standard of Review. Our review of this equity action is de novo. Iowa R. App. P. 4. We give weight to the trial court's fact findings, but are not bound by those findings. Iowa R. App. P. 14(f)(7).

In determining the award of child custody, we are governed by section 598.41 of the Iowa Code. Subsection (2) of that section was recently amended by the legislature, and now states that joint custody should not be granted when there is "clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed." Iowa Code § 598.41(2), 1984 Legis. Serv. No. 3 at 44 (West).

II. Joint Custody. When we consider the factors listed in section 598.41(3), we do not find clear and convincing evidence that Dwight's legal custodial relationship with his children should be severed. The evidence shows that both parents would be suitable custodians, and that the psychological and emotional needs and development of the children would suffer due to lack of active contact with both parents. The evidence also shows that both parents have actively cared for the children before and since the separation. Moreover, the children wish to retain close relationships with both parents.

The evidence is not as clear-cut regarding the other factors to be considered. The trial court noted that while Debra seemed very willing to support Dwight's relationship with the children, Dwight "reciprocated only grudgingly." In view of Dwight's testimony that no one can replace Debra as the children's mother and his position throughout the proceedings that joint custody is appropriate, we give little weight to this observation of the trial court.

The biggest question regarding joint custody is whether the parents can communicate with each other regarding the children's needs. The evidence shows that the parties have not been successful in working out visitation arrangements under a predissolution decree granting "reasonable" rights of visitation. The trial court found that both parents contributed to the troubles. To remedy the problem, the trial court imposed a fixed visitation schedule, which it believed would "solve most of the problems which have existed during the pendency of this action." We agree. We also believe that when the calming effects of that fixed schedule are considered, the evidence is not clear and convincing that the parents will not be able to communicate about such matters as the medical care, education, and religious instruction of the children. See Iowa Code § 598.41(4), 1984 Legis. Serv. No. 3 at 43-44.

The trial court also considered Debra's resistance to joint custody. It found her resistance reasonable in light of some of her past difficulties with Dwight. However, most of those difficulties resulted from the visitation problems. When those are removed from consideration, we do not find Debra's resistance to be supported by clear and convincing evidence. One party cannot veto joint custody. See In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). We believe that once this action is final and the parents stop using visitation rights as a weapon against each other, they will act like responsible adults and be able to communicate regarding the children's needs. Therefore, we award joint custody.

III. Physical Care. The trial court awarded physical care of the children to Debra. We affirm that portion of the decree.

The evidence shows that Debra is more sensitive to other's needs and feelings than is Dwight. The only expert witness at the trial recommended that Debra be given care of the children. Because Dwight is a construction worker who is assigned duties in various cities, he will probably have less time available to be with the children than Debra will have available.

The main factor mitigating against Debra having physical care is her cohabitation with another man. However, there is no evidence that Debra is promiscuous, that the children have been exposed to her sexual activity, or that her cohabitation has adversely affected the children. Her cohabitation should only be one factor in determining which parent becomes the physical custodian. See In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). We believe this factor is outweighed by other considerations.

The dissolution decree is modified to grant joint custody.

AFFIRMED AS MODIFIED.