

IN THE COURT OF APPEALS OF IOWA

No. 4-556 / 94-1017

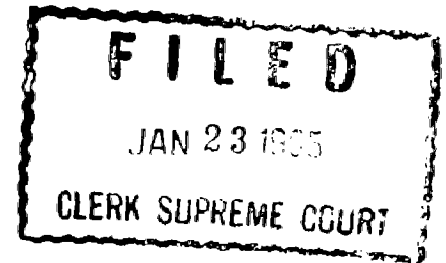
IN RE THE MARRIAGE OF MARIANNE R. MEISTER AND
FRANCIS N. MEISTER

Upon the Petition of
MARIANNE R. MEISTER,

Petitioner-Appellee,

And Concerning
FRANCIS N. MEISTER,

Respondent-Appellant.



Appeal from the Iowa District Court for Plymouth
County, Dewie J. Gaul, Judge.

Francis N. Meister appeals from child custody, alimony
and attorney fee provisions of the parties' dissolution
decree. **AFFIRMED.**

Michael G. Yaneff of Yaneff & Cosgrove, Sioux City, for
appellant.

P.D. (Phil) Furlong of P.D. Furlong, P.C., Sioux City,
for appellee.

Brian E. Buckmeier, Sioux City, for minor children.

Heard by Sackett, P.J., Habhab and Cady, JJ.

CADY, J.

In this dissolution of marriage case, we are asked to consider whether the trial court correctly awarded split physical care of the minor children. The remaining issues involve alimony and attorney fees. In our de novo review, we affirm.

Marianne and Francis Meister were married on September 1, 1973. They had three children. Scott was born June 14, 1974, Greg was born August 22, 1978, and Janet was born July 8, 1985. Marianne and Francis separated in September 1992 when Marianne moved from the rural family home near Merrill, Iowa into an apartment in neighboring LeMars, Iowa. Janet went with Marianne and Greg remained in the family home with Francis. Marianne and Francis agreed to a visitation arrangement. Scott was attending college at the time and was not legally affected by the custody dispute.

Francis was self-employed as a farmer throughout the marriage. Marianne received a bachelor of science degree in 1975, but did not regularly work outside the home during most of the marriage. She was pursuing a masters degree in computer science at the time of trial. The trial court found Francis had net monthly income of less than \$500, and Marianne had net income each month of \$21. Francis was 45 years of age at the time of trial and Marianne was 43 years old. A female friend, Linnea Burnett, began living with Francis in January 1994. Linnea's two children also live in the home. Francis and Linnea plan to marry.

JUN 19 1997

Marianne was the primary caretaker of the children during the marriage. She initially sought physical custody of Greg, but eventually acceded to Greg's strong desire to remain with his father. Greg, however, testified he did not want to be separated from Janet. He felt it would impair their relationship. Janet did not testify. The attorney for the children recommended Janet remain with Marianne and Greg remain with Francis.

The trial court awarded Marianne and Francis joint legal custody of the children, with physical care of Janet to Marianne and physical care of Greg to Francis. It awarded no child support. Francis was ordered to pay monthly alimony of \$300 until December 31, 1997 due to Marianne's long absence from the work place. The court ordered the alimony to terminate earlier upon the death of either party, remarriage or cohabitation by Marianne, or if Marianne was no longer a full-time student. The property and debts were divided, and Francis was ordered to pay the children's attorney fees and \$3000 towards Marianne's attorney fees.

Francis appealed. He claims the district court placed too much emphasis on his cohabitation with Linnea Burnett in granting physical care of Janet to Marianne. He also argues the alimony and attorney fee awards were excessive.

I. Scope of Review

Our scope of review is de novo. Iowa R. App. P. 4. We recognize and give weight to the findings of fact made by

the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7). We approach the case with the best interests of the children in the forefront. Iowa R. App. P. 14(f)(14).

II. Split Physical Care

Split physical care refers to an arrangement where each parent in a dissolution action is awarded primary physical care of at least one child of the marriage. In re Marriage of Will, 489 N.W.2d 394, 397 (Iowa 1992). It is rarely utilized by courts in structuring a custody arrangement since it is contrary to our recognized presumption that siblings should not be separated. Id. at 397-98. The arrangement is generally disfavored because it deprives children of benefit of their constant association. Id. As with most legal principles, however, the rule is not absolute. Split physical care may be awarded if compelling reasons exist which demonstrate that separation could better promote the long-range interests of the children. Id.; In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). See Jay M. Zitter, Annotation, Child Custody: Separating Children by Custody Awards to Different Parents, 67 A.L.R. 4th 354 (1989).

The starting point in our search to determine whether split physical care would best serve the children is to consider the general custody factors enumerated in Iowa Code section 598.41 (3) (1993), as well as those identified in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa

CONFIDENTIAL

1974). An award of split physical custody requires a determination that both parents are capable caretakers of the children placed in their care. Will, 489 N.W.2d at 398. Other acknowledged factors include the difference in age between the children, the period of time the children would be together if split physical care was not awarded, the relationship between the children, and the likelihood that one of the parents or children would turn other children against the parent. Id.

The evidence reveals Marianne is a capable caretaker of Janet, just as it shows Francis has been a capable caretaker of Greg. Francis argued that Marianne has not fully cooperated with visitation on two occasions, but the evidence shows that Marianne has generally respected the agreed visitation rights of Francis since the separation. Clearly, the isolated visitation problems raised by Francis do not impact the conclusion that Marianne is a capable caretaker of Janet. On the other hand, the moral implication of Francis' cohabitation with Linnea Burnett is a factor to consider in determining the relative strength of the parties to be the caretaker of the children, especially Janet. See In re Marriage of Zabecki, 389 N.W.2d 396 (Iowa 1986).

Greg and Janet are separated in age by seven years. Greg was fifteen and one-half years old at the time of the trial. Greg and Janet lived apart for one and one-half years prior to the trial pursuant to the pretrial custody

agreement. They are not particularly close. Greg would frequently antagonize Janet prior to the separation. Janet has adjusted well to the current living arrangement, and appears outwardly content.

Although the decision is close, we believe the circumstances of the case are compelling and support the split physical care arrangement. Greg is unyielding in his preference to live with his father and Janet has adjusted well to living with her mother and visiting Greg and her father. The visitation arrangement allows Greg and Janet to interact every other weekend, which the trial court found was "probably as much togetherness as can be expected." We also agree with the trial court that any change in the current arrangement after the long period of separation prior to trial would be particularly disruptive to Janet.

III. Alimony

Many factors are considered in determining an award of alimony, most which are now defined by statute. See Iowa Code, section 598.21 (5) (1993). Upon our review of these factors, we agree with the district court that Marianne should be awarded monthly alimony of \$300 until December 1997 or until she ceases to attend college as a full-time student or one of the other terminating conditions occur. The marriage lasted 20 years, Marianne has limited earning ability while she completes her advanced degree, Francis has no child support obligation, and Francis shares his living expenses with Linnea.

IV. Attorney Fees

The trial court is authorized to assess all or part of the attorney fees incurred on behalf of a minor child in a dissolution action to one or both of the parties, unless they are indigent. Iowa Code, section 598.12 (1993); In re Marriage of Bevers, 326 N.W.2d 896, 901 (1982). The trial court is also authorized to require one spouse to pay all or part of the attorney fees of the other spouse. Such an award is discretionary. In re Marriage of Gaer, 476 N.W.2d 324, 330 (Iowa 1991).

Francis makes no claim of indigency. In determining whether the trial court abused its discretion in awarding attorney fees, we focus on the reasonableness of the fees and the parties' respective abilities to pay. In re Marriage of Geil, 509 N.W.2d 738, 743 (Iowa 1993). Under this standard, we find no abuse of discretion in the trial court's decision requiring Francis to pay the children's attorney fees and a portion of Marianne's attorney fees.

AFFIRMED.