

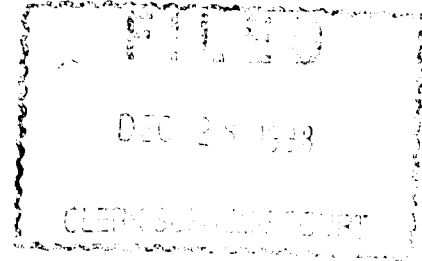
IN THE COURT OF APPEALS OF IOWA

No. 8-563 / 97-2151
Filed December 28, 1998

**IN RE THE MARRIAGE OF DEANN K. WOODRUFF
and TIMOTHY L. WOODRUFF**

Upon the Petition of
DEANN K. WOODRUFF,
Appellant,

And Concerning
TIMOTHY L. WOODRUFF,
Appellee.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch,
Judge.

Deann K. Woodruff appeals the child custody, child support, and alimony
provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED AND
REMANDED.**

Sara A. Kersenbrock of Kersenbrock Law Office, for appellant.

John R. Walker, Jr. of Beecher, Rathert, Roberts, Field, Walker & Morris,
Waterloo, for appellee.

Heard by Sackett, C.J., Huitink, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HUITINK, J.

Deann Woodruff appeals from the physical care, child support, alimony, and attorney fee provisions of the decree dissolving her marriage to Tim Woodruff.

I. Background Facts and Proceedings.

The Woodruffs were married on January 31, 1981. They have two children: Brite, born April 1, 1988; and Christian, born November 10, 1993.

Tim and Deann were both thirty-seven years of age at the time of trial. Deann is a physician's assistant employed by Medical Associates in Waterloo. Her gross earnings in 1997 were \$49,600. Tim has a bachelor's degree in business administration. His work experience includes management positions with Norell Corporation and Wendy's Restaurants. Because Tim has been unemployed for eight years, he has no significant earnings history.

Deann initiated these proceedings on November 8, 1996. The parties nevertheless continued to reside with the children in their Hudson, Iowa, home pending final resolution of disputed economic and custodial issues. When asked at trial why the children should be placed with her, Deann testified:

A. Well, because the primary reason that I want the divorce is because Tim will not change his abusive ways to me and then using the children. And they're -- they have exhibited some of the things, awful things that Tim does. I have seen those behaviors in the boys. So the big thing is I don't want them to grow up and be like Tim and treat their spouses that way and their children that way. I want them to grow up and be loving children. I want them to have well-developed consciences because it seems when Tim does these things, he has no remorse. He doesn't care it's hurting the children. I know he wants to

hurt me, but he doesn't care if he involves the children in it. So my big thing is I want them to have functional families when they grow up.

Deann's reference to Tim's abusive ways included two 1993 incidents in which she claimed Tim choked her and threatened her with a gun. She also testified Tim habitually used vulgar and demeaning language in the children's presence dressed inappropriately, abused alcohol and tobacco, and refused to find a job. Tim denied Deann's allegations of abuse and other inappropriate behavior. When he was asked why he wanted physical care of the children, he testified:

A. I would like to see -- the divorce itself has been a stressful time for all of us. I would include Deann in that, and it has been especially on the children. I would like to see some kind of continuity continue. I've been the primary caregiver. I've been the one they've gone to in stress and during the day. I would like to have that area at least stay normal.

Q. What about visitation?

A. I would like for her to have visitation with the children and spend as much time as possible with them.

The trial court, finding Tim's denials more credible, expressly rejected Deann's allegations of physical abuse. The remainder of her complaints were either implicitly rejected or disregarded. Tim was awarded physical care because the court determined, "Tim has been actively fulfilling that role throughout the marriage and can continue to best serve the children's best interests."

The court also ordered Deann to pay Tim rehabilitative alimony in the amount of \$500 per month for thirty-six months. The court reserved ruling on the amount of

child support until the attorneys could re-calculate the appropriate amount of support based on a yearly income for Deann of \$61,000.

Both Deann and Tim filed rule 179(b) motions. The court modified Deann's visitation, but denied Deann's request to modify her alimony obligation. The court set Deann's child support obligation at \$850 per month based on net monthly income attributions of \$2688.96 for Deann and \$1297 for Tim. The court additionally ordered Deann to pay \$5000 toward Tim's attorney fees.

Deann appeals. She contends the district court erred in: (1) awarding Tim physical care of the children; (2) calculating her child support obligation based upon her earning capacity instead of her actual earnings; and (3) ordering her to pay alimony and attorney fees.

II. Standard of Review.

Our review in cases such as these 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). We are not bound by these determinations, however. *Id.* 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).

III. Physical Care.

In child custody cases, our first and governing consideration is the best interests of the children. The critical issue is not which parent possesses the greater

right to the child, rather the controlling consideration must be the best interests of the child. *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 child. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974).

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 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).

The record indicates the parties' children are thriving and well-adjusted in every respect. They enjoy good relationships with each other and their parents. Neither has any needs requiring special accommodations.

We share the district court's confidence in the parties' individual ability to attend to the children's primary care needs. Each offers a custodial environment preserving the stability and comfort the children presently enjoy. We, however, unlike the district court, do not believe the parties' primary care experiences distinguish Tim as the preferred physical care provider.

Tim's assumption of a substantial primary care role was largely by default and certainly not to Deann's exclusion. Tim's refusal to find a job forced Deann to

assume disproportionate responsibilities for the family's financial, domestic, and primary care needs. The time and energy required to meet these needs have deprived Deann of the opportunity to participate in the children's activities to the same extent as Tim. This is not, as Tim claims, a situation where the parties have agreeably designated a primary wage earner and care provider. There is abundant evidence of Deann's desire to spend more time with the children by reducing her work schedule and Tim's broken promises to find suitable employment.

We also find the presumed advantages of continuity in the children's physical care underlying the district court's custodial award have been overstated. Tim's inevitable return to substantial employment will reduce his future availability to meet the children's primary care needs. Conversely, Deann can and is willing to reduce her work schedule to two and one-half days per week while maintaining sufficient income to support herself and the children.

Although both parties possess many favorable parental qualities, Deann is clearly more ambitious and responsible. The record indicates she has sacrificed more and worked harder to provide for the family's needs than Tim has. It would be inequitable to deny her physical care simply because past circumstances have worked to Tim's practical advantage. We conclude both equity and the children's best interests are served by placing their physical care with Deann.¹

¹ The foregoing proved sufficient to resolve this issue and we, therefore, decline to address other evidence of Tim's alleged character flaws.

In reaching this decision, we do not intend to minimize Tim's past or future parental role. The fact that we do not award him physical care does not imply that his children will be deprived of the benefit of his considerable parental qualities. As joint custodian, Tim has the right to continuing physical and emotional contact with his children and is entitled to share the rights and responsibilities of raising them. *See* Iowa Code § 598.41(5) (1995); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Tim's faithful attention to these rights and obligations is essential to the welfare of his children.

Our decision to place physical care of the children with Deann necessitates a determination of Tim's child support obligation. Because we find the record insufficient for this purpose, we remand this issue to the district court. In making this determination, the district court shall use Deann's actual earnings at the time procedendo issues in this case and shall attribute no less than \$1297 net monthly income to Tim. We do not retain jurisdiction.

V. Alimony.

Deann contends the district court's award of rehabilitative alimony was not justified in light of Tim's education, training, and work experience. We disagree.

Rehabilitative alimony serves to support an economically dependent spouse through a limited period of education and retraining. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996). Its objective is self-sufficiency. *Id.* Cases in which rehabilitative alimony is awarded are those where the spouse to receive

alimony needs to redevelop previous skills, receive new training, or develop potential supportive skills. *In re Marriage of Peterson*, 491 N.W.2d 535, 538 (Iowa App. 1992).

We find the district court's award of rehabilitative alimony was justified. Although Tim has a college degree and work experience, he has been absent from the workforce for at least eight years. He will need temporary financial support from Deann to make the transition to substantial employment.

Although the amount awarded is equitable, the duration of the award is not. We accordingly reduce the duration of the award from thirty-six months to twenty-four months.

VI. Attorney Fees.

Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. *Id.* Awards of attorney fees must be for fair and reasonable amounts, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982).

We are unable to say the district court's attorney fee award was an abuse of discretion. We affirm on this issue. Each party shall, however, pay their own appellate attorney's fees. Costs shall be equally divided.

VII. Conclusion.

The district court's decree is modified as above provided and remanded with directions.

AFFIRMED AS MODIFIED AND REMANDED.