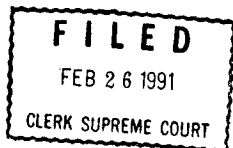


IN THE COURT OF APPEALS OF IOWA

No. 0-478 / 90-298



IN RE THE MARRIAGE OF GERALD CLIFFORD CASEY AND JOAN
MARLENE CASEY

Upon the Petition of
GERALD CLIFFORD CASEY,

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Appellee/Cross-Appellant,

And Concerning
JOAN MARLENE CASEY,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dubuque County,
L. John Degnan, Senior Judge.

Each party appeals the dissolution decree which placed
the parties' one child in joint legal custody and shared
physical custody. **MODIFIED AND REMANDED.**

Kevin M. Magee and Mary C. Kelley, Legal Services Corp.
of Iowa, Dubuque, for appellant/cross-appellee.

David A. Lemanski of Fuerste, Carew, Coyle, Juergens &
Sudmeier, P.C., Dubuque, for appellee/cross-appellant.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

SCHLEGEL, J.

Both parties in this dissolution of marriage action have appealed the judgment of the district court. Both the petitioner, Gerald Casey, and the respondent, Joan Casey, are dissatisfied with the court-ordered shared physical custody of their three-year-old infant, Erinne Elizabeth. Although the parties agree that a joint custody arrangement is appropriate, each party contends that it is in the best interests of the child to be placed in the permanent physical care of that parent. We affirm the decree as modified.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We must review all of the facts and circumstances, as well as the law, to determine rights from credible evidence on issues properly presented and preserved. In re Full, 255 N.W.2d 153, 158 (Iowa 1977); In re Lattig, 318 N.W.2d 811, 812 (Iowa App. 1982). We will give weight to the trial court's findings of fact, Iowa R. App. P. 14(f)(7), but we are not bound by them. In re Novak, 220 N.W.2d 592, 597 (Iowa 1974); Lattig, 318 N.W.2d at 811-12. Finally, we note that precedent is of little value; we must reach our decision based on the particular facts of this case. In re Kehrli, 241 N.W.2d 923, 926 (Iowa 1976) (quoting In re Briggs, 225 N.W.2d 911, 912 (Iowa 1975)); Lattig, 318 N.W.2d at 812. As the primary issue here is the placement of the child's physical

custody, our paramount concern must be the best interests of the child. Iowa R. App. P. 14(f)(15).

The parties were married in June 1987. Erinne Elizabeth, born in January 1988, is the only child born of the marriage. Joan has two teenage children by a prior marriage. The parties separated in March 1989.

Both parties work full time and are in good health. Joan is forty years old and earns \$957 disposable income per month as a bookkeeper and office manager. She receives \$120 per month for support of the older children. Gerald is thirty years old and earns \$1080 disposable income per month as a surgical room technician and naval reservist.

There was much discord in the home leading to the dissolution. The trial court noted that both parties are uncompromising. One of many problems was Gerald's relationship with Joan's children which reflected constant enmity.

Without having discussed the matter, Gerald took Erinne with him when he left home. Joan obtained a temporary injunction for the return of Erinne. The parties later agreed upon a temporary arrangement which altered physical placement several times each week. Because both parents work, Erinne spends most of her day in day care.

The parties entered into a prejudgment stipulation which anticipated that the parents would have joint custody but that primary physical care would be with one parent. The stipulation established a visitation schedule and

financial and insurance arrangements. The parties left the issues of placement and support to the court.

Both parents love Erinne and want primary physical care of her. Each testified that the shared physical custody arrangement was not in her best interests. Although the home studies found both parents well qualified, the counselor testified that Joan had some advantages. These included having siblings in the home and the family, learning, and social atmosphere.

The trial court determined that either parent would be suitable for physical placement. In its original decree, the trial court ordered Joan to take primary physical care of Erinne. Nevertheless, the trial court entered a nunc pro tunc dissolution decree ordering shared physical custody.¹ The nunc pro tunc decree adopted a system whereby one parent has the child overnight, drops her off at day care, the other parent picks the child up, and the process repeats itself during the week with the parents having custody on alternating weekends.

We have expressed our dissatisfaction with such Solomonic arrangements before. In In re Muell, we noted that "while in most cases a child's best interests will be

1. There is no satisfactory explanation either in the record or the briefs of the purpose of entering the nunc pro tunc decree. We find no motions or transcripts concerning this change, nor does the decree itself explain the change. We note that the parties challenge the substance of the decree, but neither raises questions about its regularity.

served by associating with both parents, an attempt to provide equal physical care may be harmfully disruptive in depriving the child of a necessary sense of stability." 408 N.W.2d 774, 776 (Iowa App. 1987) (citing Note, Divided Custody of Children After Their Parents' Divorce, 8 J. Fam. L. 58 (1968)); see also In re Burham, 283 N.W.2d 269, 272 (Iowa 1979). Although we believe the parents should continue to have joint custody, we find that the present shared physical care arrangement may be harmful to the child. Because the parents agree, the sole issue before us is which parent should have primary physical care of Erinne.

Iowa Code section 598.41(3) sets forth the considerations we must make in determining what custody arrangement will be in the best interest of the child. Additional considerations are set out in In re Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Our examination of the record in light of these considerations leads us to the conclusion that Joan should be the primary physical caretaker for Erinne. Despite Gerald's assertions, Joan appears to have been the primary caretaker during the marriage. See In re Orte, 389 N.W.2d 373, 374-75 (Iowa 1986); Winter, 223 N.W.2d at 167; In re Muell, 408 N.W.2d 774, 777 (Iowa App. 1987); In re Ertmann, 376 N.W.2d 918, 921 (Iowa App. 1985). Although we recognize that there is some dispute over how well the older children get along with Erinne, we are not convinced that it is such that it

should deprive Joan of primary care, nor do we find that this contravenes the importance of having siblings together. Orte, 389 N.W.2d at 374.

We think Gerald should have liberal visitation rights. The parties have entered into a prejudgment stipulation concerning a visitation schedule. We have carefully examined the stipulation, and we find the schedule appropriate and in the best interests of the child. We adopt by reference the visitation schedule set out in the stipulation.

Because of the custody arrangement established by the trial court, it did not order either party to pay child support. We remand this case to the district court for such further proceedings and orders as are necessary to establish the proper child support award in accordance with the supreme court's child support guidelines.

We affirm the judgment and decree in all other respects. Costs of this appeal shall be taxed one-half to each party.

MODIFIED AND REMANDED.