

BACKGROUND: John and Alicia had a 4-year-old daughter. Frank represented John at trial and on appeal. John was a full-time factory worker who lived with another woman, Tracy, who also worked at the factory. Alicia lived with Dean. Dean worked full-time and Alicia worked part-time for Dean's father's business. John and Alicia's four-year-old daughter had a new baby sister, daughter of Alicia and Dean. Both John and Alicia used illegal drugs at the time they met and continued to do so after they began living together. John and Alicia had a volatile relationship. Alicia alleged that John physically abused her throughout their relationship and that this abuse drove her from their home.

TRIAL COURT'S DECISION: The trial court granted John custody of his 4-year-old daughter and granted Alicia visitation every other weekend and Wednesday afternoons along with summer visitation. The trial court also ordered Alicia to pay John child support based on full-time employment even though she only worked part-time.

APPELLATE COURT'S DECISION. Alicia appealed, arguing that she should have been granted custody of the parties' daughter and that the trial court failed to adequately consider the relationship between the parties' daughter and her sister. Alicia also argued that the trial court failed to consider the physical and emotional abuse she claims John inflicted on her. Frank represented John and argued that John is the more stable parent and better able to provide for his daughter.

IN THE IOWA DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR ██████████ COUNTY

2000.05.24 10:17:03
JUDGE: J. DIA

FATHER)	No. ██████████
Petitioner,)	
)	FINDINGS,
)	CONCLUSIONS AND
vs.)	DECRETAL ORDERS
)	
MOTHER)	
)	
Respondent.)	

Trial was held on March 22 and 23, 2000. The Petitioner was present with his counsel, Frank J. Nidey and the Respondent was present with her counsel, James L. Benz. Proposed findings, conclusions and decrees were submitted by both sides.

Each parties' proposed findings of fact, conclusions of law and orders, the financial affidavits, exhibits and the child support worksheets are all made a part of the trial record.

FINDINGS

Petitioner, FATHER was born ██████████
1972. Respondent, MOTHER was born ██████████ 1975.

FATHER & MOTHER are not and never have been married but are the parents of M.R.T. ██████████ who was born on ██████████, 1996.

MAY 24 2000
cc: Client

FATHER is employed at [REDACTED] where he has worked for the last four years.

FATHER is presently a group leader, helping to supervise 34 people on his line. FATHER earns \$14.82 per hour. He contends that he expects little overtime in the future because the company is in the process of further automating its operations. FATHER lives with T.R. [REDACTED] who is also employed at [REDACTED]. FATHER AND T.R. live in a large, well furnished townhouse which has a bedroom for M.R.T.

MOTHER is employed by [REDACTED] as a secretary making \$8.00 an hour.

MOTHER has been working there part-time since the birth of MOTHER'S second daughter, M.H.

born on January, 27, 2000. M.H.'s father is D.H. MOTHER resides

with D.H. . He also works for [REDACTED], owned by D.H.'s father. D.H.

testified that MOTHER could work full-time at \$8.00 an hour if she wished and that, while MOTHER

is working, she can care for her children. This rate for a 40-hour week equals \$16,640 per

year which is what FATHER should have imputed and did impute to her as income. MOTHER and

D.H. live in a large, well furnished mobile home which has a bedroom M.R.T. shares with

D.H.'s son, C.H. , from a previous relationship.

FATHER AND MOTHER first met in the summer of 1995 and started to live together shortly

thereafter. Both FATHER & MOTHER were using illegal drugs at the time they met and continued to do so after they began living together. FATHER testified that he stopped using drugs while MOTHER was pregnant with M.R.T. as he saw the birth of his daughter as an event which should cause the end of his drug use. FATHER candidly admitted that he and MOTHER began using drugs for a short time during 1996 while M.R.T. was an infant but has not used illegal drugs since 1996.

MOTHER has been living with D.H. since shortly after FATHER filed for custody of M.R.T. in April of 1999. Since D.H. AND MOTHER have been living together, D.H. has served a ten day jail sentence for assault causing bodily injury and completed a 30 day inpatient course of treatment for substance abuse. At the time of trial, D.H. claimed that he had been clean and sober for eight months. MOTHER claims that she has not used drugs since May of 1999. This is a relatively short time since she last used drugs.

The life led by FATHER AND MOTHER while they were living together was not stable or family oriented. FATHER AND MOTHER both testified that MOTHER moved from the residence the two of them shared on occasions. FATHER testified that, when M.R.T. was six months old, MOTHER told FATHER that she had slept with another man and that she wanted to move with M.R.T. to South Carolina. FATHER AND MOTHER reconciled and MOTHER did not move to South Carolina.

When M.R.T. was approximately 14 months old, MOTHER moved in with her mother but was there only a week when MOTHER's step-father asked MOTHER to leave. Shortly thereafter, MOTHER moved to an apartment in [REDACTED] for which FATHER provided the deposit of one half the first month's rent and \$50.00 per week for living expenses. During this time, FATHER was working evenings while MOTHER was working days. MOTHER had another boyfriend at that time.

M.R.T. would stay with MOTHER during the evenings and with FATHER overnight and during the day. During this time period MOTHER's mother grew very ill and died unexpectedly following surgery. Eventually, in October of 1997, FATHER AND MOTHER reconciled again and began living together with a friend named Amanda. MOTHER was depressed in the wake of her mother's death and, at one point, FATHER contends that he found MOTHER apparently about to take an overdose of anti-depressants. Problems then developed between Amanda and MOTHER so that, on January 1, 1998, FATHER AND MOTHER moved together to an apartment in [REDACTED] Iowa. MOTHER then began working part-time at [REDACTED] during the day and FATHER was working evenings at [REDACTED]. At FATHER'S suggestion, MOTHER began but did not complete counseling. Once again, MOTHER told FATHER that she did not want to be with him and, once again, MOTHER stayed with FATHER while she looked for her own apartment.

MOTHER testified that FATHER physically abused her throughout their relationship and that

his abuse of her is what drove her from their home. FATHER categorically denied the abuse. Although it was contended that he hung her over a balcony and caused her to fear for her life, no charges were apparently filed. Further, this alleged act was not directed at M.R.T. He denied that he choked her even though MOTHER's aunt, Melissa [REDACTED], testified that she saw red marks on MOTHER'S neck and that MOTHER'S belongings were outside on the ground from the balcony. No charges of assault or domestic abuse apparently were filed. Both parties testified to the fact that the police were called to their residence on several occasions but that no charges were ever filed. There is reason to doubt MOTHER'S testimony on this point. The absence of any arrests for domestic abuse on any of these occasions is significant in light of the mandatory arrest provisions of the Code of Iowa. The Court also finds significant the testimony of the parties and others as well as Petitioner's Exhibit #1 (the child abuse report) concerning MOTHER'S fight with Stacy [REDACTED] in M.R.T.'S presence. In contrast to FATHER'S unrefuted testimony that MOTHER did not follow through with counseling, FATHER voluntarily participated in the Batterer's Education Program in order to try to improve his relationship with MOTHER. The slamming of the car door by FATHER on MOTHER'S ankle was not shown to be deliberate.

In about June of 1998, after MOTHER obtained her own apartment. FATHER AND MOTHER

agreed that MOTHER would care for M.R.T. from 2:30 pm to 10:00 pm and that FATHER would have the care of M.R.T. at all other times. By this time, FATHER'S sister, Lorenza [REDACTED] (hereafter Tia) had come to live with FATHER to help care for M.R.T. while FATHER was working. FATHER testified that, during this time, MOTHER lived for a week or two with various relatives and lived in her car off and on. FATHER was providing the primary care for M.R.T., all the while doing what he could to be certain that M.R.T. spent time with FATHER. During this time, MOTHER worked as a stripper in [REDACTED] Iowa. From the testimony about this period of time is that MOTHER had few overnight visits with M.R.T. for a year, from June of 1998 until June of 1999 (the date FATHER filed for custody of M.R.T.), and that FATHER had primary care of M.R.T. for that year. Petitioner's Exhibit #1, the Child Abuse Assessment Notification and attachments, conclusively confirms this reading of the testimony. Although MOTHER'S family members testified that MOTHER was always welcome in their homes, it appears from Exhibit #1 that the investigating social worker attempted to, but could not contact MOTHER through her family. Moreover, it appears from Exhibit #1 that FATHER gave an honest account of the circumstances of M.R.T.'S life; that FATHER gave an honest even companionate appraisal of MOTHER'S circumstances; and that M.R.T. was in the primary care of FATHER. FATHER'S testimony was consistent with the contents of Exhibit #1.

FATHER filed his petition, seeking primary care of M.R.T. on April 16, 1999 and, on June 14, 1999, filed his Application for Emergency Temporary Custody and Visitation. In his affidavit filed in support of his temporary application, FATHER stated, as he did at trial, that MOTHER had been living with friends and relatives for a year; that FATHER had been providing the majority of the care of M.R.T. for that year; and that, immediately after she was served the petition, MOTHER moved in with a man (D.H.) she had known only a few weeks. Shortly thereafter, the parties were able to reach agreement on a temporary shared care arrangement which, although not approved by the Court, did work rather well for M.R.T. and the parties. By all accounts, M.R.T. is a happy, healthy four year old who is loved by and loves each of her parents.

It appears that instability prevailed in MOTHER'S life until after the petition was filed by FATHER in this case. MOTHER has stabilized her life during the last year by moving in with; starting to work for; and having a child with D.H. D.H. by his own admission, has serious substance abuse problems. It is hoped that D.H. AND MOTHER have dealt with their substance abuse problems and that their anticipated marriage will be successful. However, there is no assurance that MOTHER will not have an unstable home again as she had in 1998 and 1999. FATHER on the other hand, has been steadily employed at [REDACTED] for the last

four years and has been the parent who has always been there for M.R.T. , providing housing, income and health care. Both D.H. AND FATHER have law violation records and the parties have, by agreement, submitted copies of relevant documents from the court files. Most of FATHER'S record dates back to 1996 when FATHER WAS twenty four years old and admitted he was still using illegal drugs. Some of the law offenses committed by FATHER were not violent. The violent offences of which he was convicted were against other parties.

D.H. was convicted of domestic abuse in 1997 and at least one other assault for which he paid restitution for medical bills in the amount of \$4,922.41. D.H. was sentenced to 10 days in jail for assault causing bodily injury in January of 1999 and, in December of 1999, he was sentenced on a conviction of interference with official acts. FATHER has never been charged with domestic abuse and has certainly never been convicted of an assault necessitating nearly \$5,000.00 in medical bills.

MOTHER apparently has no fear of FATHER mistreating or neglecting M.R.T. as she was agreeable to awarding generous visitation of M.R.T. with FATHER

There was also testimony concerning the arrangements for and transportation to medical and dental appointments as well as testimony about the arrangements for and transportation to swimming lessons and preschool. FATHER testified that, as primary caretaker, he made the arrangements for most of these services and activities. Although MOTHER testified that FATHER would not allow her to participate in these decisions, the Court heard no evidence other than MOTHER'S testimony to support such an assertion.

Family members and friends testified for both MOTHER AND FATHER. MOTHER AND FATHER are fortunate to have the support of their families. Both parties had witnesses who testified that they were good parents. There was the testimony from the parties, the families and friends concerning M.R.T.'s transitions from the care of one parent to the other. MOTHER, MOTHER'S family and D.H. all testified that M.R.T. was upset and cried when it was time to go to be with FATHER. FATHER AND T.R. also testified that M.R.T. used to be upset and cry when it was time to go to MOTHER'S care until they determined that, if they spoke positively about going to MOTHER'S and asked M.R.T. to do something liking picking up toys to assist in the transfer, then M.R.T. was happy to go to be with her mother.

CONCLUSIONS

The Court has jurisdiction of the parties and the subject matter of this case.

The parties have agreed that they should have joint legal custody of M.R.T.

██████████ (dob ██████/96); that FATHER should provide health insurance for M.R.T. ; that the parties should divide equally all uncovered medical, dental, orthodontist, doctor, prescription or eye glass expense for M.R.T. They agreed that they should alternate the right to claim M.R.T. as a dependent and for appropriate credits on their federal and state income tax returns with FATHER claiming M.R.T. for 1999, MOTHER claiming M.R.T. for 2000 and so on until M.R.T. can no longer be claimed as a dependent.

The parties have been unable to resolve any of the remaining issues. Therefore, the issues to be determined by the Court are which parent should have primary care of M.R.T. , the schedule of visitation that should be available for the other parent, the amount of child support payable, whether FATHER should pay any of MOTHER'S attorney's fees and the payment of the court costs.

The objective in resolving a custody dispute is to place the child in the environment most likely to bring them to a healthy physical, mental and social maturity. In Re: Marriage of Knight, 506 NW 2d 728, 730 (Iowa App. 1993). Both parties have shown that they are able to share M.R.T. with the other party, an important consideration when deciding ordinary joint custody. The Court should and has, pursuant to Section 598.41(1) (a) of the Code of Iowa, considered the primary care and visitation arrangement which will assure the child the opportunity for the maximum continuing physical and emotional contact with both

parents and which will encourage parents to share the rights and responsibilities of raising the child. Although the case law is clear that siblings should not be separated from one another absent compelling reasons, In Re: Marriage of Smiley, 518 NW 2d 376, 389 (Iowa 1994), the Court concludes that the primary care and visitation arrangement ordered below is appropriate and will not unduly separate M.R.T. from her infant sister for any considerable time. It was not proven that FATHER has a history of domestic abuse.

The Court concludes that FATHER is the more stable parent of the two and that FATHER has been M.R.T.'s primary caretaker for most of her life, at least since 1998. FATHER has not only provided the majority of the day to day care for M.R.T. but he has provided the necessary services as well as shelter, food and clothing. FATHER has, under some difficult circumstances, done what he could to foster and continue the relationship between M.R.T. AND MOTHER, especially during the year MOTHER had no permanent residence. MOTHER has been present in M.R.T.'s life but only began providing consistent care for M.R.T. after FATHER filed a petition for custody of M.R.T.. However, MOTHER should be granted liberal visitation.

Primary care is not awarded as a reward or punishment to either party. Some day neither party will have primary care. Therefore, the parties should conduct themselves so that M.R.T. will have pleasant childhood memories. Fortunately, the parties live relatively close to each other where the visitation is consistent and inexpensive.

