

**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

2000.06.01 10:17:03  
JUDGE: J. DIA

FATHER	)	No. ██████
Petitioner,	)	
	)	<b>FINDINGS,</b>
	)	<b>CONCLUSIONS AND</b>
vs.	)	<b>DECRETAL ORDERS</b>
	)	
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.

The amount of child support indicated by the application of the child support guidelines is presumed to be the appropriate amount.

In an action for modification of a dissolution decree, the attorney fees are awarded to the prevailing party. In this case FATHER is the prevailing party. It can be presumed that this Code Section 598.36 also applies to this type of paternity action. In his proposal FATHER does not seek attorney fees from MOTHER. Although costs are normally assessed to the prevailing party, which is FATHER, in his proposal he only seeks that she pay half of the court costs.

### DECRETAL ORDERS

IT IS HEREBY DECREED AND ORDERED:

1. The parties, FATHER and MOTHER, are awarded joint legal custody of the minor child, M.R.T. (dob [REDACTED]/96). FATHER is awarded primary care of M.R.T. subject to the following schedule of liberal visitation with MOTHER:
  - a.. Every other weekend from 5:00 pm on Friday to 5:00 pm on Sunday. MOTHER shall have every Wednesday from noon until 5:00 pm until M.R.T. starts school at which time the Wednesday visitation will be from after school until 7:00 pm.
  - b. In each even-numbered year, MOTHER shall have visitation on New Year's Day; the Fourth of July; Thanksgiving from 5:00 pm on the Wednesday preceding Thanksgiving until 9:00 am on the Saturday following Thanksgiving; and Christmas Eve

from 10:00 a.m. Christmas Eve until 10:00 a.m. Christmas Day. During odd-numbered years the same visitation periods are reserved for FATHER.

c. In each odd-numbered year MOTHER shall have visitation on Easter weekend from Friday at 5:00 pm until Sunday at 5:00 pm; Christmas Day from 10:00 a.m. Christmas day until 10:00 a.m. the day after Christmas; and New Year's Eve from 10:00 a.m. New Year's Eve day until 10:00 a.m. New Year's Day. During even-numbered years the same visitation periods are reserved for FATHER

d. Every other year MOTHER shall have M.R.T. with her on Memorial Day weekend from Friday at 5:00 p.m. until the day after Memorial Day at 8:00 a.m. MOTHER shall have M.R.T. each Mother's Day from 8:00 a.m. until 8:00 p.m.

e. Every other year MOTHER shall have visitation with M.R.T. on Labor Day weekend from Friday at 5:00 p.m. until Tuesday morning at 8:00 a.m. FATHER shall have M.R.T. each Father's Day from 8:00 a.m. until 8:00 p.m.

f. MOTHER shall have summer visitation with M.R.T. for a period of 6 weeks each summer. FATHER may have this visitation in increments of two weeks. If MOTHER takes the visitation in a six-week period, FATHER shall have M.R.T. with him every third weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m. MOTHER shall give FATHER written notice of her intention to exercise this visitation at least 60 days prior to the time the visitation is to begin. MOTHER AND FATHER may each take M.R.T. on vacations out of the state

for periods of up to three weeks.

If the visitation to which ~~MOTHER AND FATHER~~ are entitled falls on a holiday, the holiday shall take priority over regular and there shall be no makeup visitation.

The parties can allow the other party to deviate from these visitation provisions without waiving the right to insist on strict compliance in the future.

4. ~~MOTHER~~ shall pay to the Linn County Clerk of Court, P.O. Box 1468, Cedar Rapids, Iowa, 52406-1468 or to the Collection Services Center of the Department of Human Services if Respondent is so notified by that Department the sum of \$235.00 per month to ~~FATHER~~ as support for ~~M.R.T.~~ Payments shall commence the first day of the first month following the entry of the Decree herein and continuing the first day of each month thereafter until child support payments are no longer required. These payments shall continue until ~~M.R.T.~~ finishes high school or pursues equivalency requirements in a manner which is reasonably expected to result in completion of the requirements for a high school diploma or equivalency prior to the child reaching nineteen years of age, (Iowa Code Section 598.1.9) whichever occurs last or until ~~M.R.T.~~ marries, becomes self-sustaining, or becomes otherwise emancipated, whichever occurs first If support payments are not paid as ordered herein and become delinquent in an amount equal to the payment for one month, the District Court or the Collection Services Center shall order an assignment of income sufficient to pay the support obligation. Pursuant to Iowa Code Section 252D.8, the income of the child support payor is immediately subject to withholding regardless of whether support payments

are in arrears. The amount of the assignment of income shall not exceed the amount specified in 15 U.S.C., Section 1673(b). The Court reserves the right to order post-high school education for M.R.T. under Iowa Code Section 598.1.6 until she reaches closer to the time when she is graduation from high school.

IT IS FURTHER ORDERED that each party shall file with the Clerk of Court, upon entry of the Order, and to update as appropriate, information on location and identity of the party, including Social Security number, telephone number, driver's license number and name, address and telephone number of the party's employer. The information filed with the Clerk of Court shall be available, upon request, to a party, unless the party filing the information also files an Affidavit alleging the party has reason to believe that release of the information may result in physical or emotional harm to the affiant or the child. Information filed with the Clerk of Court shall be available to the Child Support Recovery Unit upon request.

5. FATHER shall continue to provide health insurance coverage for M.R.T. for so long as it is available to him through his employer at group rates. FATHER AND MOTHER shall be equally liable for all uncovered medical, dental, orthodontic, doctor, prescription or optical expenses for M.R.T.

6. FATHER AND MOTHER shall 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. may no longer



be claimed. MOTHER shall only be allowed to claim M.R.T. as a dependent and for appropriate tax credits if she is current on her child support obligation as of December 31 of the calendar year for which MOTHER is allowed to claimed M.R.T.

7. Each year, by May 2, 2000, the parties shall exchange the latest state and federal income tax returns, W-2's and any other statements of income received for the previous year.


8. Each party is responsible for his or her own attorney's fees.

9. Pursuant to FATHER'S proposed decree order, each party is responsible for one half of the court costs.

Dated on this 23<sup>rd</sup> day of May, 2000.

MAILED/DELIVERED ON 5/23/00  
BY [Signature] TO: Frank Nidey  
James Benz

William R. Eads  
\_\_\_\_\_, JUDGE  
\_\_\_\_\_  
JUDICIAL DISTRICT OF IOWA

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2001 Iowa App. LEXIS 283, \*

FATHER      Petitioner-Appellee, vs. MOTHER      Respondent-Appellant.

No. 1-205 / 00-1240

COURT OF APPEALS OF IOWA

2001 Iowa App. LEXIS 283

April 27, 2001, Filed

**NOTICE: [\*1]** NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION OF THE COURT OF APPEALS MAY NOT BE CITED BY A COURT OR BY A PARTY IN ANY OTHER ACTION.

**PRIOR HISTORY:** Appeal from the Iowa District Court for █████ County, █████, Judge. <sup>MOTHER</sup> appeals from an order establishing paternity and awarding physical care of their minor child. <sup>FATHER</sup> contends (1) she should have been awarded physical care of their minor child; and (2) her actual earnings should have been used in calculating her child support obligation.

**DISPOSITION:** AFFIRMED.

### CASE SUMMARY

**PROCEDURAL POSTURE:** Appellant mother challenged the judgment of the District Court, █████ County (Iowa) which entered an order establishing paternity of the parties' minor child and awarded appellee father physical care of their minor child, granted appellant liberal visitation and ordered appellant to pay child support.


**OVERVIEW:** On appeal, the appellant argued, inter alia, that she should have been granted primary care of the parties' minor child. Appellant argued that the trial court's findings were flawed and the trial court failed to consider that the custodian award would separate the child from her half-sister. The court affirmed the custodial award. The court agreed that the appellee had shown more stability than the appellant had since the minor child's birth. After the parties' separated, the appellee always provided a home for the child, and provided financial support and medical care for the child. For a year, the appellant was basically homeless and sleeping in her car. These were factors in the appellee's favor in making the custodial award. The evidence of abuse was disputed, and both parties had engaged in behaviors not conducive to good parenting, including using alcohol and drugs and being abusive to each other. Additionally, the factors favoring the presumption of leaving siblings together was not strong in this case. The parties' minor child had not established a relationship with her seven-month-old half-sister.

**OUTCOME:** The judgment was affirmed.


**CORE TERMS:** custody, half sister, abusive, fixing, raising, child support, physically, stable, credibility, favoring, domestic, siblings, ordered to pay, joint custody, believable, confrontation, emotionally, visitation, contending, apartment, custodial, custodian, abused, woman, birth


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**HN1**  An appellate court reviews child custody decision de novo. Iowa R. App. P.


4. [More Like This Headnote](#)


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**HN2**  The criteria governing custody decisions is the same regardless of whether the parties are dissolving their marriage or are unwed. [More Like This Headnote](#)


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**HN3**  In awarding child custody, the question is always which parent will do the better job of raising the child. An appellate court looks to the factors set forth in *In re Marriage of Winter*. The appellate court gives weight to the fact-findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14 (f)(7). Yet, the court is not bound by these determinations. The court bases its decision primarily on the particular circumstances of the parties before us. The interests of the minor child are the primary consideration. [More Like This Headnote](#)

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**HN4**  An appellate court gives consideration to each parent's role in child raising prior to a separation in fixing primary physical care. Though courts do not award custody based on hours of service for past care, they attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. There is no inference favoring one party as opposed to the other in deciding which one should have custody. The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding. [More Like This Headnote](#)


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**HN5**  Iowa Code § 598.41(1)(b), (2)(c) directs that evidence of domestic abuse creates a rebuttable presumption against joint custody. An appellate court considers the evidence of domestic abuse in determining if the presumption is rebutted and how much weight should be give to that one factor. [More Like This Headnote](#)

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**HN6**  Abusive behavior negates against a parent receiving custody. [More Like This Headnote](#)

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**HN7**  There is a presumption that siblings should not be separated. Generally courts oppose split physical care because it deprives children of the benefit of constant association with one another. The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range best interests of children. Good and compelling reasons must exist for a departure. [More Like This Headnote](#)

**COUNSEL:** Stephen B. Jackson and Stephen B. Jackson, Jr. of Jackson Law Office, Cedar

Rapids, for appellant.

Frank J. **Nidey of Nidey** Peterson Goldberg, P.L.C., Cedar Rapids, for appellee.

**JUDGES:** Heard by Sackett, C.J., Huitink and Streit, JJ.

**OPINIONBY:** SACKETT

**OPINION:**

**SACKETT, C.J.**

We are asked to review the district court's resolution of a custody dispute in a paternity action. The child, M.R.T., was born [REDACTED], 1997. Her parents are FATHER born in 1972, and MOTHER [\*2] born in 1975. They were in a relationship before and after M.R.T.'s birth but separated six to twelve months later. In April of 1999 FATHER filed a petition asking the court (1) to establish his paternity, (2) name him and MOTHER custodians; (3) grant him primary care; and (3) order MOTHER to pay child support. After a trial the district court granted the parties joint custody and awarded FATHER primary physical care. MOTHER was granted liberal visitation and ordered to pay child support. MOTHER now appeals contending (1) she, not FATHER should have been granted primary care, and (2) the district court should have used her actual earnings in fixing her child support obligation. We affirm.

HN1 We review de novo. Iowa R. App. P. 4; *In re Marriage of Riggert*, 537 N.W.2d 789, 791 (Iowa Ct. App. 1995); *In re Marriage of Harris*, 499 N.W.2d 329, 330 (Iowa Ct. App. 1993).

HN2 The criteria governing custody decisions is the same regardless of whether the parties are dissolving their marriage or are unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988); *Petition of Purscell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995).

HN3 The question is [\*3] always which parent will do the better job of raising the child. *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App. 1991). We look to the factors set forth in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). 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). Yet, we are not bound by these determinations. *Id.* We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). The interests of MOTHER are the primary consideration. See *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27 (Iowa Ct. App. 1988). HN4 We give consideration to each parent's role in child raising prior to a separation in fixing primary physical care. See *In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa Ct. App. 1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). Though we do not award custody based on hours of service for past care, we [\*4] attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. *In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa Ct. App. 1998); *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). There is no inference favoring one party as opposed to the other in deciding which one should have custody. See *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding. See *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985).

In awarding custody the district court found:

FATHER is the more stable parent of the two and 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 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 [\*5] 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.

MOTHER argues these findings are flawed, and the district court did not consider evidence that would show M.R.T.'S interests would be best served in her primary physical care. MOTHER contends she is presently more able to meet the child's needs. MOTHER also contends the district court did not properly consider evidence that FATHER was physically and emotionally abusive toward her and failed to consider that the custodian award will separate M.R.T. from her half sister. MOTHER also contends the district court failed to give adequate weight to FATHER'S past history and did not properly assess his credibility.

FATHER refutes MOTHER'S arguments contending the evidence shows he is the more stable parent and the one more suitable to provide M.R.T.'S primary care. He contends the district court gave the proper weight to his past and to the past conflicts between him and MOTHER. FATHER contends little weight should be given [\*6] to keeping M.R.T. with her infant half sister because the girls are over three years apart in age, and they have established no relationship.

FATHER AND MOTHER both have rocky pasts. At the time they first lived together they both were heavy drug users and at times have been involved in drug trafficking. There have been a series of conflicts between the couple.

We agree with the district court that FATHER has shown more stability than MOTHER since M.R.T.'S birth. After FATHER & MOTHER separated FATHER always provided a home for M.R.T. FATHER has had a stable job working for Amana, and he provided financial support and medical care for his daughter. MOTHER moved in and out of his apartment. For a time FATHER helped MOTHER pay for an apartment. During that period the parties shared the care of M.R.T. For a year MOTHER was basically homeless and sleeping in her car. These are factors in FATHER'S favor in assessing the custodial award.

MOTHER testified that FATHER was abusive to her during their relationship. She contends the district court did not give this evidence the proper weight. <sup>HNS</sup> Iowa Code section 598.41 directs that evidence of domestic abuse creates a rebuttable [\*7] presumption against joint custody. See Iowa Code § 598.41(1)(b), (2)(c). We consider the evidence of domestic abuse in determining if the presumption is rebutted and how much weight should be give to that one factor. See *In re Marriage of Ford*, 563 N.W.2d 629, 632 (Iowa 1997).

The evidence of abuse is disputed. MOTHER testified FATHER physically and emotionally abused her during the time they were together and that that was the reason she left his home. MOTHER'S grandfather testified FATHER slammed MOTHER'S foot in a door. FATHER testified he never abused MOTHER or any other woman. He contended there were times that MOTHER was aggressive and he restrained her. He points to evidence she was involved in a physical altercation with another woman in a bar. He contends if he choked her he did it in defending himself against her.

Three times the police were called to the home that MOTHER & FATHER occupied. They did not make arrests apparently because each complained to the officers that the other had been the abuser. Two friends of FATHER testified MOTHER was the aggressor in physical confrontations, that she kicked FATHER in the head and he responded only [\*8] in self-defense. At a friend's suggestion FATHER attended classes to educate himself on self-control in cases of confrontation with MOTHER.

<sup>HNG</sup> Abusive behavior negates against a parent receiving custody. Our de novo review convinces us that both FATHER & MOTHER have engaged in behaviors not conducive to good

parenting, including using alcohol and drugs and being abusive to each other. Believable testimony regarding negative behavior of each of the parties is in the record. We find they have both matured since the time they first established a relationship. Each is now in another relationship. Neither has married. FATHER points out that MOTHER'S current partner has had problems with alcohol abuse, was convicted of physically abusing his wife, and paid nearly five thousand dollars in medical bills as restitution. We also note he recently completed substance abuse treatment. Nothing is gained by examining all of the negative comments and accusations FATHER & MOTHER have made against each other. Our focus is not on which parent is worse, but instead on which parent can better serve M.R.T.'S needs.


Fortunately we are also able to find substantial and believable testimony that both FATHER and [\*9] MOTHER love M.R.T. and do a good job of taking care of her.

MOTHER claims the district court did not properly consider the need to keep M.R.T. together with her then seven-month-old half sister. <sup>HN7</sup> There is a presumption that siblings should not be separated. *In re Marriage of Smiley*, 518 N.W.2d 376, 380 (Iowa 1994). Generally we oppose split physical care because it deprives children of the benefit of constant association with one another. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). The rule is not ironclad, however, and circumstances may arise which demonstrate that separation may better promote the long-range best interests of children. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). Good and compelling reasons must exist for a departure. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). The factors favoring the presumption of leaving siblings together is not strong in this case. M.R.T. has not established a relationship with her sister. At the time of trial M.R.T. was four years old and her half sister only seven months. In the past several years M.R.T. has been [\*10] in the primary care of FATHER. MOTHER was awarded substantial visitation and the children will have an opportunity to be together.

After carefully weighing all factors and giving the required deference to the factual finding of the district court we affirm the custodial award.

MOTHER was ordered to pay child support of \$ 235 a month until M.R.T. finishes high school or reaches nineteen years of age. MOTHER contends the trial court should have based its child support award on her actual income. The question is did the district court abuse its discretion in fixing MOTHER'S net income for the purpose of applying the Child Support Guidelines. *In re Marriage of Genl*, 486 N.W.2d 284, 287 (Iowa 1992); *In re Marriage of Thede*, 568 N.W.2d 59, 62 (Iowa Ct. App. 1997). The income used represented evidence of what MOTHER claimed she could earn. The district court did not abuse its discretion in fixing MOTHER'S income for the purpose of fixing child support. We affirm on this issue. We award no appellate attorney fees.

**AFFIRMED.**

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