

**IN THE COURT OF APPEALS OF IOWA**

No. 3-950 / 13-0756  
Filed December 5, 2013

**IN RE THE MARRIAGE OF NICOLE L. STICHTER  
AND BRIAN P. STICHTER**

**Upon the Petition of  
NICOLE L. STICHTER,**  
Petitioner-Appellee,

**And Concerning  
BRIAN P. STICHTER,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Scott County, Joel W. Barrows,  
Judge.

Brian P. Stichter appeals the district court's order awarding Nicole L.  
Stichter physical care of their daughter. **AFFIRMED.**

Michael J. Koury Jr. of Bush, Motto, Creen, Koury & Halligan, Davenport,  
for appellant.

Justin A. Teitle of Teitle Law Offices, Davenport, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

**MULLINS, J.**

Brian Stichter appeals the district court's order awarding Nicole Stichter physical care of their daughter. The district court ordered Brian to pay \$552.18 in child support and awarded him the tax exemption for their child. On appeal, Brian argues the district court erred in awarding physical care of their daughter to Nicole. Nicole cross-appeals and argues the district court should have granted her the tax exemption at least every other year. Finally, Nicole asks that this court award her attorneys fees. We affirm.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Nicole and Brian were married on June 13, 2009. Their only child, G.S., was born in 2010. Brian is thirty-two years old. He works as a machinist at the Rock Island Arsenal and earns approximately \$55,000 annually. He grew up in Eldridge, Iowa, and has lived in the Quad Cities his entire life. Nicole is thirty years old and also works at the Rock Island Arsenal as an administrative assistant. She earns approximately \$38,000 annually. Nicole is from Morrison, Illinois, and has lived in the Quad Cities area most of her life. Both Nicole and Brian plan on remaining in the Quad Cities for the foreseeable future.

Prior to the couple's separation, the record shows they both took an active role in G.S.'s caregiving duties. Brian attended all of Nicole's doctor visits during the pregnancy and was by her bedside when she gave birth. When G.S. was born Brian took a six-week leave from work to care for her and Nicole. Nicole attended night classes until December 2011. During that time Brian shouldered

the responsibility for their daughter's care a few nights each week while Nicole attended class. Nicole testified that she trusted Brian with G.S.'s care.

Brian's mom Laurie Stichter provided daycare for G.S. while the couple worked at the Arsenal. Laurie runs a daycare service out of her home located in Eldridge. In April of 2012, Nicole removed G.S. from Laurie's care and enrolled her in the Kettlesen Daycare located in Davenport. Nicole stated she believed the switch benefited G.S. because it would allow her to be around other people and children.

During G.S.'s first year, the couple lived in a house owned by Brian. The couple sold the property in 2011 with the hope of building a new house more suited to their needs. After the house sold, from January 2011 through March 2012 the couple lived in Brian's grandmother's basement. Once the parties separated in March 2012 Nicole moved into her current residence. Brian continues to live with his grandmother.

The trial record reveals the couple endured extensive marital strife. During their marriage Brian occasionally lost his temper, which resulted in incidents of conflict with Nicole. The evidence shows sexual misconduct by both parties.<sup>1</sup> Further facts will be detailed as they pertain to the issues on appeal.

Nicole filed a divorce petition and obtained a temporary restraining order against Brian in April 2012. In the application for the restraining order, Nicole cited a few threatening altercations instigated by Brian, and his generally controlling demeanor. As a result of the restraining order, the parties did not

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<sup>1</sup> As G.S. was absent during most or all of the troubling events, we see no benefit to recounting greater detail in this opinion.

have direct communication in the twelve-month period before the divorce trial. During that period Brian had visitation with G.S. every Wednesday evening and alternating weekends.

After a trial in April 2013, the district court awarded the parties joint custody of G.S., and Nicole was awarded physical care and custody subject to Brian's visitation rights. Brian was ordered to pay \$552.18 in monthly child support and to provide for G.S.'s health insurance. Brian was allowed to claim the tax exemption for G.S. The court awarded him a visitation schedule of alternating weekends, and every Tuesday afternoon through Wednesday evening. The parties paid their own attorneys fees and split the court costs. The court removed the restraining order.

On appeal, Brian argues the district court erred in awarding Nicole physical care of G.S., the district court did not err in awarding him the tax exemption, and Nicole should not be awarded attorneys fees for this appeal.

## **II. SCOPE OF REVIEW.**

We review custody decisions de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). "Precedent is of little value as our determination must depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). "[W]e give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them." *In re Marriage of Gensley*, 777 N.W.2d 705, 713 (Iowa 2009).

### III. PHYSICAL CARE.

On appeal, Brian does not challenge the court's finding of joint custody; he only seeks to overturn the district court's award of physical care to Nicole. "When considering the issue of physical care, the child's best interest is the overriding consideration." *In re Marriage of Fennelly*, 737 N.W.2d 97, 100-01 (Iowa 2007). The court is guided by the factors set forth in Iowa Code section 598.41(3) (2011) as well as those identified in *Hansen*. *In re Marriage of Hansen*, 733 N.W.2d 683, 697-700 (Iowa 2007). If joint physical care is not appropriate, "the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights." *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). In making our determination, gender is irrelevant and neither parent has a "greater burden than the other in attempting to gain custody in a dissolution proceeding." *In re Marriage of Bowen*, 219 N.W.2d 683, 689 (Iowa 1974).

Brian argues that for most of G.S.'s life he served as her primary caregiver and took a more active role in her parenting. In support of this claim, he notes that at the beginning of G.S.'s life Nicole was largely absent due to her night classes. He also alleges that Nicole has been "actively thwarting" his attempts to have meaningful contact with his daughter and thus undermining their father/daughter bond. Nicole rebuts this argument by citing the district court's finding that she was "best suited and more qualified to provide for [their daughter's] day to day care." She notes the district court cited Brian's issues with anger, his sexual preoccupations, and lack of maturity. Finally, she notes that

she has provided the primary care for G.S. over the past year, and disrupting G.S.'s schedule now would be unduly burdensome.

The district court applied the factors articulated in *Hansen* and found G.S.'s best interests would be served with Nicole as her primary caregiver. The court did not entirely believe the testimony presented by either party. With respect to Brian, the court found his "sexual preoccupation" problematic, and that it showed "a lack of judgment and maturity." The court found Nicole's testimony about her involvement in certain sexual activities to be more voluntary than she allowed in her testimony. The court stated:

It is clear that both parties love [G.S.] very much. Both would do a good job raising [G.S.]. On balance, however, it is in [G.S.]'s best interest for primary physical care to remain with Nicole. [G.S.] is not yet three years old. She has resided primarily with Nicole for the last year. The Court believes it would be unduly disruptive to her schedule and routine to grant shared care.

The district court concluded, based on the record developed at trial, both parents are capable and suitable custodians, but discounted Brian due to his lack of maturity and to avoid further disrupting G.S.'s established routine.

In deciding whether the district court made the appropriate decision by awarding physical care to Nicole, we consider the four nonexclusive factors articulated in *Hansen*: (1) the stability and continuity of care-giving for the children; (2) the ability of the parents to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree in which parents are in general agreement about their approach to daily matters. *Hansen*, 733 N.W.2d at 697–700.

“Stability and continuity factors tend to favor a spouse who, prior to divorce, was primarily responsible for physical care.” *Id.* at 696; see Iowa Code § 598.41(3)(d) (“Whether both parents have actively cared for the child before and since the separation.”). Both parties made an effort to provide for G.S.’s care while they lived together. Nicole stated Brian did a good job of playing with G.S., but he has difficulty separating playtime from his responsibilities. She also noted Brian may have problems with providing predictability and structure for G.S. The record shows Brian took care of G.S. in the evenings while Nicole attended classes. After the couple separated in March 2012, Nicole has served as G.S.’s primary caregiver. Brian testified that prior to March 2012 and the restraining order, the couple communicated well on matters concerning G.S. He believes Nicole sought the restraining order against him out of spite.

We next consider the ability of the spouses to communicate and show mutual respect, and the amount of conflict between the couple. *See Hansen*, 733 N.W.2d at 698. The record is rife with instances of conflict between the couple, often instigated by Brian. A final instance, where Brian allegedly threw a telephone at Nicole, prompted her to move out. The record also shows the couple was unable to reach agreement on even small daily concerns. For example, how they should distribute invitations to G.S.’s birthday, or what color to paint her room. Nicole emphasized she would be willing to communicate with Brian for the sake of G.S. Brian also believes the couple can set aside their differences in the interests of G.S.’s care.

Finally, the record indicates some issues regarding the parties' approach to daily matters concerning G.S. See *id.* at 699. It appears the parties have similar parenting styles. As previously mentioned, however, Nicole has concerns with Brian's maturity level and his ability to provide structure for G.S. She reports that Brian's controlling demeanor, and her tendency to acquiesce, will make joint physical care difficult. Further, based on Brian's testimony, if he is granted physical custody he will seek different daycare arrangements for G.S.

Upon consideration of all arguments raised by both parties on appeal and a review of the record, we find the district court was correct in placing physical care of G.S. with Nicole:

Court would note that it found neither party to be entirely credible in their testimony. Both played up their strengths and played down their weaknesses. The Court believes that Nicole's involvement in some of the sexual activities discussed was considerably more voluntary than she would have led the Court to believe. That said, Brian's sexual preoccupation is of great concern to the Court. It shows a lack of judgment and maturity.

Echoing the district court, certain factors persuaded us that G.S. would be best served with Nicole as her primary care provider, rather than a joint physical care arrangement. Specifically, we defer to the district court's credibility findings and agree with its concerns about Brian's lack of maturity, as evidenced by his occasional loss of temper and his online sexual pursuits. We also believe the current physical care arrangement is in her best interests. We conclude Nicole is best suited as G.S.'s primary physical care provider and affirm the district court's judgment.



#### **IV. FINANCIAL ISSUES**

##### **A. Tax Exemption**

Nicole cross-appealed the district court's ruling which awarded G.S.'s tax exemption solely to Brian. She argues the court should have awarded her the tax exemption every other year. "The 'general rule' is that the parent given primary physical care of the child is entitled to claim the child as a tax exemption." *In re Marriage of Okland*, 699 N.W.2d 260, 269 (Iowa 2005) (citation omitted). However, the dissolution court has the authority to award exemptions "to achieve an equitable resolution of the economic issues presented." *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996).

We consider the record to determine the most equitable grant of the tax exemption. The record shows Brian is liable for monthly child support payments, G.S.'s health insurance payments, and was granted a fairly liberal visitation schedule. With these factors in mind, we affirm the district court's award of the tax exemption to Brian. On our de novo review, we find Nicole has failed to demonstrate circumstances that justify altering the district court's award of the tax exemption to Brian.

##### **B. Appellate Attorney Fees**

Nicole seeks an award of appellate attorney fees. Such an award is discretionary. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *Id.* After considering these factors, and the fact that

we denied Nicole's appeal of the award of the tax exemption to Brian, we award Nicole attorneys fees in the amount of \$2000 for Brian's appeal of this case.

**V. CONCLUSION**

On our de novo review of the facts and having considered all issues presented on appeal, we affirm the physical custody provisions set forth by the district court, affirm the award of the tax exemption, and award appellate attorney fees. Costs are allocated eighty percent to Brian and twenty percent to Nicole.

**AFFIRMED.**