IN THE COURT OF APPEALS OF IOWA

No. 7-443 / 07-0275
Filed October 12, 2007

Upon the Petition of
TROY JAMES LENZ,
Petitioner-Appellee,

And Concerning
DIANA MAE FENSKE,
Respondent-Appellant.

Appeal from the Iowa District Court for Calhoun County, William C. Ostlund, Judge.

A mother appeals from a district court ruling that placed physical care of the parties' minor child with the father. **AFFIRMED AS MODIFIED.**

Dorothy L. Dakin of Kruse & Dakin, L.L.P., Boone, for appellant.

Dan T. McGrevey of McGrevey Law Office, Fort Dodge, appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Diana Fenske appeals from a district court ruling that placed physical care of the parties' minor child with Troy Lenz. We affirm as modified.

I. BACKGROUND FACTS AND PROCEEDINGS.

Diana and Troy are the parents of Ava Rose Lenz, born in September 2005. The parties were never married. Paternity is not disputed. Troy filed a petition in November 2005 seeking joint legal custody and physical care of Ava. The petition came before the district court in October 2006.

Diana and Troy are recovering substance abusers. They met in 2004 at Community and Family Resources (CFR) while they were participating in in-patient substance abuse treatment. Diana was being treated for her addiction to cocaine and marijuana, and Troy was being treated for his addiction to alcohol.

Diana began using illegal drugs after dropping out of high school in 1998. She attended in-patient treatment for the first time in 1999. She relapsed in 2000 after she gave birth to her daughter, Deborah, from a prior relationship. A few months after Deborah was born, Diana and Deborah moved to Florida. They lived with Diana's mother in Florida for "about four months." Diana then secured employment and obtained a duplex where she and Deborah lived for approximately three years. Diana continued to use drugs during this time period. In 2004, she "realized that [her] drug use was getting out of control." She returned to Iowa and entered in-patient treatment at CFR for her addiction to cocaine and marijuana.

Troy began having a "serious problem" with alcohol after graduating from Iowa State University with a major in agriculture business and a minor in

agronomy in 1997. He has several alcohol-related convictions, the most recent of which was in 1998. Troy entered in-patient treatment in September 2003 at the insistence of his family, and he was involuntarily committed for treatment in November 2003 and again in July 2004. He was also hospitalized in November 2003 after overdosing on medication.

Both parties were successfully discharged from in-patient treatment in August 2004. Troy has maintained his sobriety since then with the exception of one weekend in January 2005. He did not participate in out-patient treatment following his release from CFR. However, he testified he attends Alcoholics Anonymous meetings on a weekly basis. Diana completed her aftercare out-patient treatment in December 2004. She testified she has refrained from using illegal drugs since she was discharged from treatment.

The parties started living together in September 2004. Soon thereafter, Diana obtained employment as an office manager at Grell Commercial Roofing. She was laid off in May 2005 and remained unemployed until November 2005 when she began working as a secretary at Beam Industries. Diana obtained her GED in 2005 and enrolled at a local community college. She hopes to become an accountant. At the time of the trial, Diana was employed full-time at Beam Industries and taking two college classes.

Troy has been employed at Star Energy as a warehouse manager since December 2004. While the parties were together, he farmed forty acres that he rented from his father and assisted his father with the family's farming operation. He testified he stopped "farming the extra acres" in 2006 so that he could "spend [his] time with Ava."

Troy and Diana's relationship began to deteriorate shortly after Ava was born. Troy began keeping a journal in October 2005 documenting Diana's activities and her involvement with Ava. According to his journal, beginning on October 21, 2005, Diana started drinking and going "out to bars" from six or seven o'clock in the evening until early in the morning, leaving him to care for Ava "from the time [he got] home from work till 6:00 in the morning." Troy testified he would "feed Ava, change her diapers, [and] play with her" while Diana would "maybe hold her for fifteen minutes to a half an hour." Diana denied these claims and testified she primarily cared for Ava because Troy was farming from the time he came home from work until nine or ten o'clock at night throughout the majority of October.

In November 2005, Troy became "afraid that Diana was going to take Deborah and Ava and go to Florida . . . ." He consequently filed a petition on November 21, 2005, requesting joint legal custody and physical care of Ava. He also requested the court to enter an injunction restraining Diana from removing Ava from the parties' residence in Manson, Iowa. The district court granted Troy's request for a temporary injunction.

After the entry of the temporary injunction, Troy, Diana, and Ava continued to live together until January 2006 when Diana and Deborah moved out of Troy's home in Manson to an apartment in Webster City. Thereafter, the parties shared physical care of Ava on an alternating weekly basis. The district court entered an "Order on Injunctive Relief and Temporary Custody" on February 7, 2006, confirming the temporary joint physical care arrangement, dissolving the temporary injunction, and enjoining both parties from removing Ava from Iowa.

Shortly before trial, Troy purchased an acreage between Pomeroy and Palmer, and Diana purchased a house in Webster City. The parties indicated to the court at trial they were not seeking a continuation of the temporary joint physical care arrangement due to the fact they lived in different school districts.

Following a two-day trial, the district court entered a detailed ruling placing Ava in the parties' joint legal custody and in Troy's physical care. Diana was granted visitation with Ava on alternating weekends from 6:00 p.m. Friday to 7:00 p.m. Sunday; one evening per week from 5:00 p.m. to 7:00 p.m.; alternating holidays, consisting of eight specified holidays including Christmas Eve as one holiday and Christmas Day as another; time on Diana's birthday and on Ava's birthday; Mother's Day; and three periods of two weeks each in the summer. The court ordered Diana to pay child support to Troy. Finally, the court ordered Diana was entitled to retain a vehicle purchased by Troy "by assuming and paying the $100.00 per month owed on the promissory note by the 15th day of each month, or in the alternative returning the vehicle to [Troy], who shall assume the indebtedness."

Diana appeals. She claims the district court erred in (1) finding Ava's best interests would be served by placing physical care with her father; (2) failing to properly apply the presumption that it is in a child's best interests to keep siblings together; (3) failing to award sufficient visitation; (4) asserting jurisdiction over a property dispute in a paternity action or, in the alternative, awarding the vehicle to Troy; and (5) failing to award her attorney fees. Diana also requests an award of appellate attorney fees.

II. SCOPE AND STANDARDS OF REVIEW.

Our review in this equity matter is de novo. Iowa R. App. P. 6.4; *Callender v. Skiles*, 623 N.W.2d 852, 854 (Iowa 2001) (stating while "questions of paternity are reviewed on legal error," decisions as to the "reasonableness of the court's visitation and custody award" are reviewed de novo). Although not bound by the district court's fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*).

III. MERITS.

A. Physical Care.

"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, 101 (Iowa 2007). The court is guided by the factors set forth in Iowa Code section 598.41(3) (Supp. 2005) as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *See Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994) (noting criteria apply regardless of parents' marital status). Among the factors to be considered are whether each parent would be a suitable custodian for the child, whether both parents have actively cared for the child before and since the separation, the nature of each proposed environment, and the effect on the child of continuing or disrupting an existing custodial status. *See* Iowa Code § 598.41(3); *Winter*, 223 N.W.2d at 166-67. The ultimate objective is to place Ava in the environment most likely to bring her to healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). With these principles in mind, we conclude the district court was correct in placing Ava's physical care with Troy.

As the district court recognized, we are faced with two loving and capable parents. Where the child would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In cases such as this, where there are two suitable parents, "stability and continuity of caregiving are important factors . . . ." *Id*. at 696. These factors tend to favor a parent who, prior to the parties' separation, was primarily responsible for the physical care of the minor child. *Id.*

Diana argues the district court failed to properly consider the evidence of her role as the primary caretaker of Ava. The court was presented with conflicting evidence on the question of which parent served as the primary caregiver. Troy testified that he remained at home and cared for Ava "from 6:00 in the evening 'til 6:00 in the morning" while Diana was drinking and going "out to the bars" throughout October, November, and December 2005. Troy presented several witnesses who testified they had seen Diana at various bars drinking and behaving as though she was intoxicated. Diana did admit she drank alcohol after being released from in-patient substance abuse treatment. However, she denied almost every instance where Troy or other witnesses claimed to have seen her intoxicated or at a bar.

The district court's decision to place Ava in Troy's physical care was based "in large part" on its "perception of the candor and credibility of the parties." The court was not as concerned with Diana's reported behavior as it was with "her denial of these facts." The court was "convinced that Troy's life and personality has been accurately reflected on the record and acknowledged

by Troy himself." However, the court was "not equally convinced that [was] the case with" Diana due to "inconsistencies in her testimony and that of others."

We give considerable deference to the district court's detailed credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Moreover, our own review of the record leads us to agree with the court's findings regarding the credibility of Diana and other witnesses. We accordingly reject Diana's contentions regarding the district court's credibility determinations.

Diana also argues the district court failed to consider Troy's "physical and verbal abuse" of her when making its custody decision. A history of domestic abuse is a significant factor in determining which parent should have physical care of a child. *In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997). In assessing what is sufficient to constitute a history of domestic abuse, we weigh the evidence of abuse, its nature, severity, repetition, and to whom it is directed. *In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997).

Diana raised the issue of domestic abuse for the first time at trial, testifying Troy "has put his hands on me" and "kicked me." A witness for Diana testified he "saw bruises on her wrist one time," which she told him were "from Troy." Diana's testimony regarding the dates and details of these incidents was vague. She did not report any of these events to the police, and there were no protective orders between the parties. *See* Iowa Code § 598.41(3)(j). She did not reveal any allegations of physical or verbal abuse in her responses to interrogatories propounded by Troy. The district court questioned "her veracity" due in part to

"inconsistencies in the interrogatories." We find the district court did not err in declining to give weight to Diana's domestic abuse allegations. *See Forbes*, 570 N.W.2d at 759 (finding the district court's failure to "specifically discuss" section 598.41(3)(j) is "not fatal under our de novo review").

Diana next argues the district court erred in placing physical care of Ava with Troy because "he is less likely to support Ava's relationship with" Diana. One of the many factors to consider in determining a suitable custodial arrangement is which parent will better support the other parent's relationship with the child. Iowa Code § 598.41(3)(e). Although there is evidence both parties have disparaged each other, Diana and Troy testified they would support one another's relationship with Ava. The record also reveals the parties have allowed each other access to Ava outside of the set temporary visitation schedule. We therefore conclude this factor does not influence the physical care determination one way or the other.

After considering the parties' arguments on appeal and reviewing the evidence anew, we ultimately agree with the district court that Diana and Troy are both competent and loving parents who are "sincere in their desire to care for Ava." Each is capable of providing for Ava's long-range best interests. In close cases such as this, we give careful consideration to the district court's findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995). We accordingly affirm the district court's decision to place physical care of Ava with Troy.

In doing so, we recognize the presumption that siblings should not be separated. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). This

presumption applies equally to half-siblings. *Id.* Diana contends the district court erred in failing to properly apply this presumption. The presumption is not "iron-clad." *Will*, 489 N.W.2d at 398. However, good and compelling reasons must exist for a departure from the presumption. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). Our primary concern remains the long-range best interests of the child. *In re Marriage of Brauer*, 511 N.W.2d 645, 647 (Iowa Ct. App. 1993).

The factors favoring the presumption of leaving the siblings together are not strong in this case. At the time of the trial, Deborah was six years old and Ava was one year old. Deborah and Ava lived together for only three months before the parties began sharing physical care of Ava. Diana was awarded liberal visitation with Ava, and the children will have many opportunities to be together. The district court acknowledged Diana's assertion that the "warm, loving and compassionate relationship that she has established between her and Ava and Deborah is an important factor." However, the court determined it was in Ava's best interests to be placed in Troy's physical care because he represented "the most stable environment in the long term" and "Ava's welfare is secure in his hands." We see no reason to disturb the district court's findings in this regard.

B. Visitation.

The next assignment of error is whether the visitation schedule set by the district court allows sufficient contact between Diana and Ava. In determining the appropriate amount of visitation, we are guided by the principle a court should order such visitation as will ensure a child the opportunity for maximum

continuing physical and emotional contact with the noncustodial parent. *See* Iowa Code § 598.1(1), § 598.41(1)(a). Diana argues she "should have been granted mid-week overnight visitations [and] spring break and extended holiday visitation . . . ." She points out that school holiday breaks at Christmas-time usually last ten days to two weeks.

The trial court's duty with respect to visitation, and our duty on appeal as well, is to do equity and achieve a fair and appropriate result that provides Ava with the opportunity for the maximum continuing physical and emotional contact with both parents. We find that in order to do so Diana should have visitation with Ava for one-half of any school spring break each year and one-half of the school holiday break at Christmas-time each year. We modify the district court's decree to so provide. The breaks in question shall be determined by the school calendar in the school district in which Troy resides.

The trial court's duty with respect to visitation is not to decide each and every detail exactly as we would if sitting as the trial court. It has range of discretion within which to fashion a visitation schedule. While it might have provided for mid-week overnight visitation, it was not compelled to do so. Its order does include mid-week evening visitation. We find that the trial court's visitation order, as modified herein, meets the goal of providing for visitation that is equitable and reasonable and satisfies the statutory criteria of maximizing Ava's continuing contact with both parents. We therefore decline to further modify the trial court's decree to provide for mid-week overnight visitation.

C. Vehicle.

Troy purchased a 1990 Pontiac 6000 sedan from Diana's sister for $2000 during the parties' relationship with the expectation Diana would repay him. The parties thereafter executed a promissory note whereby Diana agreed to pay Troy $100 per month until the debt was paid in full. In the event she failed to make payments, the parties agreed Troy would retain the vehicle. Troy testified Diana had paid him $400 at the time of trial.

As a part of the decree entered in this matter, the district court enforced the promissory note and ordered that Diana "shall be entitled to retain the vehicle by assuming and paying the $100.00 per month owed on the promissory note . . . or in the alternative returning the vehicle to [Troy] who shall assume the indebtedness." Diana argues the district court erred in asserting jurisdiction over a property dispute in a paternity action. In the alternative, she contends she should have been awarded the vehicle free of any debt. We do not agree.

The district court stated in its ruling that it addressed the vehicle issue at the request of the parties. The record shows both parties elicited testimony regarding the vehicle at trial. Despite Diana's assertions to the contrary, she did not object to evidence on the issue until after the district court entered its decree. "When a party introduces evidence without objection on an issue not raised by the pleadings, the court considers the matter tried by consent and properly in the case." *Gibson Elevator, Inc. v. Molyneux*, 668 N.W.2d 565, 568 (Iowa 2003). Therefore, the district court's order regarding the vehicle was appropriate given the circumstances presented by this case.

D. Attorney Fees.

The district court denied Diana's request for an award of attorney fees. The decision to award attorney fees rests within the sound discretion of the court, and we will not disturb its decision absent a finding of abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Whether fees ought to be awarded depends, in part, on the ability of the parties to pay. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We find no abuse of discretion and affirm the district court's decision.

Similarly, we have authority to award appellate attorney fees. *See id*. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *Sullins*, 715 N.W.2d at 255. None of these factors justify an award of appellate attorney fees in this case.

IV. CONCLUSION.

Upon our de novo review of the record, we agree with the district court's decision to place physical care of Ava with Troy. Although both parents are suitable, we find it is in Ava's best interests to be placed in Troy's physical care. We modify the visitation schedule set by the district court to provide that Diana shall have visitation with Ava for one-half of school spring breaks and Christmas-time breaks. We reject Diana's claim that the district court erred in entering an order regarding the promissory note executed between the parties for a vehicle. Finally, we conclude the district court did not abuse its discretion in declining to award attorney fees to Diana. We likewise conclude Diana is not entitled to an

award of appellate attorney fees. The judgment of the district court is accordingly affirmed as modified.

Costs on appeal are taxed three-fourths to Diana and one-fourth to Troy.

AFFIRMED AS MODIFIED.