

IN THE COURT OF APPEALS OF IOWA

No. 8-536 / 07-2099
Filed October 29, 2008

SCOTT DORAU,
Petitioner-Appellee,

vs.

**CAREY JANE HART f/k/a
CAREY JANE TOWNSEND,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

A mother appeals from the child custody provision of a district court order.

AFFIRMED.

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des
Moines, for appellant.

Becky Knutson of Davis, Brown, Koehn, Shors, & Roberts, Des Moines,
for appellee.

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

VOGEL, P.J.

Carey Hart appeals from the district court's custody order granting her and Scott Dorau joint physical care of their daughter. She contends joint physical care is not supported by the record and is not in the best interests of the child. We affirm.

Dorau and Hart met in 2000, had an on-again, off-again romantic relationship for several years but never married. In September 2004, their daughter, Riley, was born. In November 2004, Dorau filed a petition seeking to establish joint custody, visitation, and child support for Riley. A February 2005 temporary order established visitation. Dorau continued to make voluntary child support payments until a subsequent temporary order was entered in November 2006. In August 2006, Dorau amended his petition and requested joint physical care.

In August 2007, a two-day trial was held, during which Dorau continued to request joint physical care while Hart requested primary physical care of Riley. Subsequently, the district court granted Dorau and Hart joint legal custody and joint physical care. Due to Riley's close relationship with her half-sister, Hart's nine-year-old daughter, the district court set forth a schedule that began with Dorau having Riley one-third of the time and moving to Dorau having Riley one-half of the time once Riley reached elementary school age.

Hart appeals. She maintains joint physical care is not supported by the record nor in Riley's best interests. She asserts that she has been Riley's primary physical caretaker since Riley's birth and she and Dorau cannot communicate effectively to support an award of joint physical care. Dorau

responds that joint physical care is in Riley's best interests, he has a history of close involvement with Riley, and the parties have been able and are willing to cooperate with each other for the benefit of Riley.

We review child custody orders de novo. Iowa R. App. P. 6.4. However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). Our overriding consideration is the best interest of the child. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) (stating that in determining whether to award joint physical care or physical care with one parent, the best interest of the child remains the principal consideration).

In determining physical care of a child, the courts are guided by the factors enumerated in Iowa Code section 598.41(3) (Supp. 2005), as well as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). See *Hansen*, 733 N.W.2d at 698 (holding that although Iowa Code section 598.41(3) does not directly apply to physical care decisions, "the factors listed [in this code section] as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child"). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique,

the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

In the present case, we agree with the district court's finding that joint physical care is in Riley's best interests. Evidence introduced at trial demonstrated that both Dorau and Hart have been actively involved in Riley's life. Although Riley has primarily lived with Hart, Dorau has been an involved father. He attended doctor's appointments throughout Hart's pregnancy and was present when Riley was born. Dorau immediately began exercising visitation, including overnight visitation, and voluntarily paying child support. After some disagreements regarding visitation, when Riley was approximately one month old, Dorau filed a petition seeking to enforce his legal rights as Riley's father. The district court entered a temporary order and Dorau continued to regularly exercise visitation and to voluntarily pay child support. Additionally, Dorau regularly attended Riley's doctor's appointments.

Hart did testify to the problems she had communicating with Dorau, and there were times she denied visitation. However, the district court suggested this attitude was "perhaps a consequence of her zeal to have primary physical care." Again, we defer to the district court for these critical assessments of the witness's testimony. See *In re Marriage of Behn*, 385 N.W.2d 540, 543 (Iowa 1986) (stating that the district court "is greatly helped in making a wise decision about the parties by listening to them and watching them in person"). Further, Hart admitted on cross-examination that she and Dorau have generally been able to communicate and effectively work together.

Evidence also demonstrated, as the district court found, that “[a]buse of alcohol has led to significant problems for [Hart].”¹ Due to Hart’s past behavior, “[t]here is a serious question about [Hart’s] ability to support [Dorau’s] relationship with Riley.” However, the district court relied upon the child custody evaluation and testimony of Dr. Steven Dawdy, the licensed child psychologist. Dr. Dawdy testified that both parties were involved parents and were capable of communicating “in a businesslike if not friendly manner” for the benefit of Riley. He also included in his report to the court, “The differences, however, between the parents are not great nor highly predictive of significant conflict, thus suggesting that they are entirely capable of sharing parenting responsibilities.” The district court took all the relevant factors into account and found that both Dorau and Hart are fit parents and “are capable of communicating and cooperating to carry out Riley’s best interests.” With our deference to the district court’s credibility findings, we conclude that the district court’s factual findings were fully supported by the record and the district court weighed the appropriate factors in determining the physical care award. We find nothing in the record to disturb the district court’s award of joint physical care.

Dorau and Hart both request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court’s discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other

¹ Hart has three convictions for operating a motor vehicle while intoxicated. The most recent was a felony conviction in 2002 stemming from an incident when Hart was driving with her older daughter in the vehicle. At the time of trial, she was still required to have an intoxilyzer installed in her vehicle. She contends that she is a “recovered alcoholic,” but admits that she continues to consume alcohol.

party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). The district court found that for determining child support, Dorau's annual income was \$30,611 and Hart's annual income was \$6000. After considering the appropriate factors, we decline to award appellate fees. Costs on appeal are assessed to Hart.

AFFIRMED.