IN THE COURT OF APPEALS OF IOWA

No. 8-678 / 08-0129
Filed December 17, 2008

NICHOLAS R. DIETZ,
Petitioner-Appellee,

vs.

TAMMY MCDONALD,
Respondent-Appellant.

Appeal from the Iowa District Court for Chickasaw County, Lawrence H. Fautsch, Judge.

Tammy McDonald appeals the district court ruling on Nicholas Dietz's petition to establish paternity, custody, and visitation regarding the parties' child. **AFFIRMED.**

Gary J. Boveia of Boveia Law Firm, Waverly, appellant.

Margaret C. Callahan of Belin, Lamson, McCormick, Zumbach, and Flynn, P.C., Des Moines, and Craig G. Ensign, Northwood, for appellee.

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

MILLER, J.

Tammy McDonald appeals the district court's ruling on Nicholas Dietz's petition to establish paternity, custody, and visitation regarding the parties' child. She contends the court erred in (1) ordering graduated visitation that ultimately results in joint physical care; (2) establishing Nicholas's child support obligation by imputing income to Tammy; (3) determining the amount of Tammy's trial attorney fees Nicholas was required to pay; and (4) failing to require Nicholas to reimburse Medicaid for prenatal, birth, and postnatal expenses. Tammy also requests an award of appellate attorney fees. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. Tammy and Nicholas are the parents of Maverick, born in September 2006. At the time of trial Tammy and Nicholas were each twenty-nine years of age and had never been married, either to each other or to another.

The parties met and began dating in early 2005. Tammy had a child, Morgan, born in August 1997, from a previous relationship. We note that Morgan had been in Tammy's physical care throughout Morgan's life and was flourishing in her care. When the parties met, Tammy was working at a nursing home as a licensed practical nurse (LPN). Shortly thereafter, in May 2005, she began working for Covenant Medical Clinic as a phlebotomist. Tammy earned approximately fifteen dollars per hour at the nursing home and approximately eleven dollars per hour at Covenant. She owned her own home when the parties met.

Effective January 1, 2005, Nicholas had become a fifty-percent owner of the combined family farming/dairy operation through the establishment of a limited liability company (LLC) called "Eagle View Dairy." The formation of the company was part of Nicholas's father's estate plan for passing the family farming operation to Nicholas. Eagle View owns and provides the care for approximately 135 dairy cattle and 300 stock cattle. Nicholas also farms approximately 700 acres, 240 of which are in Eagle View Dairy, LLC. The entire Eagle View operation has a net worth of approximately $1.4 million dollars, and Nicholas has a personal net worth of approximately $752,000.

In October 2005, Nicholas moved out of his apartment and into a mobile home on the family farm. He suggested to Tammy that she move into the home with him and try working on the farm to see what farm life was like, in case they ever decided to marry. Tammy left her employment at the medical clinic and moved from the home she owned to move in with Nicholas and begin working on the farm, with the belief they eventually would marry. Nicholas agreed to pay Tammy $1,000 per month and pay for any other expenses she incurred. There is a dispute regarding why Tammy initially did not have health insurance when she began working on the farm. She blames Nicholas for failing to procure it, while he states he told her it was her responsibility to set up the insurance and he would just pay for it.

Tammy became pregnant with Maverick in December 2005 while the parties were living together. After Tammy became pregnant, Nicholas procured and paid for health insurance for her and her daughter Morgan, but the insurance did not cover expenses related to Tammy's preexisting pregnancy. Nicholas

testified that if Tammy would have acquired insurance in October 2005, as he suggested, such expenses would have been covered by the insurance.

The parties' relationship did not survive long after Tammy's move to the farm. In light of shared concerns Nicholas asked Tammy to move out of the trailer in late February of 2006 and she did so. Nicholas offered Tammy some money for her expenses when she left and gave her a check for $4,000.

Tammy quit working on the farm when she moved out. Instead of going back into nursing she decided to become a massage therapist and began training for such a career. Tammy testified she chose to change careers because she felt it would be easier for her to maintain a reduced and/or flexible schedule as a massage therapist, which in turn would facilitate her ability to raise Morgan and the child she was then expecting. She further stated she believed that once she was established as a massage therapist she could do as well financially as she could as an LPN.

Nicholas accompanied Tammy to several of her doctor's appointments while she was pregnant with Maverick. He also went to Lamaze classes with her, although they apparently only went to two of those classes because Tammy was having a hard time with them. In addition, Nicholas took Tammy shopping shortly before Maverick was born to buy the supplies necessary for the baby's first days. He was with Tammy in the delivery room in September 2006 when Maverick was born, spent the night in the hospital with her, and when the time came drove them home from the hospital. Nicholas continued to pay Tammy's and Morgan's insurance up until at least February of 2007.

Nicholas testified that several times during Tammy's pregnancy she threatened that she would "make it difficult" or "tough" for him to see the baby after it was born if, for example, he were to get a paternity test or if he did not get back together with her. Within a few days of Maverick's birth Tammy told Nicholas she would not allow him to see Maverick until she had talked to a lawyer. She thereafter apparently relented and Nicholas began to see Maverick almost every day. However, Tammy would not allow Nicholas to see Maverick alone and in fact did not allow him to take Maverick out of her home until a temporary court order required her to do so in December 2006. During one of Nicholas's early visits to see Maverick he and Tammy discussed custody arrangements. Nicholas told Tammy he was interested in joint physical care as Maverick moved beyond the infant stage. Tammy told him that joint physical care was not an option and he should be satisfied with visitations every other weekend. Tammy agreed this conversation took place prior to Nicholas filing the present action.

Nicholas filed his petition to establish paternity, custody, and visitation on September 28, 2006. Following this filing it appears the parties' communications and cooperation about Maverick deteriorated. Around mid-November Tammy decided she did not want to be present during Nicholas's visitations with Maverick. She told Nicholas that to see Maverick he would have to do so at a time when her mother could come to her home and supervise the visitation, and her mother would only be available four days a week from 6:00 p.m. to 8:00 p.m. Nicholas was offended by this arrangement and not readily available at this new time due to his farming responsibilities. Thus, he did not see Maverick from

approximately mid-November until the temporary order on December 12, 2006, established his right to unsupervised visitations with Maverick every Monday, Wednesday, and Friday from 8:00 a.m. until noon. This court-ordered temporary schedule remained in effect through trial in the fall of 2007.

At Nicholas's request the court appointed Dr. Mark Peltan to conduct a custody evaluation. As part of his evaluation Dr. Peltan conducted psychological evaluations of both Tammy and Nicholas. Dr. Peltan found traits of concern with regard to each. He had some concern about Nicholas's "sense of entitlement," possibly from a relationship with an "overindulging mother." However, Dr. Peltan found Tammy's emotional stability to be more concerning, finding she "may tend to have wide mood swings occurring over long periods of time such as those that accompany manic depressive illness," and that her profile on certain testing was of the type "found among individuals who are intentionally trying to deceive persons who are evaluating them." Dr. Peltan stated that Tammy "could benefit both herself and her children" by involving herself in therapy. He recommended she seek counseling. In his summary he found that Nicholas "presents as healthier overall."

Dr. Peltan ultimately recommended that the parties' current physical care arrangement continue to be modified as Maverick gets older, gradually giving Nicholas more time with Maverick until they eventually achieve "full" joint physical care. Among other things he recommended an alternating "four day-three day/three day-four day schedule" from approximately the time Maverick is thirty months of age until he starts school. He also recommended Maverick not spend a full week apart from either parent until he is school age. At trial Dr. Peltan

testified that such phased-in joint physical care would be best because it generally has the best outcome for children, and was very favorable in this case because the parties live close together, live in the same school district, and had reported to him that they were able to communicate reasonably well about day-to-day issues.

Tammy hired another custody evaluator, Dr. Hartson. He testified that in general he recommends graduated visitations culminating in joint physical care when dealing with a child as young as Maverick in order to provide for changes at different developmental stages of the child. However, Dr. Hartson testified that because he had not met with Nicholas it would be unethical for him to create a specific custody plan in this case. Thus, all of Dr. Hartson's testimony focused on general, rather than case-specific, concerns and polices regarding physical care arrangements for children.

The district court adjudged Nicholas to be the biological father and awarded the parties joint legal custody of Maverick. After considering the provisions of Iowa Code section 598.41 (2007) and the factors set forth in *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007), the court concluded physical care of Maverick should be placed with Tammy "with graduated visitation to [Nicholas] which will culminate in shared physical care."

With regard to the issue of child support, the court accepted the child support computations Nicholas provided, including that Nicholas's annual gross income was $23,692.50, and imputed full-time minimum wage income to Tammy. Based on these amounts the court ordered Nicholas to pay $300 per month in child support prior to joint physical care and $68 per month after the graduation

to joint physical care was complete. On the issue of what amounts, if any, Nicholas should pay to Tammy for prenatal and postnatal expenses under section 600B.25, the court concluded that the check Nicholas gave to Tammy in February 2006 was in excess of any such expenses. The court noted that all of the birthing expenses had been paid through governmental assistance. The court also ordered that Nicholas "be allowed to take the child as a tax exemption for income tax purposes as long as he is current in his child support payments for the tax year in question," that he pay $3,642.23 toward Tammy's trial attorney fees, and that he pay the fees of Dr. Peltan, Dr. Hartson, and a mediator.

Tammy appeals the district court order, claiming the court erred in (1) ordering graduated visitation that ultimately results in joint physical care; (2) imputing income to Tammy in establishing Nicholas's child support obligation; (3) determining the amount of Tammy's trial attorney fees Nicholas was required to pay; and (4) failing to require Nicholas to reimburse Medicaid for prenatal, birth, and postnatal expenses. Tammy also requests an award of appellate attorney fees.

II. SCOPE AND STANDARDS OF REVIEW.

The parties agree that in this case, involving primarily the physical care of a child of unmarried parents, our scope of review is de novo. In such a review we examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). This is because the trial 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). "Prior cases have little precedential value, except to provide a framework for analysis, and we must base our decision on the particular facts and circumstances before us." *Id*.

III. MERITS.

A. Physical Care.

Tammy first contends the district court erred in ordering graduated visitation that will culminate in the parties having joint physical care of Maverick. The court concluded that physical care of Maverick should be placed with Tammy for the present due in large part to his young age and the fact Tammy was breast feeding him, but that Nicholas should have graduated visitation with Maverick that will ultimately result in the parties having joint physical care. The only portion of the court's physical care determination that Tammy takes issue with is its culmination in joint physical care. Thus, we need address only the propriety of that portion of the court's decision.

The criteria governing physical care determinations are the same whether the parents are dissolving their marriage or have never been married to each other. *Jacobson v. Gradin*, 490 N.W.2d 79, 80 (Iowa Ct. App. 1992); *Hodson v. Moore*, 464 N.W.2d 699, 700 (Iowa Ct. App. 1990). "Joint physical care" means an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child. Iowa Code § 598.1(4). The rights and responsibilities include, but are not limited to, shared parenting time with the child, maintaining homes for the child, and providing routine care for the child. *Id*. With joint physical care "neither parent

has physical care rights superior to the other parent." *Id.* Iowa Code section 598.41(5)(a) provides:

> If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent. . . . If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

Any consideration of joint physical care must still be based on Iowa's traditional and statutorily required child custody standard of the best interest of the child. *See id.*; *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

> Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*. The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity.

Hansen, 733 N.W.2d at 695 (emphasis in original) (citing *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995)).

With this consideration in mind, our supreme court recently identified a nonexclusive list of factors to be considered when determining whether a joint physical care arrangement is in the best interests of the children. *Id.* at 697-99.

> The factors are (1) "approximation"—what has been the historical care giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) "the degree to which the parents are in general agreement about their approach to daily matters."

In re Marriage of Berning, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (quoting *Hansen*, 733 N.W.2d at 697-99).

As set forth above, the district court here concluded that physical care of Maverick should be placed with Tammy "with graduated visitation to [Nicholas]

which will culminate in shared physical care." In making this physical care determination the district court noted it relied on the recommendations by both experts, Dr. Peltan and Dr. Hartson, that Maverick's contact with Nicholas be gradually increased until joint physical care is appropriate and reached. In looking at the *Hansen* factors the court found,

> In this case, the sole child at issue is an infant. There is therefore a minimal history of care giving as to Maverick. While some conflict clearly exists between the parties, it is not at such a level that one would anticipate that this conflict will not diminish over time. Both parents put Maverick first in their lives. Also, both parties agree that it is important that Maverick have a strong relationship with both of the parents. As stated by Dr. Peltan . . . "despite their negative reports about one another, it is encouraging that they seem to have developed adaptive ways of managing the issue of co-parenting." It can therefore be anticipated that the parties will be able to communicate with each other for the well-being of their child. Lastly, there is very little, if any, evidence that the parties disagree about fundamental child-rearing practices.

After considering relevant factors as discussed below, for the following reasons we agree with the district court.

First, we note that due to the specific facts and circumstances of the case at hand the parties' history of caregiving does not carry the weight it may carry in cases where one parent has been the primary caretaker of older children the majority of their lives. Here, Nicholas and Tammy separated before Maverick was born and at the time of trial Maverick was only one year of age. He thus had been primarily in Tammy's care for that fairly short amount of time. Dr. Peltan testified, and the district court found, that a bond existed between Nicholas and Maverick. This was apparently so despite the fact Maverick had not been able to have unsupervised visits with Nicholas until Nicholas initiated court action and the court's December 12, 2006 temporary order mandated it. "[T]he quality of the

parent-child relationship is not always determined by hours spent together or solely upon past experience." *Hansen*, 733 N.W.2d at 697. We conclude past caretaking patterns do not weigh heavily against joint physical care.

Similarly, the fourth *Hansen* factor, the degree to which the parents are in general agreement about their approach to daily matters and fundamental child-rearing practices, does not seem to be such an issue here as to weigh against joint physical care. The only real disagreement between the parties regarding this factor is Tammy's concern for Maverick's safety while at the farm. We agree with the district court that there is no indication Nicholas and his parents are not fully capable of protecting Maverick from dangers inherent in a farming operation. Although the parties may have somewhat different ideas about what is the "ideal" environment for a child to grow up in, we have no doubt Maverick will benefit from exposure to both parental environments. Furthermore, both parties agree it is important for Maverick to have a strong relationship and active contact with both of his parents. We agree with the district court there is "very little, if any, evidence that the parties disagree about fundamental child-rearing practices."

Tammy's main arguments against joint physical care deal with the second and third *Hansen* factors. Tammy points to several incidents she claims demonstrate a lack of communication and a high degree of conflict between the parties, making joint physical care infeasible and not in Maverick's best interest. Apparently neither Dr. Peltan nor the trial court found the problems alleged by Tammy to be of the substantial significance that Tammy suggests. Dr. Peltan testified that Tammy and Nicholas reported to him they are able to "communicate reasonably well about day-to-day issues," and that he believed they could

"cooperate on day-to-day parenting issues." In his written evaluation Dr. Peltan found that "[d]espite their negative reports about one another, it is encouraging that they seem to have developed adaptive ways of managing the issue of co-parenting." The district court noted and quoted this opinion in making its physical care determination. The court also found that although some past and present conflicts clearly exist, "it is not at such a level that one would anticipate this conflict will not diminish over time." Furthermore, the court determined that because Nicholas and Tammy both clearly love Maverick, are capable parents, put Maverick first in their lives, and agree it is important he have a strong relationship with both parents, "[i]t can therefore be anticipated that the parties will be able to communicate with each other for the well-being of their child."

We agree with these findings of the district court and adopt them as our own. It is clear the parties have had some interpersonal conflicts and difficulties in communicating. However, some failures of communication and cooperation are not surprising with the breakup of a romantic relationship and must be viewed in that context. *See In re Marriage of Ellis*, 705 N.W.2d 96, 103 (Iowa Ct. App. 2005), *disagreed with on other grounds by Hansen*, 733 N.W.2d at 692. Both parties testified at trial that they believed the other to be a decent parent who loves their child. We, like the district court, believe that the parties' communication will rebound and their level of conflict will decrease as the stress of the breakup of their relationship and this litigation ends. We anticipate that because they are mature adults, their love for their child and their respect for each other as parents of their child will outweigh any future conflicts or problems with communication for the well-being of Maverick.

Accordingly, we conclude the district court did not err in ordering graduated visitation that will culminate in the parties' joint physical care of Maverick. The court's findings and conclusions regarding the parties' ability to overcome their conflicts, communicate with each other, and promote Maverick's contact with the other parent are supported by the evidence in the record. We agree with the court, and the experts relied upon by the court, that this physical care arrangement is in Maverick's best interests.

B. Child Support.

Tammy next contends the district court erred in calculating Nicholas's child support obligation for Maverick. More specifically, she argues the court erred in imputing to her a minimum wage income rather than using her actual earnings to determine Nicholas's child support obligation without making findings that are required in order to vary from the amount of child support that would result from application of the guidelines using her current income. Tammy asserts the district court should have used her actual monthly income of $520.21, which would result in an actual annual income for her of approximately $6,242.52.

The district court found it was appropriate to impute a minimum wage income to Tammy. This resulted in an annual income of $12,896 for purposes of calculating child support. In doing so the district court found that although Tammy is currently earning less than minimum wage, "it is clear that her earning capacity is considerably more than her present income." The court then used this figure together with the child support computations provided by Nicholas, which included an annual income for Nicholas of approximately $24,000, in

determining Nicholas's child support obligation of $300 per month while Maverick is in Tammy's physical care and $68 per month when the graduation to joint physical care is complete.

"In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). However, before the court utilizes earning capacity rather than actual earnings, a finding must be made that if actual earnings were used, a substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *Id*. Although Tammy is correct that the district court did not make explicit factual findings in this regard, because our review is de novo we may make our own findings and conclusions on the issues properly raised before us. *See Lessenger v. Lessenger,* 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). When assessing whether to use earning capacity we examine not only present earnings but also such things as employment history, earnings history, and reasons for the parties' current employment situation.

Tammy's 2005 income tax return, 2005 being her last full year of work prior to trial, showed she earned approximately $26,900 that year. She testified that while working as an LPN she was earning about fifteen dollars per hour and as a phlebotomist she was earning around eleven dollars per hour. At the time of trial Tammy was working as a self-employed massage therapist as her sole source of income. As noted above, Tammy testified she decided to become a massage therapist after her break-up with Nicholas because she believed it would give her more flexibility to care for Morgan and Maverick. She further

stated she believed that once she was established as a massage therapist she could do as well financially as she could working as an LPN.

Upon our de novo review we conclude a substantial injustice would result to Nicholas if Tammy's actual earnings were used to determine his child support obligation rather than imputing to her *at least* minimum wage income. Clearly, Tammy has the current capacity to earn substantial income beyond what she is presently earning as a self-employed massage therapist. Although we recognize her desire to work reduced hours in order to spend more time with her children and we in no way fault her for this decision, this does not preclude the imputation of income to her in order to do justice between the parties in setting child support. *See Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa Ct. App. 1996) ("While we respect a parent's wish to remain at home with his or her children, we cannot look at this fact in isolation in determining earning capacity."). "Both parents have a legal obligation to support their children, not necessarily equally, but in accordance with his or her ability to pay." *In re Marriage of Blum*, 526 N.W.2d 164, 165 (Iowa Ct. App. 1994). Furthermore, we are unable to conclude that the district court acted in a manner that was unfair or inequitable to Tammy by imputing to her a minimum-wage, gross annual income of $12,896 when she has a demonstrated earning capacity of twice that amount, $26,000 per year.

We conclude the district court did not err in imputing minimum wage income to Tammy for purposes of determining Nicholas's child support obligation. We agree with the district court that Tammy's earning capacity is significantly greater than her present income. It would be unfair and result in

substantial injustice to Nicholas to determine his support obligation based only on her current income, or on any imputed income less than minimum wage.

C. Trial Attorney Fees.

At trial Tammy introduced a statement of professional services from her counsel showing $23,925.55 in fees and $4,286.68 in disbursements, for total charges of $28,212.23. At the time of trial Tammy had already paid all but $3,642.23 of this total. In order to do so she had cashed out her 401(k) retirement plan and used money from a loan her mother took out against the mother's farm. The district court ordered Nicholas to pay the remaining $3,642.23 in Tammy's trial attorney fees. Tammy argues the district court abused its discretion in requiring Nicholas to pay only the $3,642.23 instead of a more substantial portion or all of her trial attorney fees.

"An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion." *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award must be for a fair and reasonable amount, and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994).

In addition to the $3,642.23 Nicholas was ordered to pay toward Tammy's trial attorney fees, the district court ordered him to pay the fees of Tammy's expert, Dr. Hartson. The $4,286.68 in disbursements shown on Tammy's exhibit included $3,500 for Hartson's fee. Thus, the court's award orders Nicholas to pay $7,142.23 of Tammy's litigation costs. The court also ordered Nicholas to pay $1,450 to the court-appointed custody evaluator, Dr. Peltan, and $940 charged by a mediator the parties had enlisted in a failed attempt to resolve the

case without trial. Furthermore, the record regarding the parties' financial situations, discussed above in detail, also supports the district court's award. Nicholas's annual income is only around $24,000, while Tammy has a nearly equal earning capacity but for various reasons has chosen to work in a less remunerative field only part time.

We conclude the district court assessed the parties' abilities to pay and awarded Tammy a fair and reasonable amount based on the parties' financial positions. We find no abuse of discretion in the amount of the award. We affirm the court's order regarding attorney fees.

D. Birth-Related Expenses.

Iowa Code section 600B.25 provides that the district court may order the father to pay for the reasonable and necessary expenses for prenatal care, birth of the child, and postnatal care of the child and mother. As noted above, the district court here concluded that the $4,000 check Nicholas gave to Tammy in February 2006 satisfied the requirements of this Code provision. The court noted this amount was in excess of any prenatal and postnatal expenses and all of the actual birthing expenses were paid through governmental assistance, here the Medicaid program.

Tammy entered an exhibit at trial showing $9,467.49 was paid by Medicaid for her and Maverick's prenatal, birth, and postnatal expenses. On appeal Tammy contends the court erred in not holding Nicholas responsible for the full $9,467.49 and asks that we order him to reimburse Medicaid that amount. Tammy does not assert a personal right to recover these medical expenses. She

seeks solely to have this court order Nicholas to reimburse Medicaid the $9,467.49.

The district court in its ruling on the issues presented did not address the possibility of ordering Nicholas to reimburse Medicaid, focusing only on whether Tammy herself was entitled to recover birth-related expenses from Nicholas. In her post-ruling, Iowa Rule of Civil Procedure 1.904(2) motion Tammy did not ask the court to address this issue. Accordingly, we believe that error was not preserved on this issue. *See Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) (stating our error preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal).

Furthermore, in her brief on appeal Tammy offers no argument or citation of authority on the issue of whether a court in such a proceeding as the one here even can or should order a party to reimburse Medicaid. Accordingly, we deem waived any claim the district court erred in not requiring Nicholas to reimburse Medicaid. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue."); *Soo Line R.R. Co. v. Iowa Dep't of Transp*., 521 N.W.2d 685, 691 (Iowa 1994) ("[R]andom mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration."); *Id*. at 689 (stating court will not consider issues concerning which an appellant cites no authority nor offers any substantive argument).

E. Appellate Attorney Fees.

Tammy seeks an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of a party seeking an award, the ability of the other party to pay, and the relative merits of the appeal. *Id*. Applying these factors to the circumstances in this case, we conclude each party should be responsible for his or her own appellate attorney fees.

IV. CONCLUSION.

Based on our de novo review of the record, and for the reasons set forth above, we agree with the district court's physical care decision giving Nicholas graduated visitation with Maverick that will culminate in the parties having joint physical care. Under the specific facts and circumstances of the case at hand the physical care provisions of the decree and the graduated parenting schedule set forth by the district court are appropriate. We further conclude the court did not err in imputing minimum wage income to Tammy for the purpose of determining Nicholas's child support obligation. Using her actual earnings would result in substantial injustice to Nicholas. We conclude the court did not abuse its discretion in determining the amount of Tammy's trial attorney fees Nicholas is required to pay and affirm the court's award. Finally, we conclude Tammy did not preserve error on, and waived, her claim that the court erred in failing to require Nicholas to reimburse Medicaid for prenatal, birth, and postnatal expenses. We decline to award Tammy appellate attorney fees.

AFFIRMED.