

IN THE COURT OF APPEALS OF IOWA

No. 9-057 / 08-1103
Filed March 26, 2009

**IN RE THE MARRIAGE OF DIANA GAIL ARNOLD AND PHILIP ANDREW
ARNOLD**

Upon the Petition of

DIANA GAIL ARNOLD,
Petitioner-Appellee,

And Concerning

PHILIP ANDREW ARNOLD,
Respondent-Appellant.

Appeal from the Iowa District Court for Franklin County, Colleen D.
Weiland, Judge.

Philip Arnold appeals from the custody provisions of the decree dissolving
the parties' marriage. **AFFIRMED.**

Joseph G. Bertogli, Des Moines, for appellant.

Dennis F. Chalupa of Brierly Charnetski L.L.P., Newton, for appellee.

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

MILLER, J.

Philip Arnold¹ appeals from the custody provisions of the decree dissolving the parties' marriage. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Philip and Diana Arnold were married in June 1973. They have four children together: Michelle, born in February 1981, Philip Jr., born in September 1993, Clara, born in June 1995, and Rachael, born in August 1997. Diana filed a petition for dissolution of marriage in September 2007. The petition for dissolution of marriage came before the court for trial in March 2008.

Philip and Diana lived in Florida for the majority of their thirty-four year marriage. Philip owned his own construction business in Florida specializing in manufacturing and installing theater seats and church pews. In 1993, he decided to enroll in a seminary school located some distance away from where the family resided. He would often stay with a friend during the week and return home on the weekends. Philip completed seminary school in 1996. He then resumed his construction business to pay off the loans he had accumulated while in school. He traveled extensively for work and was often gone for a "week at a time, two weeks at a time."

In 2000, Philip accepted a position as a pastor for a small church in rural Iowa. After moving to Iowa, Diana, who had worked as a registered nurse for much of the parties' marriage, decided to stay home with their children and assist

¹ We note that the record and briefs are in conflict as to the correct spelling of Philip's first name. It was spelled as "Philip" throughout the district court proceedings, but in Philip's appellate brief it is spelled as "Phillip." We will utilize the spelling in the district court proceedings.

Philip with the church. She returned to work as a nurse at a local hospital in August 2002 when the parties' youngest child began school. She worked from 7:00 p.m. to 7:00 a.m. two days each week and 11:00 p.m. to 7:00 a.m. two other days each week.

Diana provided the majority of care for the parties' children during their marriage. She testified that she was in charge of cooking, cleaning, and caring for the children, although she did acknowledge that Philip would assist her when he was home, stating, "It's not like he didn't totally not do anything. But I pretty much did the meals then too. And I took care of the kid[s]. They were my responsibility." The children remained her primary responsibility even after she returned to work in 2002. Diana testified that she would call the children by 7:00 a.m. each morning when she was at work to make sure they were up and ready to go to school despite the fact that Philip was at home with them in the mornings. He testified that he did not wake up with the children because "she called them every morning and got them up. There was no need for me to get up."

In July 2007, Diana decided to leave Philip after she "got a phone call from him that upset [her]." That was "the final degrading remark" according to Diana, who described a marital relationship fraught with abuse, both physical and verbal. Diana testified that on one occasion early in their marriage, Philip "took a knife to me in the kitchen in front of [Michelle] and I ended up getting my finger cut." On another occasion, Philip punched Diana in the face, breaking her teeth and causing her to lose consciousness. This incident also took place in front of

Michelle. Philip obtained counseling to assist him with “control[ling] his anger,” and the parties reconciled. However, Diana testified that although the physical abuse ended before Philip Jr. was born, the verbal abuse continued throughout the remainder of their marriage, “you know, name calling . . . spitting in your face and just making sure you knew what a lousy person you were.”

After the parties separated, their three minor children lived with Diana in a small two-bedroom apartment for a short period of time. But because the apartment was located outside of the children’s school district, Diana returned the children to the family home to live with Philip before school began in August 2007. The district court continued that arrangement in its October 2007 temporary order, which placed the children in the parties’ joint legal custody and Philip’s physical care, despite its “[m]isgivings about Philip” due to his

approach to his relationship with Diana since the separation Diana stated and appears to be supportive of the children’s relationship with Philip. She also clearly kept the children’s best interests in mind by returning them to their established home when the school year started

Philip, on the other hand, has been very controlling about Diana’s access to the kids. He did not let them stay overnight with her until she found a home that he deemed appropriate. The court finds Diana credible when she talked about Philip’s ongoing denigration of her in telephone conversations.

The court noted that allowing the children to remain “in the family home increases their stability while the dissolution action is pending. Further, Diana’s night work hours would result in more movement by the children between houses on school nights, which would likely lead to confusion and disruption.”

Prior to the trial, Diana was able to switch her shifts at the hospital to 7:00 a.m. to 3:30 p.m. with every other weekend off. She also began residing in a

four-bedroom rental house located within minutes of the children's school. Diana acknowledged at the trial that after the temporary hearing Philip would occasionally let her visit the children in excess of what was provided for in the temporary order. However, she testified they continued to have difficulty communicating, describing one incident shortly before the trial where Philip told her not to "ever call over here on a weekend when they're in my custody again."

Following the trial, the district court entered a decree placing the children in the parties' joint legal custody and Diana's physical care. Although it believed both parties were suitable custodians, the court found it was in the children's best interests to be placed in Diana's physical care because (1) "Diana was the primary caretaker of the children and the household until the parties' separation"; (2) "certain traits demonstrated by Philip during the marriage indicate a disturbing propensity toward mistreatment of family members"; and (3) "Diana will be more effective in encouraging the children's relationship with Philip than vice versa."

Philip appeals. He claims the district court erred in placing physical care of the children with Diana.

II. SCOPE AND STANDARDS OF REVIEW.

We review dissolution cases de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. MERITS.

When considering the issue of physical care, the children's best interests are the overriding consideration. *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in Iowa Code section 598.41(3) (2007) as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). See *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the custodial factors in section 598.41(3) apply equally to physical care determinations). Among the factors to be considered are whether each parent would be a suitable custodian for the children, whether both parents have actively cared for the children before and since the separation, the nature of each proposed environment, and the effect on the children 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 the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Hansen*, 733 N.W.2d at 695. With these principles in mind, we conclude the district court was correct in placing the children's physical care with Diana.

As the district court recognized, we are faced with the fortunate situation of two dedicated, loving, involved, and capable parents. Where the children 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, with 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 children. *Id.*

Philip acknowledges that Diana was primarily responsible for the physical care of their minor children prior to their separation. But he asserts this factor should be disregarded because he was “required to travel large distances away from the home and by necessity, Diana took on the role of primary caretaker for the children.” Our supreme court in *Hansen* recognized there may be circumstances that “outweigh considerations of stability, continuity, and approximation.” *Id.* at 697. “For example, if a primary caregiver has abandoned responsibilities or had not been adequately performing his or her responsibilities because of alcohol or substance abuse, there may be a strong case for changing the physical care relationship.” *Id.* There are no such circumstances present in this case. Indeed, even when Philip changed careers and became a pastor with a flexible schedule that allowed him to be home with the children in the mornings, Diana continued to provide the majority of care for the children.

Despite Diana’s successful caregiving for the children during the parties’ marriage, Philip asserts that the district court should have placed physical care with him because when the children were in his “temporary custody all three . . . improved in school” and “blossomed.” However, the factors of stability and continuity of caregiving focus on the caretaking arrangement prior to the parties’ separation. *Id.* at 696-97. This is so because “past caretaking patterns likely are a fairly reliable proxy of the intangible qualities such as parental abilities and emotional bonds that are so difficult for courts to ascertain.” *Id.* at 696. Furthermore, the “successful caregiving by one spouse in the past is a strong predictor that future care of the children will be of the same quality.” *Id.* at 697.

Philip finally argues the district court erred in relying on his past physical abuse of Diana in making its physical care determination. The court found “that certain traits demonstrated by Philip during the marriage indicate a disturbing propensity toward mistreatment of family members.” In so finding, the court relied on Philip’s past physical abuse of Diana in addition to the verbal abuse that continued throughout their marriage. The court found “Diana more credible in regard to her description of more recent emotional mistreatment of her by Philip and occasional demeaning or degrading comments aimed at the children.” The court further found “[m]any of Philip’s explanations at trial appear improbable, and . . . his demeanor in court [was] somewhat supercilious and manipulative.”

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 Philip.

After considering the parties’ arguments on appeal and reviewing the evidence anew, we ultimately agree with the district court that Diana and Philip are both “able to provide love and care to the children as well as effectively minister to their needs.” Each is capable of providing for their children’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). The court thoroughly considered the evidence and made a lengthy ruling, which included detailed findings of fact and reasoning concerning

the physical care issue. Its findings are fully supported by the evidence, its reasoning is sound, and its detailed application of the law correct. We accordingly affirm its decision to place physical care of the children with Diana.

Diana and Philip each request an award of appellate attorney fees. 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. Applying these factors to the circumstances in this case, we decline both parties' requests for an award of appellate attorney fees.

IV. CONCLUSION.

Upon our de novo review of the record, we agree with the district court's decision to place physical care of the minor children with Diana. Although both parents are suitable, we find it is in the children's best interests to be placed in Diana's physical care. We deny both parties' claims for appellate attorney fees. The judgment of the district court is affirmed.

AFFIRMED.