

IN THE COURT OF APPEALS OF IOWA

No. 0-225 / 09-1784
Filed May 12, 2010

**IN RE THE MARRIAGE OF JENNIFER S. COOVER
AND THOMAS F. COOVER**

**Upon the Petition of
JENNIFER S. COOVER,**
Petitioner-Appellee,

vs.

**And Concerning
THOMAS F. COOVER,**
Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

Thomas Coover appeals from the child custody provisions of the parties' dissolution decree and the court's award of attorney fees to Jennifer Coover.

AFFIRMED.

Teresa A. O'Brien, Sioux City, for appellant.

Sabrina L. Sayler of Crary, Huff, Inkster, Sheehan, Ringgenberg, Hartnett & Storm, Sioux City, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

Thomas Coover appeals from the child custody provisions of the parties' dissolution decree and the court's award of attorney fees to Jennifer Coover.

Our standard of review is de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). We give the district court deference as to matters of fact—especially when determinations of credibility are involved—as that court had the benefit of viewing the demeanor of the witnesses firsthand. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). We review an award of attorney fees for abuse of discretion. *In re Marriage of Rosenfeld*, 668 N.W.2d 840, 849 (Iowa 2003).

Thomas and Jennifer Coover were married in 1996. They have a son, age eleven, and a daughter, age six. Thomas and Jennifer separated in early 2009 and Jennifer filed a petition for dissolution in April 2009. The court awarded temporary joint physical care on a weekly basis on May 15, 2009.

On August 28, 2009, an emergency hearing was held on Thomas's application for writ of temporary injunction. Thomas asked that the court restrain Jennifer from removing the children from the Sioux City Community Schools. Following the hearing, the court ruled: the children should remain in the Sioux City school district where they were currently enrolled; the son should remain in counseling; and "should [the son's] therapist believe he is either not safe or his school placement is somehow a safety or health issue," counsel could seek review. The son has difficulties with attention and hyperactivity.

On October 8, 2009, trial was held on the unresolved issues of physical care,¹ visitation, child support, dependency exemptions, alimony, insurance, attorney fees, debt, and court costs. On October 23, 2009, the court filed its findings of fact and conclusions of law in which, among other things, it awarded Jennifer physical care and set visitation, denied Jennifer's request for alimony, and ordered Thomas to pay \$2500 toward Jennifer's attorney fees. Thomas appealed.

Thomas contends the trial court erred in awarding physical care of the parties' children to Jennifer. The ultimate objective of a physical care determination is to place the child in the environment most likely to bring the child 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. "[T]he basic framework for determining the best interest of the child" is well established. *Id.* at 696. Generally, stability and continuity of caregiving are important considerations. *Id.* "Stability and continuity factors tend to favor a spouse who, prior to divorce, was primarily responsible for physical care." *Id.* (citing Iowa Code § 598.41(3)(d)). We may look to the successful caregiving by one spouse in the past as a strong predictor that future care of the children will be of the same quality. *Id.* at 697.

Upon our de novo review of the evidence, we agree with the trial court's findings, the most pertinent being:

¹ Neither party sought joint physical care.

The facts show Jennifer was the primary caretaker of the children during the marriage. Thomas's role was the primary wage earner. Thomas is now adjusting and trying to fulfill some of those responsibilities otherwise fulfilled by Jennifer. His work schedule is less flexible than Jennifer's. The lack of flexibility has caused him to accumulate points² that could lead to his termination. But for his significant other, who is picking up and dropping off the children when they are with him, he would have difficulty or would have to alter his current arrangements. . . . [B]oth parents are capable of [raising the children]. However, to a large extent the court must rely on the past as a predictor of the future. Jennifer has been the one who has placed the children's best interests first. She has taken more flexible positions that would enable her to be absent, at doctors' appointments, or at school. With these factors in mind, the court believes physical care of the children should be with Jennifer.

We affirm the award of physical care to Jennifer.

On appeal, Thomas challenges the trial court's award of attorney fees. Trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Witten*, 672 N.W.2d 768, 784 (Iowa 2003). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). In addition, the fees must be fair and reasonable. *Id.* To overturn the award, Thomas must establish that the trial court abused its discretion. *Id.*

Thomas does not contest that he has more ability to pay the fees than does Jennifer. Nor does he claim that the fees are not fair and reasonable. Instead, Thomas claims the district court abused its discretion in awarding Jennifer attorney fees because the award "sends a chilling effect throughout the legal community." He argues the court awarded attorney fees because he

² Thomas's employment utilizes a point system in which employees are charged points for missing work up to a pre-set level, when the employee is terminated.

sought physical care of his children. This is a mischaracterization of the court's ruling.

Jennifer asked the trial court to order Thomas to pay all or part of her attorney fees of \$6751. The district court properly stated that an award of attorney fees was within its considerable discretion and any such award must be "fair and reasonable in light of the parties' financial positions." The court noted that both parties unnecessarily increased attorney fees in requesting awards not supported by "the facts and evidence": Thomas for physical care, and Jennifer for alimony. The court then noted that "Thomas's desire the children not be permitted to leave the Sioux City Community School District" further escalated attorney fees. The court acknowledged that the parties are entitled to make their requests for relief, and ordered Thomas to pay \$2500 toward Jennifer's trial attorney fees. We cannot say that the court abused its discretion in ordering Thomas to pay a portion of Jennifer's attorney's fees.

Jennifer requests an award of attorney fees on appeal. An award of appellate attorney fees is not a matter of right, but rests within the appellate 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 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). We decline to award attorney fees.

Costs on appeal are assessed to Thomas.

AFFIRMED.