

IN THE COURT OF APPEALS OF IOWA

No. 0-359 / 09-1676

Filed June 16, 2010

**IN RE THE MARRIAGE OF MATTHEW BERNARD
AND DAPHNE BERNARD**

**Upon the Petition of
MATTHEW BERNARD,**
Petitioner-Appellant,

**And Concerning
DAPHNE BERNARD,**
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker,
Judge.

Matthew Bernard appeals from the custodial and attorney fee provisions of
the decree dissolving his marriage to Daphne Bernard. **AFFIRMED.**

Barry S. Kaplan and Melissa A. Nine of Kaplan, Frese & Nine, L.L.P.,
Marshalltown, for appellant.

William A. Welp of Welp & Geffe Law Offices, Marshalltown, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Matthew Bernard appeals from the custodial and attorney fee provisions of the decree dissolving his marriage to Daphne Bernard. He contends the district court erred in granting joint physical care of the parties' child and not awarding him physical care of the child. Matthew further asserts the court erred in awarding Daphne attorney fees. We affirm.

I. Background Facts and Proceedings.

Matthew and Daphne were married in 2003. Matthew is now thirty-three years of age and Daphne is thirty-five. They are the parents of one son, Caleb, now five years old.

Matthew works as an assistant manager at a Fareway store. He has worked for Fareway for the last seventeen years. Daphne, at the time of trial, was attending a community college and working fifteen hours a week as a server at an Applebee's restaurant.

After Matthew learned of Daphne's relationship with Jeremy Sawyer, Daphne moved out of the marital home on or about November 1, 2008. Matthew filed a petition for dissolution of marriage November 4, 2008. After about a week, Daphne moved back in with Matthew, and they lived together in a very tense atmosphere for the next few months. In February 2009 Daphne filed a petition for relief from domestic abuse and obtained a temporary protective order against Matthew. When she obtained the order, she also obtained physical care of Caleb, and Matthew did not see his son for seventeen days. After a hearing to determine if a final protective order should be entered, the court found insufficient

evidence, cancelled the temporary order, and concluded the action should be dismissed.

Matthew filed an application for temporary custody requesting he be granted primary care¹ of Caleb. The parties' temporary visitation agreement was approved by the court in July 2009. The agreement provided that the parties would share physical care of Caleb on an alternating week-to-week basis.

Following trial, the court found that the parties agreed their joint physical care arrangement had gone fairly well during their separation, although Matthew insisted it was no longer in Caleb's best interests mainly because of Daphne's relationship with Jeremy. After applying the guidelines for the determination of custody as set out in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974), the court concluded:

Both Matthew and Daphne can provide adequate care for Caleb. At the present time they are caught up in what has occurred during their marriage and the resentment and emotional heat this has generated. This court believes, however, that both parties can overcome these problems and support each parent's relationship with their son. This Court concludes the parties shall exercise joint physical care of their son pursuant to the temporary visitation agreement filed on July 6, 2009. The parties shall share joint legal custody of Caleb.

The court ordered Matthew to pay \$1000 towards Daphne's attorney fees.

Matthew appeals.

¹ Although the term "primary care" is not defined in Iowa Code chapter 598 (2007), we nevertheless use the term in this opinion because it was used by the parties and the district court, and further, we recognize "primary care" and "primary physical care" are commonly used by the profession and the courts, including this one.

II. Scope and Standard of Review.

Our review of dissolution of marriage controversies is *de novo*. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). “Although we decide the issues raised on appeal anew, we give weight to the trial court’s factual findings, especially with respect to the credibility of the witnesses.” *Brown*, 776 N.W.2d at 647 (citations omitted). Because our determination depends on the facts of a particular case, precedent is of little value. *Id.*

III. Child Custody.

In child custody cases the first and governing consideration is the best interests of the children. Iowa Code § 598.41(1)(a) (2007). The court’s objective is to place the children in the environment most likely to bring them to health, both physically and mentally, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 1999). “Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*.” *Id.* Under a *custody* umbrella, our legislature has set forth ten non-exclusive considerations in Iowa Code section 598.41(3) (parental suitability; whether developmental needs of the child will suffer from lack of contact with both parents; communication with each other; history of caregiving; ability to support the other’s parental relationship; child’s wishes or opposition; agreement of the parents; geographic proximity; child’s safety; history of domestic abuse). Though these considerations technically apply to *joint legal custody* decisions, rather than *physical care* determinations, they, as well as other facts and

circumstances, are relevant to decide whether joint physical care is in the children's best interests. *Id.* at 696 (citing *Winter*, 223 N.W.2d at 166-67 (listing twelve non-exclusive factors)).

Hansen recited four factors to consider where there are two suitable parents and whether to implement a joint physical care arrangement: (1) the stability and continuity of caregiving, as supplemented by the approximation principle; (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." *Id.* at 696-99.

Against this backdrop of a multiplicity of applicable factors, Matthew contends the facts and circumstances dictate an award of primary care to him. In support of his contentions, he asserts: (1) Daphne is in a serious relationship with Jeremy, an alcoholic and admitted methamphetamine addict; (2) Daphne abuses alcohol; (3) Caleb's safety is in jeopardy as a result of Daphne's and Jeremy's alcohol abuse; (4) Daphne is underemployed and financially unstable; (5) Daphne physically abused Matthew; (6) a psychologist recommended Matthew have primary care of Caleb; and (7) Caleb expressed a preference to live with Matthew fulltime.

Both parties requested that Dr. Brian Steiner, a clinical psychologist, conduct a child custody evaluation. At trial, after discussing the parents' strengths and weaknesses, Dr. Steiner concluded that if he had to recommend to the court a primary caretaker, "Matthew would be best served as a primary physical custodian if a shared custody doesn't happen." When asked his

preference regarding joint care versus a primary caretaker in this case, Dr. Steiner responded:

My preference follows the research suggestions that children do best when they have roughly equal time with both parents unless other factors intervene. In this case Caleb seems to be expressing and experiencing some stress about this splitting of time and that leads me then to recommend more towards one parent having primary physical care.

In his written custody evaluation, Dr. Steiner noted that since the parties separated, they shared custody and visitation on about a fifty percent basis. Although both parties expressed to Dr. Steiner issues of inappropriateness of care provided by the other parent, “neither has made any accusation that the other parent is in any way unfit or prone to endangerment of Caleb.” The parties also expressed concern about their contrasting parenting styles, but Dr. Steiner found

[d]espite these concerns, there is very little evidence to suggest that either Matthew or Daphne in the past have had difficulty in co-parenting Caleb effectively. There appears to be no evidence of major conflicts or stresses being placed on Caleb prior to the current separation and divorce proceedings.

The parties indicated to Dr. Steiner that “their current arrangement of sharing custody has worked fairly well.” Caleb’s showing some stress and discomfort with the process appeared to be normal “given the current custody battle situation and ongoing conflicts between the parents.” Although Caleb expressed a preference for living with his father, Dr. Steiner found “clear evidence that Caleb is strongly attached to both his father and his mother, and both parents have very strong attributes which make their involvement in his ongoing life and parenting critical.” At the end of the day, Dr. Steiner concluded:

The information gathered in the evaluation suggests that it would likely be in Caleb's best interest to reside with and have primary custodial care under the supervision of his father with frequent and liberal visitation with his mother. On the other hand, there is strong enough evidence regarding the strengths of both parties, that should a co-parenting arrangement be achieved which involves Caleb spending equal time with both parents, that arrangement would also be very beneficial to Caleb as well.

Matthew's primary concern, at trial and on appeal, is Daphne's relationship with Jeremy Sawyer. Sawyer admitted to using methamphetamine for five years, but testified he had been clean since February 2007. He admitted he began to drink heavily as his previous marriage was ending, but stated that following separation he did not continue what amounted to binge drinking. He drinks approximately a six-pack of beer each evening after work, and while Daphne is concerned about Jeremy's drinking, she stated she would not put Caleb in harm's way. At the time of trial, Daphne lived in her own apartment. Jeremy was not living with her. Daphne had no plans on moving in with Jeremy.² Jeremy has no criminal record. Although Daphne had told Matthew she was engaged to Jeremy, she later said that was a lie. Jeremy also denied an engagement. On appeal, Daphne admits her "choice of Jeremy Sawyer to replace Matthew, although perhaps not a good choice, has not been shown to be detrimental to Caleb." Daphne's choice of Jeremy, whether temporary or not, does not disqualify her from exercising joint physical care. Nothing in the record indicates Jeremy has jeopardized Caleb's physical or emotional safety. While Matthew's concerns about the relationship are understandable, the bases of his

² "[I]f a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the children becomes a significant factor in a custody dispute." *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003).

concerns do not outweigh all the other applicable factors supporting joint physical care.

Matthew asserts Daphne abuses alcohol. He admits it is “hard to deduce from the record the true extent of Daphne’s drinking,” but most of the conduct he complains of was old history. Dr. Steiner concluded, “Despite concerns brought up during the evaluation, there is no evidence that there are significant abuse problems of alcohol or drug issues in either party.” There is no direct credible evidence that Caleb’s safety has been jeopardized by Daphne’s social drinking.

Matthew points to financial and living arrangement instabilities in Daphne’s life as disfavoring her from joint physical custody. Because of their significant differences in income, Dr. Steiner favored Matthew over Daphne on the ability to provide Caleb’s material needs, but this one factor does not tip the scales in favor of awarding physical care to Matthew. It is not atypical for one parent’s income to be greater than the other’s. Custody is not granted based on one’s wealth. In any event, the child support award lessens the impact of the disparity of the parties’ incomes. Additionally, some instability in living arrangements during the parties’ separation and dissolution proceedings is to be expected.

On two occasions Daphne hit Matthew. Matthew points to the two instances as disfavoring Daphne from joint physical care. Both incidents stemmed from the tension between the parties. The first incident was some years ago, and the second occurred while the divorce was pending. Both incidents appear to be isolated and do not suggest a course of conduct on Daphne’s part.

Five-year-old Caleb expressed a preference to live with his father fulltime. Caleb did not indicate that he did not wish to spend time with his mother, but indicated that he misses his father a great deal when he is with his mother. “Deciding custody is far more complicated than asking children with which parent they want to live.” *In re Marriage of Behn*, 416 N.W.2d 100, 101 (Iowa Ct. App. 1987). “When we speak of what is best for the child, we do not mean that which the child wants.” *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985) (citation omitted). The preferences of a child, while not controlling, are relevant. *Id.* In determining what physical care arrangement is in the best interests of a child, one of the factors the court shall consider is whether the “arrangement is in accord with the child’s wishes or whether the child has strong opposition, taking into consideration the child’s age and maturity.” Iowa Code § 598.41(3)(f). In determining the weight to be given to a child’s wishes, we consider the following factors: (1) the child’s age and educational level; (2) the strength of the child’s preference; (3) the child’s relationship with family members; and (4) the reasons the child gives for his decision. *Behn*, 416 N.W.2d at 102.

Caleb’s tender years militate against giving his preference much weight. Dr. Steiner indicated that Caleb made it clear, both spontaneously and independently, that it was his preference to live with his father with frequent visits to his mother, but Dr. Steiner found Caleb’s emotional attachment and desire for closeness was much more balanced than his statements in that regard imply. Dr. Steiner observed Caleb was well and securely attached emotionally to both

parents and was quite comfortable in interacting with each in a variety of activities.

The record reflects that neither parent is perfect. That comes as no surprise as no parent is perfect, except maybe in their own eyes. Both Matthew and Daphne are suitable parents, although Matthew perceives himself as the better parent. Both parents indicated the shared care arrangement worked fairly well. Dr. Steiner found Caleb strongly attached to both of his parents and that both have very strong attributes which make their involvement in Caleb's ongoing life and parenting critical. Although Dr. Steiner suggests "it would likely be in Caleb's best interest to reside with and have custodial care under the supervision of his father," if a co-parenting arrangement was achieved with Caleb spending equal time with each parent, "that arrangement would also be very beneficial to Caleb as well."

We agree with the district court when it concluded both Matthew and Daphne can provide adequate care for Caleb. At the time of trial they were caught up in what occurred at the end of the marriage. This generated frequently seen resentment, bitterness, and emotional heat. The district court believed that both parties could overcome these problems and support each parent's relationship with their son. We agree, and upon considering all the relevant factors, we affirm the district court's award of joint physical care.

IV. Attorney Fees.

Matthew finally claims the district court erred in awarding Daphne trial attorney fees. We review such a decision for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). "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). Matthew was earning substantially more than Daphne at the time of the trial. The court’s award of trial attorney fees to Daphne was modest by any standard. In light of the parties’ respective financial positions at the time the decree was entered, we cannot say the court abused its considerable discretion in granting Daphne’s request for trial attorney fees.

V. Conclusion.

We affirm the dissolution decree entered by the district court. Costs of the appeal are taxed to Matthew.

AFFIRMED.