

**IN THE COURT OF APPEALS OF IOWA**

No. 0-474 / 10-0240  
Filed October 6, 2010

**IN RE THE MARRIAGE OF ROBERT L.  
KNECHT III AND AMANDA A. KNECHT**

**Upon the Petition of  
ROBERT L. KNECHT III,**  
Petitioner-Appellee,

**And Concerning  
AMANDA A. KNECHT,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

A mother appeals from the district court's decree awarding physical care of the parties' children to their father. **AFFIRMED.**

Dorothy L. Dakin and Dan Tungsвик of Kruse & Dakin, L.L.P., Boone, for appellant.

Norman L. Springer Jr. of McGinn, McGinn, Springer & Noethe, Council Bluffs, for appellee.

Heard by Sackett, C.J., and Potterfield and Tabor, JJ.

**POTTERFIELD, J.****I. Background Facts and Proceedings**

Robert and Amanda Knecht are the parents of three children—twin girls who were seven years old at the time of trial, and a son who was nearly five. Robert and Amanda were married on July 31, 2004, after having lived together for roughly two years. The parties separated on May 1, 2009. Robert remained in the marital home, and Amanda moved to another residence in Council Bluffs. The parties agreed at that time that Amanda would have temporary physical care of the children. On June 22, 2009, Robert filed a petition for dissolution of the marriage. Temporary orders entered in August of 2009 provided for joint physical care of the children. At the dissolution trial in December 2009, the parties entered a stipulation on the record regarding all issues except physical care of the children and visitation.

At the time of trial, Robert was thirty-two years old and a high school graduate. He was employed at Lozier Corporation, where he had worked for about five and one-half years as a tool and die planner. Robert planned to stay in the marital home following the dissolution proceedings. Robert testified that the children wanted to remain in his house and continue to attend the same school.

Amanda was twenty-eight years old at the time of trial and a high school graduate. She was employed at Mercy Hospital, where she had worked as a certified nursing assistant for about two and one-half years. Amanda had already notified her employer that she was going to quit her job, and her last day of work was scheduled to be the day after trial. At the time, Amanda was pregnant with

the child of her boyfriend, David Spaulding, who was in the Air Force. The Air Force had issued a no contact order which prevented contact between David and Amanda for the two months before trial. Amanda intended to move to Wichita, Kansas to live with David roughly two weeks after trial. She did not plan to look for work, but rather she planned to go back to school in the fall of 2010 to become a registered nurse. Amanda acknowledged that David would be the family's breadwinner for several years while she finished her schooling. Amanda testified that the children were excited about the idea of moving to Wichita.

Robert testified that for six or seven months after the twins were born, Amanda stayed home with the children and was their primary caretaker. According to Robert's testimony, after Amanda returned to work, the parents shared the caretaking duties until roughly two years before trial when Robert testified that Amanda's priorities had shifted, and he became the children's primary caretaker. He testified that Amanda worked nights and spent most of her days sleeping. He also testified that Amanda would go out frequently instead of spending time with the children. He estimated that Amanda spent about two hours per day with the children during the week.

Amanda testified that the children were still her priority, and that she rarely went out drinking. She further testified that Robert had a history of using drugs and was currently abusing alcohol. Robert admitted having had a drug problem in the past. However, he stated that at the time of trial, he had not used drugs except for twice within the past seven years. He admitted to having an alcohol problem until May 1, 2009, at which time he claims he significantly reduced his alcohol use. Amanda testified that she believed Robert was drunk during an

emotional phone conversation she had with him the month before trial, a claim Robert denies.

Amanda also testified that Robert was physically aggressive toward her, especially when he was drinking. The parties both described three specific events of physical violence, two before the marriage and the third during their five-year marriage.

First, Amanda testified that prior to the marriage when the parties were drinking, they got in a disagreement and Robert headbutted her. She testified that the parties' infants were present in the room at the time this incident occurred. She testified that the altercation ended when she called Robert's parents and took the babies to spend the night at their house. At trial, Robert admitted to this incident.

Second, Amanda testified that Robert had shot a gun in the house during one of their arguments; while the girls, who were roughly six months old, were in the house. Robert acknowledged that he had shot the gun inside the house, after taking it away from Amanda who had threatened suicide, but he testified that none of the children were home at the time.

Third, Robert admitted that during the marriage he became angry with Amanda and pushed her out of the house.

Both parties testified that there were other arguments in which they would push and yell at one another. Amanda testified that during these arguments, she sometimes feared for her and the children's safety and she would remove the children from the home for the night. The record reveals that Amanda stayed overnight with Robert's mother on one occasion and with her own mother "once

for sure.” Robert testified that both he and Amanda participated equally in their physical altercations.

Amanda also testified that Robert was rough with the children. She testified that she saw welts on the children after Robert spanked them. She also testified that she had heard Robert curse and yell at the children. Robert testified that he was not rough with the kids, and that, although he had spanked the children a handful of times, he used other methods of discipline as well. Robert further testified that at times he cursed in front of the children, but he did not call them names. Robert described an October 2009 incident that resulted in the parties’ son receiving care in the emergency room for what Robert called “nursemaid’s elbow.” Robert explained that the injury was the result of a game he played with his son and that they had not played the game since the injury.

Because of the parties’ marital problems, Amanda began seeing a counselor, Wendy Sorenson, in June of 2008. Amanda continued to see Sorenson weekly until the summer of 2009. Amanda sought to have Sorenson testify regarding Amanda’s descriptions to her of violence between the parties, but the district court declined to hear that testimony.

Both parties assert they can better provide stability for their children. Amanda asserts that she has a more stable relationship with the girls than Robert does. Robert asserts that his lifestyle is more stable than Amanda’s because he has held a long-term job and intends to stay in the marital home close to the children’s friends and extended family. Both Amanda’s mother and Robert’s mother live within ten miles of the parties’ marital home and testified that they were very involved with and had a close relationship with the children.

Amanda acknowledged that the children's grandparents had been helpful to her in raising the three children and that she would not have that help in Wichita, where she would be responsible for caring for her new baby and the three children by herself once her boyfriend was deployed.

The district court awarded physical care of the children to Robert. Amanda appeals arguing: (1) the district court failed to give proper weight to Robert's history of domestic violence and substance abuse; (2) the district court erred by improperly considering her relocation as a factor in awarding physical care to Robert; (3) the district court erred by refusing to allow Sorenson to testify regarding domestic violence; and (4) she should be awarded appellate attorney fees. Robert requests appellate attorney fees.

## **II. Standard of Review**

Because this is an action in equity, our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct.App. 1999). We give weight to the district court's findings of fact, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). Our primary concern is the best interests of the children. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

## **III. Physical Care**

Amanda argues the district court incorrectly determined the physical care arrangement for the parties' minor children by failing to give proper weight to

Robert's history of domestic violence and substance abuse and improperly considering her relocation.

### **A. Alleged History of Domestic Abuse**

In assessing which physical care arrangement is in the children's best interests, we utilize the factors in Iowa Code section 598.41(3) (2009) as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). One of the factors listed in Iowa Code section 598.41(3) is whether a history of domestic abuse exists. Amanda argues that this case reflects a long history of domestic violence, which should outweigh any other factors. She cites Iowa Code section 598.41(2)(c), which states, "A finding by the court that a history of domestic abuse exists . . . which is not rebutted, shall outweigh consideration of any other factor specified in subsection 3 in the determination of the awarding of custody under this subsection." The rebuttable presumption in that subsection, however, is applicable to a determination of legal custody in cases in which the parents do not agree to joint legal custody. See Iowa Code § 598.41(4); *In re Marriage of Daniels*, 568 N.W.2d 51, 55 n.1 (Iowa Ct. App. 1997). Amanda and Robert agreed from the outset of their dissolution proceedings that they should share legal custody of their children. Their dispute on appeal is the award of physical care. In any event, none of the statutory factors listed for consideration in determining whether a history of domestic abuse exists is present here. See Iowa Code § 598.41(3)(j).

Though the rebuttable presumption in section 598.42(2)(c) does not apply in this case, our supreme court has recognized domestic abuse as a factor which should be given "considerable weight" in determining which parent will have

physical care of the children of a marriage. *Daniels*, 568 N.W.2d at 55. The record shows that the domestic abuse in this case consisted of three specific incidents over an approximate seven-year time period. We are especially concerned about the incident that included a loaded gun, which we consider to be a serious risk to the children. Although the parties disputed whether their children witnessed all of their physical violence, the record reflects that the children were present during at least some of the arguments, a factor which weighs against an award of physical care to the aggressor. See *Daniels*, 568 N.W.2d at 55. However, the district court was convinced that both parties engaged in physical violence and that neither is solely responsible for the volatile situations witnessed by the children, and the record supports that finding. Amanda acknowledged that she never called the police, applied for a protective order, or sought medical treatment as a result of any actions by Robert. The district court made no finding of a history of domestic abuse, and Amanda made no request that the court enlarge its findings post-trial. On our de novo review, we disagree with Amanda's assertion that she has proven a history of domestic abuse that would outweigh any other factors.

### **B. Relocation**

We also disagree with Amanda's assertion that the district court improperly considered her relocation as a factor affecting the children's interests in awarding physical care. Iowa Code section 598.41(1)(d) states,

If a history of domestic abuse exists . . . and if a parent who is a victim of such domestic abuse relocates . . . based upon the fear of or actual acts or threats of domestic abuse perpetrated by the other parent, the court shall not consider the relocation . . . of



that parent as a factor against that parent in the awarding of custody or visitation.

Because we find a history of domestic abuse did not exist in this case, we determine the district court did not err in considering Amanda's relocation in awarding physical care. Further, this section is rendered inapplicable by the total lack of evidence that Amanda was relocating based upon domestic abuse. Rather, Amanda chose to relocate to be with her boyfriend.

We agree with the district court that Amanda's decision to move to Wichita to start a new family with her boyfriend is the overriding factor in determining the best interests of the children of the marriage.

### **C. Substance Abuse**

Amanda also argues the district court failed to give proper weight to Robert's history of substance abuse. We consider Robert's consumption of alcohol in determining what physical care arrangement would be in the children's best interests; however, we do not agree with Amanda's suggestion that Robert's drinking has significantly affected the children. Robert admitted to having a problem with alcohol and has taken affirmative steps to moderate his use. He appeared to have an understanding of the need for him to drink less. He has managed to maintain steady employment during the last five years and has been able to fulfill his parenting duties during that time. Robert testified that Amanda consumed alcohol about as frequently as he did. The record suggests that altercations between Robert and Amanda often occurred when both parties were drinking. Nothing in the record demonstrates an ongoing alcohol problem that disqualifies Robert from physical care of the children.

We also consider Robert's drug use in determining physical care. However, the record establishes that Robert's alleged history of drug use is not a controlling factor in this case. Robert testified that he used drugs twice within the seven years prior to trial. Amanda testified that Robert's drug use had ceased, stating, "[W]hen [Robert] quit doing drugs . . . it just kind of switched over from the drugs to the alcohol." Nothing in the record suggests that Robert used drugs at the time of trial or had any significant recent drug use; we therefore find this is not a significant factor in awarding physical care.

#### **D. Consideration of Relevant Factors**

Both parents would be suitable parents and were actively involved in caring for the children before and since the parties' separation. The record also suggests that each parent would be supportive of the other parent's relationship with the children. Though Amanda argues that Robert was physically abusive and also was a substance abuser, we find that the record supports a finding that Amanda was equally involved in the consumption of alcohol and the physical altercations that occurred between the parties.

We believe Robert would provide a more stable environment and consistency for the children. Robert will remain in the marital home, which will allow the twins to continue in their school. The children will remain close to friends and neighbors with whom they have built relationships. More importantly, the children will remain close to both Robert's and Amanda's extended families. Robert's mother testified at trial that she was "very involved" with the children and had a very close relationship with them. Amanda's mother also testified that she had a close relationship with the children. Amanda testified that the parties'

extended families have a substantial relationship with the children and see them a lot. These relationships are important to continuity in the children's lives, which they will not have in the home of Amanda's boyfriend in a new city, hours away from the home they have known. We believe Robert can provide greater stability than Amanda, and we find this is in the children's best interests.

We have carefully considered the evidence of Robert's physical abuse and substance abuse in making our determination that it is in the children's best interests that Robert be awarded physical care.

#### **IV. Sorenson's Testimony**

At trial, Amanda attempted to support her claim that Robert was physically abusive to her by calling her counselor as a witness to testify regarding the incidents of violence Amanda had discussed with her. After listening to some preliminary questions and answers and a hearsay objection on behalf of Robert, the district court declined to hear this evidence, stating:

I'm happy to listen to what [Sorenson] has with respect to [Amanda's] ability to parent and whether or not she should have primary custody. I just don't want her to repeat everything that Amanda's already said. I'm familiar with what she has said.

Amanda's counsel conceded that Sorenson had been called to testify about "some incident of violence that Amanda has discussed" and said she understood that the court might feel there had been "sufficient testimony about that."

The court accepted counsel's offer to excuse Sorenson and then stated,

I guess part of the reason is because there was an acknowledgment by Robert during his testimony there's been some issues between the two of them as related to some type of physical contact. That's why I didn't want to simply have Ms. Sorenson regurgitate that.

On appeal, Amanda argues the district court erred by refusing to allow Sorenson to testify regarding domestic violence between Amanda and Robert. We recognize that in a case heard in equity, especially in a dissolution of marriage action involving the issue of child custody, the trial court ordinarily should not rule on objections to testimony, but should receive answers subject to objection. See *Daniels*, 568 N.W.2d at 55 n.2. We find that counsel's statements summarizing Sorenson's expected testimony was a minimally sufficient offer of proof, which allows us to consider the court's decision not to hear Sorenson's testimony.

The trial court has discretion to avoid the needless presentation of cumulative evidence. *In re Marriage of Ihle*, 577 N.W.2d 64, 67 (Iowa 1998). Here, counsel agreed with the court that Sorenson would be testifying to Amanda's descriptions of marital discord, a subject already covered in Amanda's testimony.

Further, in addition to proving the trial court abused its discretion in excluding this evidence, Amanda must also prove the exclusion prejudiced her. *Id.* ("We will not presume the existence of prejudice when evidence is excluded from trial."). In this case, Amanda cannot show she was prejudiced by the exclusion of Sorenson's testimony. Our review of the record indicates that Sorenson had no first-hand knowledge of any physical altercations between the parties. Thus, Sorenson's testimony would have been limited to hearsay that Amanda had previously related to her. Amanda had already testified regarding physical altercations between her and Robert, and Robert had, for the most part, agreed with Amanda's testimony. Because Robert and Amanda both testified

regarding the violence between them and the court considered this testimony, Amanda was not prejudiced by the exclusion of Sorenson's testimony.

#### **V. Appellate Attorney Fees**

Both parties request an award of appellate attorney fees. 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 appellate attorney fees.

Costs on appeal are assessed one-half to each party.

**AFFIRMED.**

Tabor, J., concurs; Sackett, C.J., specially concurs.

**SACKETT, C.J.** (concur specially)

I concur specially. The issue is whether the father is the better parent and whether he can provide a more supportive environment for the children. I believe he can. Both parents have made some mistakes in life but I am convinced either is an adequate parent. I am disappointed that a central focus of the mother was on long past events in an attempt to put the father in a bad light rather than focusing on why she could be the better parent and why it is in the best interest of the children for her to have physical care.