

IN THE COURT OF APPEALS OF IOWA

No. 0-590 / 10-0339
Filed September 9, 2010

JOSHUA TAHA,
Petitioner-Appellee,

vs.

ANGELA KENNEDY,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

Angela Kennedy appeals from a district court ruling that placed physical
care of the parties' child with his father, Josh Taha. **AFFIRMED.**

Pamela Vandel, Des Moines, for appellant.

Scott Bandstra, Des Moines, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

VOGEL, P.J.

Angela Kennedy appeals from a district court ruling that placed physical care of the parties' child, T.C., with his father, Josh Taha.¹ Because we agree with the district court that Josh can provide a more stable and safe home environment, we affirm.

Angela and Josh are the parents of T.C., born in November 1998. The parties were never married. After T.C.'s birth, a guardianship was established appointing Angela's parents, Charles and Sheryl, as T.C.'s guardians for purposes of financial support and medical insurance. In 2002, an order establishing a visitation schedule was entered in the guardianship, giving Josh visitation with T.C. every other weekend. In February 2009, Josh filed both a petition to establish paternity and a petition to terminate the guardianship; the actions were later consolidated and came on for hearing. In January 2010, the district court dismissed the guardianship and granted Angela and Josh joint legal custody, with Josh being granted physical care of T.C., and Angela liberal visitation. Angela appeals.

Our review in this equity matter is *de novo*. *Callender v. Skiles*, 623 N.W.2d 852, 854 (Iowa 2001). Although not bound by the district court's fact findings, we give them weight, especially when considering the credibility of witnesses. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

Angela asserts the district court erred in granting Josh physical care of T.C. The criteria governing physical care determinations are the same whether

¹ We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. See Iowa R. App. P. 6.905(7)(c).

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). “When considering the issue of physical care, the child’s best interest is the overriding consideration.” *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007).

Among the factors to be considered are:²

1. The characteristics of each child, including age, maturity, mental and physical health.
2. The emotional, social, moral, material, and educational needs of the child.
3. The characteristics of each parent, including age, character, stability, mental and physical health.
4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
5. The interpersonal relationship between the child and each parent.
6. The interpersonal relationship between the child and its siblings.
7. The effect on the child of continuing or disrupting an existing custodial status.
8. The nature of each proposed environment, including its stability and wholesomeness.
9. The preference of the child, if the child is of sufficient age and maturity.
10. The report and recommendation of the attorney for the child or other independent investigator.
11. Available alternatives.
12. Any other relevant matter the evidence in a particular case may disclose.

See *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974); see also Iowa Code § 598.41(3) (listing similar factors). The ultimate objective is to place T.C. in the environment most likely to bring him to healthy physical, mental, and

² While this case has some aspects of a modification proceeding, as Josh requested physical care, which in essence was a modification of what had been the de facto custodial arrangement, there was no previous custodial order; therefore this was an initial action for custody determination. *McKee v. Dicus*, 785 N.W.2d 733, 737 (Iowa Ct. App. 2010).

social maturity. See *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

While Angela asserts she has been the primary caretaker of T.C. and could provide him more stability, her track record indicates otherwise. She has moved five times in the past five years, has demonstrated little financial stability, and involved herself with partners who have violent domestic histories. Angela has three other children, all from different partners. She has demonstrated mental health issues, and the district court was unconvinced that she had taken productive steps to address these issues. The court noted Angela's "[u]nwillingness to take psychiatric medicines, repetitive suicide attempts (with minor children present), serial paramours with violent domestic histories and a penchant for putting T.C. in the middle of parental disagreements." The district court made credibility findings as to both parents. In part it found, "Petitioner [Josh] [was] forthright and candid in his testimony . . . Respondent [Angela] was patently untruthful on the stand."

The district court found that while both parents love T.C., Josh can offer him the needed stability, both emotionally and financially. Josh has a stable job and lifestyle, with a live-in girlfriend of five years, her son, and Josh's daughter who is nearly T.C.'s age and with whom Josh has visitation every other weekend. We recognize that T.C. also has half-siblings living with Angela, and a close connection to his maternal grandparents, but we agree with the district court that Josh will provide a safe home for T.C. and allow him to establish some consistency in life, not fraught with frequent moves and domestic violence. *McKee*, 785 N.W.2d at 739 (noting the importance of giving a child "a stable,

uncomplicated living arrangement”). The guardian ad litem also supported granting physical care of T.C. to Josh, noting he would promote T.C.’s relationship with Angela, the half-siblings, and Angela’s parents. Based on our de novo review of the record, we agree with the findings of the district court, and affirm physical care of T.C. with Josh.

Both Angela and Josh request appellate attorney fees. An award of attorney fees is not a matter of right but rests within the court’s discretion and the parties’ financial positions. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). 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 trial court’s decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). After considering the appropriate factors, we decline to award either party appellate attorney fees. Costs on appeal are assessed to Angela.

AFFIRMED.