

IN THE COURT OF APPEALS OF IOWA

No. 1-906 / 11-1042
Filed December 21, 2011

**IN RE THE MARRIAGE OF NASREDIN DALIL
AND ASMA ALI**

**Upon the Petition of
NASREDIN DALIL,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
ASMA ALI,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Fayette County, John Bauerkamper, Judge.

Asma Ali appeals and Nasredin Dalil cross-appeals the decree issued by the district court dissolving their marriage. **AFFIRMED IN PART AND MODIFIED IN PART.**

Joseph G. Bertroche, Jr. of Bertroche Law Office and Ronald L. Ricklefs, Cedar Rapids, for appellant.

Daniel L. Bray and David M. Cox of Bray & Klockau, P.L.C., Iowa City, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Asma Ali appeals and Nasredin Dalil cross-appeals the decree issued by the district court dissolving their marriage. Upon our de novo review, we affirm in part and modify in part.

I. Background Facts and Proceedings.

Asma and Nasredin were both born and educated in the Republic of Sudan. Nasredin obtained a medical degree in the Sudan in 1995, and he practiced medicine there until 1998. Asma obtained a degree in Arabic and Islamic Studies, and she worked as a teacher in the Sudan.

In 1998, Nasredin immigrated to the United States with the goal of obtaining his medical license to practice medicine in the U.S. Nasredin moved to North Carolina and began preparing to take the United States Medical License Exam. Asma remained in the Sudan. On May 21, 2000, the parties were married. Asma immigrated to the U.S. in April 2001, moving to North Carolina with Nasredin. In July 2003, Nasredin moved from North Carolina to California; Asma joined him four months later.

In August 2005, the parties' son, Hashim, was born. Thereafter, Nasredin obtained his U.S. medical license. In 2006, Nasredin was accepted into a residency program at a hospital in Waterloo, Iowa, and he and the family then moved to Waterloo.

The couple's marriage has been fraught with discord. Both parties during the marriage, at different times, separated, only to reconcile.

In May 2008, Asma demanded a divorce from Nasredin and moved with their son to Iowa City. The couple reconciled, and Nasredin moved to Iowa City

with Asma and Hashim in November 2008. However, the couple again separated in early 2009. Nasredin became Hashim's primary caregiver while in Sudan and for a short amount of time after returning to the U.S.

In September 2009, Nasredin began working as a family physician. He moved to Oelwein, and Asma remained in Iowa City. Nasredin left Hashim in Asma's care while he began transitioning into practice and furnishing his home, telling Asma to "treat [Hashim] right, and I'll come visit." Nasredin later made a room for Asma in his residence. He gave Asma a key to his home and permission to come and go as she pleased. Asma and Hashim then regularly stayed at Nasredin's home. In January 2010, Hashim began living in Nasredin's home full-time, and Nasredin and Asma enrolled him in preschool in Oelwein. Asma began taking classes at the University of Iowa.

By April 2010, the couple's relationship had once again deteriorated. Setting forth descriptions of specific instances of the couple's discord would serve no reasonable purpose here.

On May 12, 2010, Nasredin filed his petition for dissolution of marriage, seeking sole legal custody of Hashim. Asma answered and requested joint legal custody. A temporary order was entered on July 21, 2010, awarding the parties joint legal custody. Nasredin was given primary physical care¹ of Hashim, with Asma having visitation every other weekend.

In October 2010, Hashim's preschool became concerned with Asma's behavior. The preschool had initially allowed Asma to call Hashim during his

¹ "Primary physical care" is not defined in Iowa Code chapter 598; nevertheless, we recognize the term is commonly used by parties, their counsel, and the courts.

scheduled childcare at the school, but the staff began noticing changes in Hashim's behavior after speaking to Asma, including emotional and angry outbursts by the child. The preschool's staff ended a phone call between Asma and Hashim on October 10, 2010, after Hashim had begun crying while on the phone with Asma, and asked Asma to call back another time. Asma then made an emergency call to police, questioning Hashim's safety. Hashim was found safe and sound at the preschool, and the school staff was asked to call Asma back, although it had already explained the situation to Asma. A few days later, Asma called the preschool to speak with Hashim, and she made several accusations against the staff, asserting they were lying and trying to take Hashim from her. Thereafter, the preschool sent a letter to Asma stating it would no longer allow Hashim to take her calls while at the school.

On October 12, 2010, it was reported to the Iowa Department of Human Services (Department) that Nasredin was sexually and physically abusing Hashim, and a child abuse assessment was initiated. Nasredin denied the allegations. The Department's worker spoke with Asma, who was very tearful and emotional during the conversation. Asma told the worker Nasredin had abused her in the past. Asma stated Hashim had been scratched by a boy at the preschool, and the school was lying about it. She stated she had observed Nasredin sexually abuse Hashim in the past.

The worker also talked to Hashim's teacher. The teacher stated that Hashim displayed violent behaviors at school and the behaviors seemed to be worse after coming back from Asma's home. The teacher stated Asma continued to call the preschool for Hashim. The teacher also reported that Asma

often returned Hashim to school late when her visitation ended. The Department determined the child abuse report against Nasredin was unfounded, and it recommended Asma have a mental health evaluation and follow with recommendations for services.

Two days after the Department's worker spoke with Hashim's teacher, Asma took Hashim to the University of Iowa Hospitals and Clinics. She reported Hashim had told her a boy had sexually abused him at the preschool. She also reported that Nasredin had locked Hashim in his room and had left him at home alone. Another child abuse assessment was initiated, and a Department worker met with Hashim and Asma. Hashim denied being abused to the worker.

On November 8, 2010, Asma did not return Hashim to Oelwein following her weekend visitation. The Department's worker contacted Asma, and she advised him she was trying to enroll Hashim in school in Iowa City. The worker stated Asma "talked constantly and [her] areas of concern were very disjointed." Among other statements, Asma told the worker: "I do not have anything to live for without him." The worker believed Asma's statement to be a suicide ideation. Based upon Asma's statement and her "acting irrational by trying to enroll her son into school when the father has physical custody," the worker contacted law enforcement officials to conduct a safety check. After the safety check, Hashim was removed from Asma's care due to the officer's concerns for the child's safety, and Hashim was returned to Nasredin. Nasredin then filed an application for a finding of contempt, based upon Asma's keeping Hashim, and an application to modify the temporary custody order.

On November 15, 2010, the Oelwein Community Schools' superintendent banned Asma from school property, which included the preschool, "due to a series of on-going disruptions" by Asma. The superintendent's letter to Asma further explained:

Your on-going attempts to by-pass the visitation provisions of your custody agreement and your frequent calling of Hashim during and after school continue to be disruptive. The school and [care center] will no longer be put in the middle of custody and visitation issues involving your son.

The school required all communication and contact with Hashim by Asma be done at another location, or it would contact police for trespass.

The Department's worker again spoke with Asma, this time with an Arabic interpreter because "Asma has been difficult to understand." Asma accused Nasredin of sexually abusing Hashim, as well as the preschool of abusing the child. A forensic interview was conducted with Hashim, and Hashim provided limited information and did not discuss any situations of abuse during the interview. The Department determined the child abuse report was unfounded.

In January 2011, the district court entered its order on Nasredin's application for a finding of contempt and to modify the temporary custody order. The court found that while Asma may or may not have had a legitimate reason to be concerned about Hashim, her action of failing to return Hashim was a willful and wanton disregard for the court's order and therefore contempt. Nevertheless, the court declined to sentence Asma on its finding of contempt, so long as she followed the strict terms and conditions of the terms of visitation set forth in the court's order, especially that Asma return Hashim to school on

Mondays following her visitation in a timely fashion. The court denied Nasredin's request to modify the temporary order, explaining:

While the court is concerned that one or both parties may be using the [Department] in order to gain a litigation advantage in this matter, the court finds no reason to modify the terms and conditions of visitation at this point. [Nasredin] points out that the child acts inappropriately following interaction with his mother. Such behavior is not uncommon in dissolution of marriage situations.

Trial was held in March 2011. Nasredin admitted that from the time Hashim born until Nasredin finished his residency in 2009, Asma was generally the child's primary caregiver. However, he stated he had concerns about Asma's emotional instability and irrational behavior, asserting Asma had anger issues and suffered delusions during their marriage.

Asma testified about communication issues she had had during the case. She testified that she had no suicide ideations and the Department's worker taking her statement as such was a misunderstanding due to communication problems. She denied having any delusions or mental health issues. She continued to assert Nasredin had been unfaithful and had abused her in the past.

Several of Nasredin's witnesses testified to their concerns of Asma's emotional and mental instability, including the Department's worker who spoke with Asma during the assessments. Asma's witnesses testified concerning her ability to safely parent Hashim.

On May 9, 2011, the district court entered its decree dissolving the parties' marriage.² The court found Asma had "displayed repeated incidents of

² Although there was an issue at trial as to whether the parties had divorced under Islamic Sharia Law prior to the filing of the dissolution petition, the district court's

uncontrolled anger, irrational thinking, paranoid charges, and instability. Her behavior has been disruptive and counterproductive to the child's emotional development." The court further found that "[e]ffective communication between the parents is non-existent. Their difference of opinion on essential child rearing issues is great and [Asma's] views are uncompromising."

The court then awarded Nasredin sole legal custody of Hashim, and it ordered Asma to pay child support. The court granted Asma visitation on every other weekend, requiring Asma to pick up Hashim on Fridays to begin her visitation and Nasredin to pick-up Hashim on Sunday nights to end the visitation. The court granted Asma five consecutive weeks' visitation in the summer, with no visitation during that time with Nasredin. The court also granted Asma visitation with the child during four of the major Muslim holidays. The court required each party to get the other's permission and signature before taking Hashim out of the country.

Additionally, the court awarded Asma rehabilitative spousal support in the amount of \$1500 per month for three years. The court required each party to pay his or her own remaining trial attorney fees.

Asma now appeals, and Nasredin cross-appeals.

II. Scope and Standards of Review.

We review custody decrees de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). We do so with the realization that the district court possesses the advantage of listening to and

ruling finding it was not appropriate to recognize the purported divorce is not at issue on this appeal.

observing the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we credit the factual findings of the district court, especially as to the demeanor and believability of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our overriding concern is the best interests of the child. Iowa R. App. P. 6.904(3)(o).

III. Discussion.

On appeal, Asma asserts the district court erred in failing to award the parties joint legal custody and her primary physical care of Hashim. Asma also contends the court should have awarded her a greater amount of spousal support for a longer duration, and the court abused its discretion in not awarding her attorney fees. Nasredin on cross-appeal contends the district court erred in requiring him to obtain Asma's permission and signature to travel internationally with Hashim, in awarding Asma visitation on all of the Muslim religious holidays, in not awarding him weekend visitation during Asma's five-week summer visitation with Hashim, and in other respects. We address their arguments in turn.

A. Custody.

1. Legal Custody.

"The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances." *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). "Joint custody is preferred because, properly tailored to the parties' circumstances, joint custodial arrangements will often go a long way

toward encouraging both parents to share the rights, responsibilities, and frequently joyful and meaningful experiences of raising their children.” *In re Marriage of Weidner*, 338 N.W.2d 351, 359 (Iowa 1983). If either parent requests joint custody the court must order joint custody unless it cites clear and convincing evidence, pursuant to the factors in Iowa Code section 598.41(3) (2009), that joint custody is unreasonable and not in the best interests of the child to the extent the legal custodial relationship between the child and a parent should be severed. Iowa Code § 598.41(2)(b). Included in the factors set forth in section 598.41(3) for the court to consider in determining the best custody arrangement, are whether each parent would be a suitable custodian for the child, whether the parents can communicate with each other regarding the child’s needs, whether both parents have actively cared for the child before and since the separation, and whether the safety of the child will be jeopardized by the awarding of joint custody. Iowa Code §§ 598.41(3)(a), (c), (d), & (i).

Considering the factors of section 598.41(3), we disagree that joint custody is unreasonable and not in the best interests of the child. Asma was Hashim’s primary caregiver for the first years of his life, and the parents shared the responsibility thereafter. Nasredin has chosen to leave Hashim with Asma when it was convenient for him, despite his allegations she was delusional and unstable during their marriage. Clearly either parent would be a suitable custodian for the child, and both parents have actively cared for the child before and since the separation. There are communication issues between the parents, but we cannot say they were so troublesome as to preclude a joint legal custody arrangement. Upon our thorough review of the record, we do not find the

circumstances of this case to be so compelling as to deviate from our state's strong policy in favor of joint custody. Accordingly, we reverse the district court's award of sole legal custody to Nasredin and modify the decree to award both parents joint legal custody of Hashim.

2. Physical Care.

"When considering the issue of physical care, the child's best interest is the overriding consideration." *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in section 598.41(3), 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). "[T]he courts must examine each case based on the unique facts and circumstances presented to arrive at the best decision." *Id.* at 700. The following nonexclusive factors are to be considered when determining whether a joint physical care arrangement is appropriate: (1) "approximation," or what has historically been the care giving arrangement for the child between the parents; (2) the ability of the parents to "communicate and show mutual respect"; (3) the "degree of conflict" between the parents; and (4) the ability of the parents to be in "general agreement about their approach to daily matters." *Id.* at 697–99; see also *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

If the court denies a request for joint physical care, "the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interests of the child." Iowa Code § 598.41(5)(a). The court shall then determine placement according to

which parent “can minister more effectively to the long range best interest of the child.” *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). “The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity.” *Hansen*, 733 N.W.2d at 695; *see also In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998) (“The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other.”).

Although we find joint legal custody is in the child’s best interests, we cannot conclude joint physical care is in Hashim’s best interests. Considering the objective to place Hashim in the environment most likely to bring him to health, both physically and mentally, and to social maturity, we find primary physical care of the child should remain with Nasredin. Hashim is settled in his father’s care in Oelwein. He is enrolled in school there and appears to enjoy it. Upon our review of the record, we agree with the district court that Nasredin has shown a superior ability to meet the child’s needs and provide a stable home environment. Asma has exercised poor judgment in placing Hashim in the middle of the custody dispute, including asserting unfounded abuse allegations that have caused the child to endure unnecessary medical and investigative examinations and fighting and screaming at Nasredin in front of the child. Although her actions are not compelling enough to justify sole legal custody with Nasredin, we find her actions and behaviors justify awarding Nasredin primary physical care. We accordingly affirm the district court’s decree in that respect.

B. Visitation and Travel Provisions.**1. Summer Visitation Schedule.**

Nasredin argues he should be given visitation with Hashim every other weekend during Asma's consecutive five-week visitation with Hashim during the summer school recess. We agree Nasredin should have two weekend visitations during Asma's five-week summer visitation period. Liberal visitation rights are in the best interests of the child. *In re Marriage of Muell*, 408 N.W.2d 774, 777 (Iowa Ct. App. 1987). The court shall order liberal visitation rights, where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents. Iowa Code § 598.41(1). We conclude it is equitable and in the best interests of Hashim to award Nasredin visitation during Asma's five-week summer visitation period. We therefore modify the decree to give Nasredin weekend visitation with Hashim on the second and fourth weekend of Asma's summer visitation period, with transportation and timing of Nasredin's weekend visitation to mirror that of Asma's regular weekend visitation, unless the parties otherwise agree.

2. Religious Holiday Visitation.

Nasredin briefly argues he, as sole custodian, should have sole decision making capabilities concerning Hashim's religious upbringing and Asma should not have been awarded visitation with Hashim on the four Muslim religious holidays. Because we find the decree should be modified to provide both parents joint legal custody, both parents have "legal custodial rights and responsibilities toward the child" and "neither parent has legal custodial rights superior to those of the other parent. Rights and responsibilities of joint legal

custody include . . . religious instruction.” *Id.* § 598.1(3); see also *In re Marriage of Gensley*, 777 N.W.2d 705, 714 (Iowa Ct. App. 2009).

The record evidences Asma was a strict adherent to the Muslim faith and regularly attended services with Hashim. Upon our review, we find no error regarding the Muslim religious holiday visitation schedule and affirm on this issue.

C. Spousal Support.

Asma argues her rehabilitative spousal support award should have been of a larger amount and longer duration. Upon our review, we agree.

Spousal support “is an allowance to the spouse in lieu of the legal obligation for support.” *In re Marriage of Sjulín*, 431 N.W.2d 773, 775 (Iowa 1988). Spousal support is a discretionary award dependent upon each party’s earning capacity and present standards of living, as well as the ability to pay and the relative need for support. See *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). Spousal support “is not an absolute right; an award depends on the circumstances of each particular case.” *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in section 598.21A(1). See *id.* We consider the length of the marriage, the age and health of the parties, the parties’ earning capacities, the levels of education, and the likelihood the party seeking support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Property division and spousal support “should be considered together in evaluating their individual sufficiency.” *In re Marriage of*

Trickey, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). We give the district court considerable discretion in awarding alimony, and we will only disturb the court's ruling when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

Rehabilitative spousal support is "a way of supporting an economically dependent spouse through a limited period of reeducation or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting." The goal of rehabilitative spousal support is self-sufficiency and for that reason "such an award may be limited or extended depending on the realistic needs of the economically dependent spouse."

In re Marriage of Becker, 756 N.W.2d 822, 826 (Iowa 2008) (internal citations omitted).

After considering the factors listed in section 598.21A(1), we agree with the district court that Asma is entitled to an award of spousal support, but find the awarded amount and duration of the spousal support to be inequitable under the facts of this case. Nasredin's earning capacity greatly exceeds that of Asma. Although Asma earned her degree in the Sudan, her earning capacity using that degree in the U.S. appears limited, and it is unlikely Asma will be self-supporting at a standard of living comparable to the one enjoyed during the marriage anytime soon. Asma was the child's primary caregiver for the first five years of the child's life and generally worked retail jobs. She testified she is working to obtain her master's degree, but completion of the program would take her "[a]t least three years" because she will have to complete it on a part-time basis. Under these circumstances, we find spousal support is warranted but modify so it is payable at the rate of \$3000 per month for five years.

D. Attorney Fees.

Additionally, Asma argues the district court erred in not awarding her trial attorney fees. An award of attorney fees is not a matter of right, but rather rests within the district court's discretion. *In re Marriage of Hocker*, 752 N.W.2d 447, 451 (Iowa Ct. App. 2008). We review the district court's award of attorney fees for abuse of discretion. *Sullins*, 715 N.W.2d at 255. An award of attorney fees is based upon the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997).

Nasredin was earning substantially more than Asma at the time of the trial. In light of the parties' respective financial positions at the time the decree was entered, see *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009), we find the court abused its discretion in denying Asma's request for trial attorney fees. We therefore modify the decree to award her \$7000 in trial attorney fees.

We also believe Asma is entitled to an award of appellate attorney fees of \$3000. In arriving at our decision, we have considered the parties' needs, ability to pay, and the relative merits of the appeal. See *Sullins*, 715 N.W.2d at 255. Costs on appeal are assessed to Nasredin.

IV. Conclusion.

We have carefully considered all of the claims raised by both parties. Those not addressed specifically in this decision are either disposed of by our resolution of other claims or are without merit. For the reasons stated above, we affirm the district court's ruling dissolving the parties' marriage, but modify the decree to (1) award the parties joint legal custody; (2) allow Nasredin two

weekend visits with Hashim during Asma's summer visitation period, (3) increase Asma's spousal support award and duration, and (4) award Asma trial and appellate attorney fees.

AFFIRMED IN PART AND MODIFIED IN PART.