IN THE COURT OF APPEALS OF IOWA

No. 2-877 / 12-0795
Filed November 29, 2012

IN RE THE MARRIAGE OF RYAN L. DUNKEL
AND EMILY A. DUNKEL f/k/a EMILY A. TAYLOR

Upon the Petition of
Ryan L. Dunkel,
Petitioner-Appellee,

And Concerning
Emily A. Dunkel f/k/a Emily A. Taylor,
Respondent-Appellant.

Appeal from the Iowa District Court for Plymouth County, James D. Scott, Judge.

Emily Taylor appeals the decree issued by the district court dissolving her marriage to Ryan Dunkel. **AFFIRMED.**

Elizabeth A. Rosenbaum, Sioux City, for appellant.

Rebecca A. Nelson of Rawlings, Ellwanger, Jacobs, Mohrhauser & Nelson, L.L.P., Sioux City, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

***I. Background Facts and Proceedings*.**

Ryan Dunkel and Emily Taylor (formerly Dunkel) were married in 2007. Three children were born of their marriage. In 2011, Ryan filed his petition for dissolution of marriage.

Following a trial, the district court entered its order and decree dissolving the marriage. The court accepted the parties' stipulation, which included that the parties would have joint custody of the children. The court concluded the parties should have shared physical care of the children. Additionally, the court determined each party's income, specifically finding "[Ryan's] W-2 provides the best record of his income, not his year-end pay stub. Ryan has begun officiating baseball and basketball approximately one evening per week when in season. In 2011 his total taxable income was $31,560." Using the child support guidelines and the parties' respective determined incomes, the court found Emily was to pay monthly child support to Ryan in the amount of fifty-nine dollars. The court declined the parties' requests that the other pay his or her trial attorney fees.

Emily now appeals, contending the court erred in (1) granting the parties shared physical custody of their children; (2) calculating Ryan's income for purposes of determining her child support obligation; and (3) failing to award her trial attorney fees. Both parties request appellate attorney fees.

***II. Scope and Standards of Review*.**

We review dissolution of marriage cases de novo. Iowa R. App. P. 6.907; *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). We decide the issues raised anew, but give weight to the district court's factual findings, especially with

respect to the credibility of the witnesses. *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). To the extent that interpretation of the child support guidelines is a legal question, our review on that issue is for errors at law. *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We review a district court's decision regarding attorney fees for an abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

III. Discussion.

A. Physical Care.

In child custody cases, the first and governing consideration is the best interests of the children. Iowa Code § 598.41(3) (2011). Here, the parties agreed to joint legal custody of the children, but disputed the children's physical care placement. *See In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007) ("Legal custody" carries with it certain rights and responsibilities, including but not limited to "decision-making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction."). Emily sought primary physical care[1] of the children, and Ryan sought either shared physical care or alternatively primary physical care of the children. The court granted the parties shared physical care.

"Physical care" involves the right and responsibility to maintain a home for the minor children and provide for routine care of the children. *Id.* If joint physical care is awarded, "both parents have rights to and responsibilities toward the child[ren] including, but not limited to, shared parenting time with the

[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.

child[ren], maintaining homes for the child[ren], [and] providing routine care for the child[ren] . . . ." Iowa Code § 598.1(4). Even though the parties disagree on some matters, these problems should be able to be resolved to the benefit of the children. *See In re Marriage of Gensley*, 777 N.W.2d 705, 716 (Iowa Ct. App. 2009).

In determining whether to award joint physical care or physical care with one parent, the district court is guided by the factors enumerated in section 598.41(3), as well as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). *See Hansen*, 733 N.W.2d at 698 (holding that although section 598.41(3) does not directly apply to physical care decisions, "the factors listed [in this code section] as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child"). Although consideration is given in any custody dispute to allowing the children to remain with a parent who has been the primary caretaker, *see id.* at 696, the fact that a parent was the primary caretaker of the child prior to separation does not assure an award of physical care. *See In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991). The ultimate objective of a physical care determination is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999); *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.

In this case, it is clear both parties love and care for the children, and both parents are willing and able to serve as care providers for the children. The focus, therefore, is on whether the interests of the children are better served by substantial and nearly equal contact with both parents through a joint-care arrangement or by naming one parent the physical-care parent, and providing the other with visitation. Where the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In close cases, we give careful consideration to the district court's findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995).

Here, the district court found the parties should share the children's physical care, explaining:

> Pre-separation care of the children was approximately equal. After the intense care the children received from their parents and grandmother the first few months of life [due to their premature births], Emily returned to work. From that point until separation the parents provided approximately equal care. Neither was clearly a primary care provider. Both bathed, fed, dressed and played with the children. Both attended doctors' appointments.
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> Ryan's contact with the children continued after separation, first informally and then pursuant to the order on temporary matters. Shared physical care will not be significantly different than the visitation schedule the parties have been following and should not undermine the children's need for stability and continuity of care.
>
> Except for their disagreements over time to be spent with the children, Emily and Ryan are both quite capable of communicating effectively with the other parent. Witnesses who know the parties believe, with time and a fixed schedule, they will move beyond the present hurt feelings that naturally accompany a divorce. The parties have been able to agree on virtually all other issues in this case, a tribute to their maturity and self-control. Both displayed a calm, respectful demeanor in court.
>
> Despite the visitation conflicts the parties encountered under the temporary order, this is not a high-conflict case. The language of the order on temporary matters is open to interpretation and may

> have contributed to the conflict that occurred during separation. Isolated difficulties the parties experience during separation or breakup of the relationship are not as important as their behavior during the marriage. *See In re Marriage of Ihle*, 577 N.W.2d 64, 69 (Iowa Ct. App. 1998). The parties' marriage was not one of abuse or high conflict.
>
> The parties are in general agreement on the manner in which their children should be raised. Their routines with the children are consistent, both have similar forms of discipline and both agree to raise the children in the same faith. Emily has no plans to leave her teaching position in Hinton, and Ryan agrees that the children should go to school in Hinton. Ryan lives in close enough proximity that he will be able to take the children to school and activities in Hinton. Given all these factors, the court concludes the environment most likely to bring [the children] to healthy physical, mental and social maturity is through shared physical care with their parents.

Upon our de novo review of the record and considering the factors pertinent to joint physical care, we find no reason to disturb the district court's award of shared physical care of the parties' children. Accordingly, we affirm the physical care decision of the district court.

B. Child Support.

Emily contends the district court erred in determining Ryan's total income was $31,560 for purposes of determining her child support obligation. Application of child support guidelines first involves determination of the "net monthly income" of the custodial and noncustodial parent. *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004). The court must determine the parents' current income from the most reliable evidence presented. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa Ct. App. 1996). "Net income is gross income less certain allowable deductions." *In re Marriage of Hilmo*, 623 N.W.2d 809, 811 (Iowa 2001). Gross monthly income is not defined in the guidelines; however, Iowa courts have stated it is the total taxable income on

Federal Form 1040. *In re Marriage of Cossel*, 487 N.W.2d 679, 683 (Iowa Ct. App. 1992). Because the guidelines provide for the consideration of a parent's state and federal income tax liability, "the amount of child support ultimately owed . . . is dependent on the allocation of tax exemptions and credits." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 338 (Iowa Ct. App. 2005). Nevertheless, income for child support calculation purposes is "not limited to income that is reportable to the federal government as income." *Hilmo*, 623 N.W.2d at 811.

Here, Ryan's 2011 year-end paystub shows his 2011 gross year-end earnings were $31,853.82 (salary - $30,493.41, salary sick or personal time - $926.94, salary vacation - $433.47). Yet, the parties' reported on their 2011 state tax returns (Iowa and Nebraska) that Ryan's wages were $29,661. His W-2 was not admitted into evidence. He testified his income was $29,640, and he stated the same amount on his child support guidelines worksheet. However, Ryan's answer to an interrogatory asking him to state all sources and amounts of income he had in 2011 states his wage earnings were $31,853.82.

Additionally, the parties' federal 2011 tax return sets out Ryan's officiating income separately from his W-2 earnings. The Schedule C-EZ, Net Profit From Business, reported Ryan's gross officiating receipts as $1960, expenses as $1233, and net profit as $727. However, Ryan's answer to an interrogatory asking him to state all sources and amounts of income he had in 2011 states his umpiring earnings were $2265.

Upon our de novo review of the record, we conclude the district court's imputed income to Ryan of $31,560 was within the permissible range of the

evidence presented. Because the district court's income determination did include Ryan's officiating income, and its imputed income was within the permissible range of the evidence presented, we affirm on this issue.

C. Trial and Appellate Attorney Fees.

Finally, Emily contends the district court should have awarded her trial attorney fees. Trial courts have considerable discretion in determining whether to award attorney fees. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay." *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006) (quoting *Guyer*, 522 N.W.2d at 822). Additionally, an award must be fair and reasonable. *Guyer*, 522 N.W.2d at 822.

In denying Emily's request for attorney fees, the district court considered the parties' respective financial circumstances, and we find no abuse of discretion. Considering the parties' financial circumstances as they were at the conclusion of the proceedings, each party has the ability to pay their fees. Accordingly, we affirm the district court's denial of trial attorney fees to Emily.

Both parties request an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We too 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. *See 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 to Emily.

AFFIRMED.