

IN THE COURT OF APPEALS OF IOWA

No. 3-030 / 12-1036
Filed February 27, 2013

**IN RE THE MARRIAGE OF ALAN MULLIGAN
AND AMY MULLIGAN**

**Upon the Petition of
ALAN MULLIGAN,**
Petitioner-Appellee,

**And Concerning
AMY MULLIGAN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Plymouth County, John D. Ackerman, Judge.

A mother appeals the district court order placing the parties' minor child in the physical care of the father, and awarding him trial attorney fees. **AFFIRMED AS MODIFIED.**

John S. Moeller of John S. Moeller, P.C., Sioux City, for appellant.

Irene Ann Schrunk of Irene A. Schrunk Law Firm, Sioux City, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Amy Mulligan, now known as Amy Mulligan-Webb, appeals the district court decision placing physical care of the parties' minor child with Alan Mulligan. She also claims the district court abused its discretion by ordering her to pay \$8500 for Alan's trial attorney fees. We affirm the district court's decision placing the child in the physical care of Alan. We modify to eliminate the award of trial attorney fees. Therefore, we affirm as modified.

I. Background Facts & Proceedings

Alan and Amy were married on September 6, 1997. They have one child, who was born in 2004. Amy has a history of mental health problems and she was hospitalized in April 2007. The parties separated later in 2007, and Alan filed a petition for dissolution of marriage on February 27, 2008. The parties entered into a consent protective order under Iowa Code chapter 236 (2007).

The parties entered into a stipulation on temporary matters that provided for joint legal custody of the child, with Amy having physical care. The parties agreed to a specific visitation schedule, and Alan was ordered to pay child support. In May 2008, Amy was involuntarily committed in a proceeding initiated by her parents. Alan moved to Michigan in June 2008. The visitation provisions of the temporary order were then modified in May 2009.

Prior to the dissolution hearing, Alan sought Amy's private medical and mental health records. The district court required Amy to produce these records, and they were discussed during the dissolution hearing. The court entered a dissolution decree on August 11, 2010, placing the child in the physical care of

Alan. Amy was granted visitation with the child and ordered to pay child support. The court ordered each party to pay his or her own attorney fees. The child has been living in Michigan with Alan since August 2010.

Amy appealed the decision granting Alan access to her confidential medical and mental health records, and its decision placing the child in the physical care of Alan. We determined “the district court abused its discretion in ordering Amy to produce her statutorily and constitutionally protected medical and mental health records and they should not have been admitted.” *In re Marriage of Mulligan*, No. 10-1752, 2011 WL 2420005 (Iowa Ct. App. June 15, 2011). We determined the case should be remanded for a rehearing before a different judge on the issues of physical care, visitation, and child support. *Id.* All other aspects of the dissolution decree were affirmed. *Id.*

The district court heard testimony over four days in March 2012. At the time of the hearing Alan was thirty-seven years old. He lives in Warren, Michigan, with his fiancé, Rose. Alan has a two-year college degree. He is employed by Quicken Loans as an insurance analyst, and earns about \$27,000 per year. As noted above, the child has been living in Michigan with Alan since August 2010. Alan is very involved in the child’s education. He has encouraged the child’s participation in Boy Scouts and church activities.

At the time of the hearing Amy was thirty-five years old. She has a college degree in psychology and business. Amy was unemployed and was looking for a job. Amy married Morgan Webb on February 29, 2012. She and Morgan have one child together, and another was on the way. Multiple witnesses testified to

Amy's mental health problems. Amy's problems have led her to self-destructive behavior, such as cutting, purging by vomiting, and intoxication. Amy told her high school friend she had been diagnosed with bipolar disorder and told other witnesses that she was diagnosed with a borderline personality disorder. However, she denied these diagnoses at trial, and was not receiving treatment for any mental health condition.

The district court issued its findings of fact, conclusions of law and decree on March 27, 2012. The court determined the parties should have joint legal custody of the child, with Alan having physical care. The court determined Amy was not a credible witness. The court noted that serious concerns about Amy's continuing mental health issues had not been resolved. The court also stated it had "serious concerns about Amy's ability to promote A.M.'s relationship with Alan," based on her conduct before the child moved to Michigan. The court concluded Alan could minister more effectively to the long-term best interests of the child.

The court determined Amy was entitled to visitation one weekend each month, alternating holidays, and two two-week periods in the summer, as well as telephone contact with the child. The court based Amy's child support obligation on her earning capacity, and found she had the ability to earn \$17,680 per year. Amy was ordered to pay child support of \$145 per month, and \$29.50 per month in cash medical support.

The district court determined Amy should be required to pay \$8500 for Alan's attorney fees. This amount was reduced by a previous sanction against

Alan for \$1000, leaving a balance of \$7500. The court noted this award was based solely on the parties' attorney fees since the court of appeals decision.

Both parties filed post-trial motions pursuant to Iowa Rule of Civil Procedure 1.904(2). The court slightly modified the visitation provisions, and otherwise denied the motions. Amy appeals the decision of the district court.

II. Standard of Review

Our review in this dissolution action is de novo. Iowa R. App. P. 6.907. We examine the entire record and adjudicate anew on the issues properly presented. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50-51 (Iowa 1999). In equity cases we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by those findings. Iowa R. App. P. 6.904(3)(g).

III. Physical Care

Amy contends the district court should have placed the parties' minor child in her physical care. She asserts she was the primary caretaker for the child during the parties' marriage, and states that the child did very well in her care. She does not believe the child has been doing as well in Alan's care. Amy claims there is nothing in the record to show her mental health condition affects her ability to care for the child.

In making a physical care determination, the court considers the factors found in section 598.41(3), as well as those found in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Paramount in this decision is the best interests of the child. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa

1999). The court's objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *Id.* "Prior cases have little precedential value; we must base our decision primarily on the particular circumstances of the parties in this case." *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

The district court supported its decision placing the parties' child in the physical care of Alan with extensive factual findings. The court specifically found Amy was not a credible witness. We give due deference to the district court's credibility determinations. *In re Marriage of Nelson*, 654 N.W.2d 551, 553 (Iowa 2002). This is because the district court has the opportunity to view, firsthand, the demeanor of the witnesses and evaluate them as custodians. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998).

We agree with the district court's determination that the child should be placed in the physical care of Alan. There is extensive evidence in the record that Amy has very serious mental health problems, which she was currently denying at the time of the dissolution hearing, and for which she was not receiving adequate treatment. Her mental health problems have led her to engage in self-destructive behaviors which could have a negative affect on her ability to care for the child. Also, during the time Amy had temporary physical care of the child, she did not encourage Alan's relationship with the child. In fact, there is evidence that she attempted to alienate the child from Alan at the outset of these proceedings.

We also note that the child has been doing very well in Alan's care since August 2010. The evidence showed Alan is very involved in the child's education and school activities. Furthermore, Alan supported the child's participation in Boy Scouts and church activities. We believe that placing the child with Alan will most likely bring the child to healthy physical, mental, and social maturity. See *Murphy*, 592 N.W.2d at 683. For these reasons, we affirm the district court's decision placing the child in the physical care of Alan.

IV. Attorney Fees

Amy claims the district court abused its discretion by ordering her to pay \$8500 of Alan's trial attorney fees. We review an award of trial attorney fees in a dissolution action for an abuse of discretion. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012). "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). We also consider whether the fees are fair and reasonable. *Id.*

In ruling on Amy's post-trial motion, the court justified its award of trial attorney fees by stating, "Amy was unsuccessful in her attempt to retain the physical care of A.M. notwithstanding the lack of use of any privileged medical records." On appeal, Alan claims the award of trial attorney fees should be affirmed based on his claim that Amy was in contempt in regard to the sale of the parties' home under the terms of the dissolution decree.

Although the district court found Amy was in contempt for failure to follow the terms of the dissolution decree concerning the disposition of the marital

home, the court specifically did not impose any attorney fees for the contempt. The award of attorney fees was based on the issues considered by the district court on remand after the court of appeals decision. The court noted that no attorney fees had been awarded in the August 11, 2010 dissolution decree, and stated that the award of attorney fees in this case was based on events subsequent to the court of appeals decision. However, the district court did not specifically delineate its reasons other than to refer to the facts and legal principles in its ruling.

We determine the district court abused its discretion by ordering Amy to pay \$7500 of Alan's trial attorney fees (\$8500 in attorney fees less \$1000 sanction against Alan). The award was not based on the relative abilities of the parties to pay attorney fees. Amy was unemployed at the time of the dissolution hearing. Although the court determined she had the ability to earn \$17,680 per year, she has no present income stream to pay this sum. Her only significant asset appears to be the equity in the home which may be necessary to procure a new residence or to refinance the home. We modify the district court's decision to eliminate the requirement that Amy pay \$8500 toward Alan's trial attorney fees.

We affirm the district court's decision as modified. We have affirmed the provision placing the child in the physical care of Alan. We have modified to eliminate the requirement that Amy pay a portion of Alan's trial attorney fees. Cost of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.