

IN THE COURT OF APPEALS OF IOWA

No. 3-527 / 12-2099
Filed June 12, 2013

DOUGLAS WAYNE DEBOWER,
Petitioner-Appellant,

vs.

SAMANTHA MCDOWELL,
Respondent-Appellee.

Appeal from the Iowa District Court for Bremer County, James M. Drew,
Judge.

A father appeals from the district court's order granting physical care of his
two minor children to their mother. **AFFIRMED.**

Andrew Howie, of Hudson, Mallaney, Shindler & Anderson, P.C., West
Des Moines, for appellant.

William Duane Werger, of Leslie, Collins, Gritters, & Werger, P.L.L.C.,
Waverly, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Douglas DeBower appeals from the district court's order granting physical care of his two minor children to their mother, Samantha McDowell. He argues the court erred in its determination that Samantha was the children's primary caregiver and contends the best interests of the children would be better served by residing with him. Upon review, we affirm the order of the district court.

I. Background Facts.

Doug and Samantha met and began dating in high school. Immediately after finishing school in January 2008, Samantha moved in with Doug and his extended family. Their first child was born in October 2008. During 2009 and 2010, Doug, Samantha, and their child lived in a variety of homes throughout Waverly. Doug was employed full-time and worked from 11 p.m. to 7 a.m.; Samantha was unemployed and took care of their child. In December 2010, Samantha learned she was pregnant with the couple's second child. Around this time, they moved back into the home of Doug's extended family. Their second child was born in August 2011. The family of four continued living with Doug's family until Samantha moved out in December 2011. In February 2012, the court entered an order for temporary custody granting Samantha physical care of the children. The final order, entered after trial in November 2012, similarly granted Samantha physical care.

Throughout his and Samantha's relationship, Doug worked hard to provide for the family and he has continued to do so. At the time of trial he was employed in Cedar Falls. His regular shift was from 11 p.m. through 7 a.m.

Sunday through Thursday. He also worked a few hours overtime each week on Fridays. Samantha was employed at a Golden Corral restaurant and worked approximately thirty hours a week.

During the course of their relationship Doug and Samantha relied heavily on Doug's family for assistance taking care of the children. Doug's aunt, in particular, provided a great deal of care for the children. Because of Doug's work schedule, he has continued to rely heavily on his family for assistance. Although he no longer resides with his extended family, Doug moved to the property just next door. While he sleeps during the day, his aunt cares for the children at one of the two homes. Once Doug wakes up in the evening, he spends some time with the children before returning to work. Doug's aunt estimated that the extended family was responsible for the children's care approximately nine hours per day, not including nights.

II. Standard of Review.

We review custody decisions de novo. *In re Marriage of Olson*, 705 N.W.2d 312, 313 (Iowa 2005). We give weight to the district court's findings, especially regarding the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). "Precedent is of little value as our determination must depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

III. Discussion.

The criteria governing custody decisions is the same whether the parents are dissolving their marriage or are unwed. *Lambert v. Everist*, 418 N.W.2d 40,

42 (Iowa 1988). The controlling consideration is the best interest of the children. Iowa R. App. P. 6.904(3)(o). As in this case, where neither party requests joint physical care, we use the factors enumerated in Iowa Code section 598.41(3) (2011) and *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), to determine which of the two parents is most likely to provide an environment that brings the children to health, both physically and mentally, and to social maturity. See *In re Marriage of Hansen*, 733 N.W.2d 683, 695-96 (Iowa 2007). In making our determination, gender is irrelevant and neither parent has a “greater burden than the other in attempting to gain custody in a dissolution proceeding.” *In re Marriage of Bowen*, 219 N.W.2d 683, 689 (Iowa 1974).

Upon our de novo review, we conclude Samantha was properly awarded physical care of the children. Stability and continuity of caregiving are important considerations when deciding physical care. See *In Hansen*, 733 N.W.2d at 696. “Stability and continuity factors tend to favor a spouse who, prior to divorce, was primarily responsible for physical care.” *Id.* at 697–98. The district court found, and we believe the record supports, that Samantha has historically been the primary caregiver for the children. During their relationship Doug worked long hours overnight and slept during the day while the children were awake. Samantha was unemployed and stayed home taking care of the children. The record does show, and Samantha admits, the couple had help taking care of the children, particularly from Doug’s aunt. However, between the two parties in question, Samantha was the primary caregiver.

Even though Doug has a good support system and pledged continued help from his family members, his work schedule is not ideal for raising young children. Because he works while the children are sleeping and then must sleep while they are awake, Doug has limited time to personally interact with and care for the children. On the other hand, Samantha's work schedule allows her to be awake when the children are, and she is thus able to take a more active role in raising them.

Doug also alleges that Samantha has suffered from depression and has been in an abusive relationship since the parties' breakup. We are not convinced that Samantha's relationship with a man that abused her once adversely affects her abilities as the physical caretaker of the children as she terminated the relationship after the abuse. We are also satisfied that the district court had an opportunity to hear the evidence and view the demeanor of the witnesses relative to any ongoing depression or mental health issues and determined it was not a compelling factor. We have no reason to disagree.

Finally, we acknowledge the district court made its determination, at least in part, because of concern regarding Doug's alleged "hobby" of wearing woman's clothing. Even disregarding the allegation, the record supports the award of physical care to Samantha. We affirm.

Samantha seeks an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of the party seeking an award, the ability of the other party to pay, and the

relative merits of the appeal. *Id.* In a custody proceeding between parents who have never married, the court may award the prevailing party reasonable attorney fees. Iowa Code § 600B.26. Taking into consideration these relevant factors, we award Samantha \$1500 in appellate attorney fees.

AFFIRMED.