

**IN THE COURT OF APPEALS OF IOWA**

No. 6-497 / 05-1751  
Filed November 16, 2006

**Upon the Petition of**  
**JOSE LUIS NUNEZ DUENAS,**  
Petitioner-Appellee,

**And Concerning**  
**ANA CECILIA CARDOSA VIDAL,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Marshall County, Carl Baker,  
Judge.

Ana Cecilia Cardoso Vidal appeals from a custody decree that awarded  
Jose Luis Nunez Duenas primary physical care of the parties' daughter.

**AFFIRMED.**

Nancy Robertson, Des Moines, for appellant.

Darrell Meyer, Marshalltown, for appellee.

Reyne See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C.,  
Marshalltown, for minor child.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**ZIMMER, J.**

Ana Cecilia Cardosa Vidal appeals from a custody decree that awarded Jose Luis Nunez Duenas primary physical care of the parties' daughter. We affirm the district court.

***I. Background Facts & Proceedings***

Ana and Jose met in Mexico in 1998. They began dating and then lived together in Mexico before Jose moved back to Marshalltown, Iowa. At the time Jose returned to Iowa, Ana was pregnant. Jose asked Ana to come live with him in the United States. He sent Ana money for an airline ticket and paid a third party to assist Ana in entering this country illegally.

When Ana arrived in Marshalltown, she lived with Jose and his parents. Ana and Jose's daughter, Jacqueline, was born in June of 2000. Ana and Jose continued to live with Jose's parents after Jacqueline's birth. Ana went back to Mexico with Jacqueline in 2001, but eventually returned to Iowa. Eventually, Jose, Ana, and Jacqueline moved into a home Jose purchased in Marshalltown.

In June 2004 Ana told Jose she wanted to visit her mother and brother in California. Jose paid for Ana's airline ticket, and Ana told Jose she and Jacqueline would be gone for four weeks. While Ana was in California, she informed Jose she wanted to extend her stay by two weeks. Later, she told Jose she intended to remain in California and would not return to Iowa. Jose drove to California and unsuccessfully attempted to persuade Ana to return to Iowa.

On August 9, 2004, Ana filed a petition for child custody, child support, and visitation in California. When Jose was served with notice of the action in

Iowa, he filed his own custody action in Iowa on August 25. The California case was dismissed when the California court determined jurisdiction of the custody action would be more properly addressed in Iowa. Jose sent money to Ana in November for the return trip to Iowa. When Ana and Jacqueline returned, they stayed with Jose in Marshalltown for approximately one month.

Jose dismissed his child custody petition without prejudice on November 10 because he believed Ana and Jacqueline were going to stay with him in Iowa. A short time later, Jose discovered Ana had obtained airline tickets to return to California with Jacqueline. Jose filed a petition for injunctive relief on November 17 in an effort to prevent Ana from leaving the state with Jacqueline. The district court entered an order that same day enjoining Ana from leaving the state with Jacqueline.

Jose subsequently filed a motion to set aside the voluntary dismissal of his petition to establish custody. He alleged he had been misled into seeking a dismissal of his petition by Ana. Ana filed a response stating she did not resist the motion to set aside the dismissal. On December 10 the court reinstated Jose's petition for custody and support. On that same date Ana went to Jose's home and started packing her clothing and Jacqueline's clothing. Jose feared Ana was going to take Jacqueline to California, so he took Jacqueline to his parents' home without Ana's permission. This prompted Ana to file a petition for relief from domestic abuse, and on December 13 the court entered a temporary protective order granting temporary physical care of Jacqueline to Ana. The court also appointed a guardian ad litem to represent Jacqueline's interests on

December 17. Following a hearing held February 15, 2005, the court entered an order which provided that Ana would maintain temporary physical care of Jacqueline pending the parties' custody trial.

Ana lived in a women's shelter for a short time after she and Jose separated for the final time. After Ana left the shelter, she established a temporary residence with Maria and Jesus Gomez. Ana told the guardian ad litem that another woman, Sonia, and an infant also lived in the home. She would not specify where they slept in the home.<sup>1</sup>

The district court heard the child custody action on July 13, 2005, and on August 10 the court awarded the parties joint legal custody and granted Jose primary physical care of Jacqueline. Ana now appeals.

## ***II. Scope and Standard of Review***

We review a district court's ruling on child custody de novo. Iowa R. App. P. 6.4; *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa Ct. App. 1998). Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

## ***III. Discussion***

When we determine physical care, our primary consideration is the best interests of the child. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). When we consider which physical care arrangement is in the child's best interests, we consider the factors set forth in Iowa Code section 598.41(3)

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<sup>1</sup> Ana gave conflicting accounts that Sonia and her infant slept in the basement, but then she stated they slept in the garage. Ana refused to show the guardian ad litem the garage, saying it was not finished.

(2003), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).<sup>2</sup> The critical issue is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). Our primary objective is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). We must also consider the willingness of each party to allow the child access to the other party. *Id.*

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<sup>2</sup> We consider the following factors from *Winter*, 223 N.W.2d at 166-67, when making physical care determinations:

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.

Ana first claims the court erred in minimizing domestic violence by Jose and in failing to apply the rebuttable presumption against joint custody when a history of domestic violence exists.<sup>3</sup>

As we have said before, domestic abuse is in every respect dramatically opposed to a child's best interests. *In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997). In this case, the record reveals there was an altercation between Ana and Jose in Jose's parents' home on May 10, 2002. The trial court heard conflicting evidence regarding this incident. Ana claimed Jose hit her in the face, but she admitted she pushed him first. Jose's mother maintained Ana threw herself at Jose and tried to scratch him, so she had to restrain Ana. She also claimed Ana attempted to throw a vase at Jose. After the altercation, Ana's nose was bleeding, and Jose's face and chest were scratched. Jose was arrested by police officers and charged with domestic abuse assault following the incident. Ana tried to have the charges dismissed with the assistance of a local lawyer. However, Jose pleaded guilty to simple assault and paid a fifty-dollar fine. He successfully completed a court ordered batterer's education program after pleading guilty.

During the parties' custody trial, Jose claimed both parties were at fault during the incident three years earlier. He stated he accepted responsibility for the incident at the time because he was concerned Ana would be deported if she was charged with domestic abuse. At trial, Ana claimed Jose was verbally

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<sup>3</sup> Iowa Code section 598.41(1)(b) (2003) establishes a rebuttable presumption against joint custody if a history of domestic abuse exists, and section 598.41(2)(c) states if a history of domestic abuse exists and is not rebutted, that outweighs any other factor considered under section 598.41(3).

abusive and controlling throughout their relationship, while Jose expressed concern Ana was too rough with Jacqueline. In its custody decree, the district court did not make specific findings regarding whether a history of domestic abuse existed in this case or whether any presumption under section 598.41(1)(b) was rebutted. However, it is apparent that the trial court ultimately concluded the evidence of domestic abuse presented in this case should not prevent either party from being considered as a primary physical caretaker for Jacqueline. Upon review of the record, we find no reason to disagree with this conclusion. The district court heard evidence that both parties behaved inappropriately during the 2002 altercation. Ana told the child's guardian ad litem there had been no incidents of physical violence since the incident in 2002, and she acknowledged Jose has never harmed Jacqueline.

Ana next claims the district court placed too much weight on her undocumented status when making the custody determination. Although the district court indicated Ana's undocumented status "complicates the custody issue," the mother's immigration status was only one factor among many in the court's determination of the child's best interests. Moreover, for the reasons which follow, our own de novo review of the record convinces us the court's ultimate decision to place Jacqueline in the physical care of her father is amply supported by the record.

We begin our discussion of physical care on a positive note. The guardian ad litem's report to the court states:

Jacqueline is a somewhat shy little girl who is clearly bonded with both of her parents. She appeared to be well taken care of by both

parents, and both parents appeared to have the ability to provide for the needs of the child. Both parents love Jacqueline.

We agree with this assessment. Although the parties have some current complaints regarding one another, they are both capable of taking care of Jacqueline. However, like the district court, we believe Jose offers Jacqueline far more stability than her mother.

Jose is a legal and permanent resident of this country. He has resided in the United States for ten years. Jose has a full-time job, a car, and a driver's license. He owns his own residence where Jacqueline has her own bedroom. Jose has at least fifteen family members living in Marshalltown. Jacqueline has a close relationship with Jose's extended family. Jose has demonstrated he can provide a stable and secure home for his daughter.

Ana's situation is much less stable. She does not have a job, a car, or a driver's license. Ana does not have a permanent home. She lives with friends she recently met in Marshalltown. Ana has no relatives in this area, and her plans for the future are uncertain. Her testimony indicated she would likely move to California if awarded custody, even though she acknowledged such a move would be unfair to Jose and Jacqueline.

Our review of the record also supports the district court's conclusion that Jose is more willing to support Ana's relationship with Jacqueline than Ana is willing to support Jose's relationship with his daughter. The denial of one parent of a child's opportunity to have meaningful contact with the other parent is a significant factor in determining a physical care arrangement. *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992).

Finally, the decision to award Jose physical care finds further support in the guardian ad litem's recommendation, following a thorough investigation, that the parties share joint legal custody with Jose granted primary physical care.

Upon our de novo review of the record, we find no reason to disagree with the district court's decision to place physical care of Jacqueline with Jose. Like the district court and Jacqueline's guardian ad litem, we believe this physical care arrangement is in the child's best interests. In reaching this conclusion, we recognize the court had the parties before it, was able to observe their demeanor, and was in a better position to evaluate them as caregivers than we are. See *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993).

Jose requests appellate attorney fees. An award of appellate attorney fees rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). Whether attorney fees should be awarded depends on the needs of the party making the request and 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 party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We decline to award appellate attorney fees in this case.

#### ***IV. Conclusion***

We affirm the district court's decision to grant joint legal custody to the parties with physical care of Jacqueline with Jose.

**AFFIRMED.**