

**IN THE COURT OF APPEALS OF IOWA**

No. 6-583 / 06-0167  
Filed August 9, 2006

**IN RE THE MARRIAGE OF DWIGHT L. HORNS  
AND SARAH HORNS**

**Upon the Petition of  
DWIGHT L. HORNS,**  
Petitioner-Appellant,

**And Concerning  
SARAH HORNS,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Winneshiek County, Margaret L.  
Lingreen, Judge.

Petitioner appeals from child custody provisions of dissolution decree.

**AFFIRMED.**

James Burns, Decorah, for appellant.

David L. Strand, Decorah, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

**HUITINK, P.J.**

Petitioner Dwight L. Horns appeals from the child custody provisions of the decree dissolving his marriage with Sarah Horns, respondent. Sarah has not filed an appellee's brief. That failure does not entitle Dwight to a reversal as a matter of right. *State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209 (Iowa 1982). We limit our consideration of the issues to those raised in Dwight's brief. *Id.*

**I. Background Facts and Proceedings**

Dwight and Sarah were married in 1999. They separated in July 2003. They are the parents of Dominic, born in June 2001. Dwight filed a petition for dissolution of marriage in April 2005. Trial was held in January 2006.

At the time of trial, Dwight was thirty years old. He lives in Postville, Iowa, with his girlfriend, Shauna Swift, in a home she owns. He moved into her home in July 2004. Dwight and Shauna have one child, Lavender, born in June 2005. Shauna has a son approximately the same age as Dominic by a previous relationship. Neither Dwight nor Shauna spoke of plans to marry, but both described themselves and the children as a "family unit."

In May 2005 Dwight began working for Poor Boy Tree Service, a company that performs right-of-way maintenance on power lines in the Midwest. He generally works ten-hour days from Monday through Thursday. The work takes him out of state, so he usually is not home during the workweek. He leaves on Sunday afternoon or evening for the job site and returns to Postville on Thursday evening. Although overtime is not typical, Dwight spent two months working in

Louisiana following Hurricane Katrina. He returned home for four days during the eight-week period.

Sarah was twenty-five at the time of trial. She lives in Decorah, Iowa, where she moved sometime after the separation. She works part-time and takes classes at a local community college. She hopes to become a psychologist. While there was testimony as to Sarah's association with a man who is a recovering alcoholic, the record is unclear as to the extent and character of the relationship.

Dominic was described by various witnesses as a bright and happy four-year-old boy. Following Dominic's birth, Dwight and Sarah worked different shifts at their jobs, which allowed for one of them to care for him while the other was at work. When the parties separated, Sarah moved out of their home in Monona, Iowa, and into an apartment in town. Dominic remained in the marital home, but Sarah continued to assist with his care on a daily basis. When Sarah moved to Decorah a few months after the separation, she began exercising visitation every other weekend. During the summer of 2005, Sarah and Dwight mutually agreed to alternate Dominic's physical care every other week. At the time of trial, Dominic was attending a child development program in Postville. The parties anticipated he would begin kindergarten in the fall of 2006.

Due to the fact Dwight and Sarah reside in different school districts, the parties indicated to the district court they were not seeking a shared physical care arrangement. Instead, Sarah requested care of Dominic during the week, with Dwight having care of Dominic on weekends when he is home. Dwight requested continuing the arrangement in place prior to trial, with Sarah exercising

visitation every other weekend and alternating Dominic's care weekly during the summer months.

The district court, in its decree of dissolution, awarded physical care of Dominic as follows, in relevant part:

During the regular school year . . . , [Sarah] shall have Dominic's physical care from Sunday at 1:00 p.m. to the end of the school day on Friday. [Dwight] shall have Dominic's physical care from after school on Friday to 1:00 p.m. on Sunday. If school is not in session on any given Friday, [Dwight] shall have Dominic's physical care commencing at 8:00 a.m. Friday morning.

. . . .

During the months school is not in regular session . . . , the parties shall alternate Dominic's physical care every Sunday at 1:00 p.m.

The court's decree also included provisions for holiday visitation.

Dwight appeals, arguing the district court erred in concluding joint physical care of Dominic was appropriate.

## **II. Standard of Review**

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50-51 (Iowa 1999). Because the district court has a firsthand opportunity to hear the evidence and view the witnesses, we give weight to its findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

## **III. Physical Care**

The primary consideration in any physical care determination is the best interests of the child. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Murphy*, 592

N.W.2d 681, 683 (Iowa 1999). The objective is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683; *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). The court considers a number of factors, including 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 separation, the nature of each proposed environment, and the effect on the child of continuing or disrupting an existing custodial status. See Iowa Code § 598.41(3) (2005); *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The court must also consider the legislature's stated statutory goal in dissolution cases: to assure the child the opportunity for the maximum continuing physical and emotional contact with both parents. See Iowa Code §§ 598.1(1); 598.41(1)(a).

Dwight argues the district court failed to give appropriate weight to the fact that he has been Dominic's primary caretaker since the parties' separation, instead focusing on his work schedule. He points to testimony that he is in contact with Shauna and the children every day by phone and "remains committed to being an active participant in Dominic's life." He further argues that due to Sarah's work and school schedule, Dominic "would spend a significant amount of time in daycare"; therefore, the district court "substituted an unknown caretaker for the child, when there is a proven caretaker [Shauna] who is more than willing to continue providing supportive, loving care." Finally, Dwight argues the separation of Dominic from his half-sibling is not in his best interests.

The district court concluded as follows:

In the instant case, both parties have a history of caring for Dominic and are fully qualified to care for Dominic. The parties have a history of cooperating to Dominic's best interest. [Dwight's] work schedule, which takes him out of state during the workweek, makes him available to care for Dominic only on weekends. In contrast, [Sarah] attends school and works in the Decorah area; she is available to care for Dominic during the workweek. Furthermore, [Sarah] is willing to make Dominic available to [Dwight] on weekends. Both parties are willing to alternate Dominic's physical care during the summer months on a weekly basis.

The court concludes joint physical care and legal care of Dominic by the parties will afford Dominic maximum contact with both parties.

We agree with the district court's conclusion that both Dwight and Sarah are capable and loving parents to Dominic. Each is capable of providing for Dominic's long-range best interests. Their willingness to cooperate in parenting is to be commended. In close cases such as this one, 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). Upon our de novo review of the record, we agree with the district court's custody determination. The physical care arrangement allows for maximum continuing contact between Dominic and both parents.<sup>1</sup>

We recognize, as the district court did, the presumption that siblings should not be separated. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). The presumption applies equally to half-siblings. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). However, our primary concern

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<sup>1</sup> We note that there is no support in the record for Dwight's assertions that Dominic will spend a "significant amount of time in daycare" while in Sarah's care. Sarah indicated at trial she would be able to take care of Dominic on a full-time basis. No further testimony related to daycare arrangements was elicited.

remains the long-range best interests of the child. *In re Marriage of Brauer*, 511 N.W.2d 645, 647 (Iowa Ct. App. 1993). We agree with the district court's determination that "[s]eparation of Dominic and Lavender is warranted so Dominic has the benefit of living with a parent while the other parent is unavailable to care for him."

We affirm the custody provisions of the dissolution decree.<sup>2</sup>

**AFFIRMED.**

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<sup>2</sup> We note that the dissolution decree allows the parties "to make whatever physical care arrangements they mutually agree upon," thereby providing the parties flexibility to adjust the specific schedule set forth in the decree as they see fit.