

**IN THE COURT OF APPEALS OF IOWA**

No. 7-906 / 07-0424  
Filed January 16, 2008

**Upon the Petition of  
JAMES MICHAEL ANDERSON,**  
Petitioner-Appellant,

**And Concerning  
NICOLE KAY HILL,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Marshall County, Michael J. Moon,  
Judge.

A father appeals from a district court ruling that placed physical care of the  
parties' minor children with their mother. **AFFIRMED AS MODIFIED.**

Elizabeth Kellner-Nelson of Pendleton Law Firm, P.C., West Des Moines,  
for appellant.

Joseph E. Halbur, Carroll, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

**MILLER, J.**

James Anderson appeals from a district court ruling that placed physical care of the parties' minor children, Isabella and Austyn, with their mother, Nicole Hill. We affirm the judgment of the district court as modified.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

James and Nicole are the parents of Isabella, born in July 2003, and Austyn, born in December 2006. The parties were never married. James filed a petition in April 2006 seeking joint legal custody and physical care of Isabella. In the alternative, he requested joint physical care of Isabella. He did not dispute his paternity of Isabella. After Austyn was born, James sought joint legal custody and joint physical care of him and requested a paternity test. The paternity test confirmed James was Austyn's father. The petition came before the district court in January 2007.

James and Nicole began dating in high school. They moved in together in 2001 after Nicole graduated from high school. She began attending cosmetology school at some point following her graduation from high school. James did not graduate from high school and has an eleventh grade education. Shortly after Isabella was born in 2003, James's uncle offered to let them live at his farmhouse in Melbourne in exchange for James's assistance in "clean[ing] the place up." James, Nicole, and Isabella moved to Melbourne in August 2003. James worked about ten hours per week for his uncle to pay for their "room and board." His uncle would also occasionally give him small amounts of cash if he needed "diapers or dog food."

In March 2004, Nicole went back to complete cosmetology school. James cared for Isabella while Nicole was attending class, but once she got home, he would “let her rest for an hour and then I tried to go out and tried to work with my uncle.” Nicole graduated from cosmetology school in September 2004. She became employed in March 2005 at a hair salon in Newton, but she was fired from her job in September 2005. James obtained employment shortly thereafter through a temporary services agency. He worked from 6:00 a.m. until 2:30 p.m. during the week in Des Moines at a recycling center. He was terminated from his employment in January 2007.

Nicole testified she was Isabella’s “main caregiver” when she lived with James. According to Nicole, she was in charge of feeding, bathing, disciplining, and taking Isabella to the doctor. She also handled the cooking, cleaning, and laundry for the family. She did acknowledge that while she was in school, James cared for Isabella. However, Nicole testified Isabella’s health suffered when she was in James’s care during the day because “she was losing weight. And it come to find out he was just feeding her . . . bottles of cereal . . . instead of feedin’ her baby food.” James, on the other hand, testified he and Nicole both cared for Isabella when they were home with her. He “was basically just there for everything” and would “help hold her, rock her, feed her her bottle.”

Nicole and James separated on March 20, 2006, after an argument. Nicole obtained a temporary protective order under Iowa Code chapter 236 (2005), which was dismissed in early April 2006. She and Isabella then moved out of the farmhouse and began residing with Nicole’s mother in Cedar Rapids. James testified that after Nicole moved to Cedar Rapids, she told him “to get a

court order . . . if I wanted to see” Isabella. He consequently filed a petition in April 2006 seeking temporary and permanent joint legal custody and physical care of Isabella. James learned Nicole was pregnant with Austyn after he filed his petition.

The district court entered a temporary order in May 2006 placing Isabella in the parties’ joint legal custody and joint physical care. The parties began sharing physical care of Isabella on alternating weeks at the beginning of June 2006. At some point thereafter, Nicole and Isabella moved to Jamaica, Iowa, with Nicole’s boyfriend, Chad. Nicole testified Isabella was “really confused” by the joint physical care arrangement because “her schedules are all messed up” and “potty training has completely went . . . out the window.” She further testified Isabella has had diaper rashes and severe head lice after returning from her visits at James’s house. Nicole was concerned that James was living “at his mother’s and I think she’s doing the caretaking when . . . they are there.” James testified he would stay at his mother’s house in Des Moines “quite a bit” when Isabella was in his care. James’s roommate in Melbourne confirmed that James spent about four nights per week with Isabella in Des Moines.

Austyn was born in December 2006. James was not able to see him until after he filed a motion requesting that Austyn be placed in the parties’ joint legal custody and joint physical care. He also requested a paternity test for Austyn. The district court entered a temporary order in January 2007 placing Austyn in the parties’ joint legal custody and in Nicole’s physical care. The court set up visitation between James and Austyn and ordered the parties to obtain a paternity test for Austyn at James’s cost initially.

The trial was held shortly after the district court's temporary order in January 2007. At trial, James learned Austyn's full name was Austyn Chad Lee Hill. He requested that Austyn's name be changed to Austyn Lee Anderson. He also requested at trial that Nicole be responsible for one-half of the costs of the paternity testing for Austyn.

Following the trial, the district court entered a ruling placing Isabella and Austyn in the parties' joint legal custody and Nicole's physical care, subject to James's visitation with the children, which included every other weekend from Friday through Sunday and alternating holidays. The court granted James's request to change Austyn's last name to Anderson. James filed a motion under Iowa Rule of Civil Procedure 1.904(2), requesting the court reconsider its ruling regarding physical care and visitation. He also requested an order apportioning one-half of the paternity test costs to Nicole. The district court denied these requests.

James appeals. He claims the district court erred in placing Isabella and Austyn in Nicole's physical care. In the alternative, he claims he should have been given additional visitation with the children. He further claims the district court erred in denying his request to change Austyn's middle name<sup>1</sup> and in

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<sup>1</sup> We agree with Nicole that James did not preserve error on this issue. In its initial ruling, the district court noted "James has asked that the surname of Austyn be changed from Hill to Anderson" and granted that request. See *Montgomery v. Wells*, 708 N.W.2d 704, 706 (Iowa Ct. App. 2005) (stating a district court may "consider the legitimacy of a child's original naming" in a paternity action where a mother unilaterally chose a child's name). The court did not address James's argument regarding Austyn's middle name. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). It is well settled that a post-trial motion is essential to preservation of error when a trial court does not resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. *Id.* at 540; see also *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984). James's

denying his request that Nicole be responsible for one-half of the paternity test costs.

## **II. SCOPE AND STANDARDS OF REVIEW.**

Our review in this equity matter is de novo. Iowa R. App. P. 6.4; *Callender v. Skiles*, 623 N.W.2d 852, 854 (Iowa 2001) (stating while “questions of paternity are reviewed on legal error,” decisions as to the “reasonableness of the court’s visitation and custody award” are reviewed de novo). Although not bound by the district court’s fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

## **III. MERITS.**

### **A. Physical Care.**

“When considering the issue of physical care, the child’s best interest is the overriding consideration.” *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The court is guided by the factors set forth in Iowa Code section 598.41(3) (Supp. 2005) as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). See *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994) (noting criteria apply regardless of parents’ marital status). Among the factors to be considered are whether each parent would be a suitable custodian for the children, whether both parents have actively cared for the children before and since the separation, the nature of each proposed environment, and the effect on the children of continuing or disrupting an existing custodial status. See Iowa Code § 598.41(3); *Winter*, 223 N.W.2d at 166-67. The ultimate objective is to place Isabella and Austyn in the environment most

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post-trial motion did not request a ruling on the issue of Austyn’s middle name. We therefore need not and do not address this issue.

likely to bring them to healthy physical, mental, and social maturity. See *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). With these principles in mind, we conclude the district court was correct in placing the children's physical care with Nicole.

Where there are two suitable parents, "stability and continuity of caregiving are important factors that must be considered in custody and care decisions." *Id.* at 696. The successful caregiving by one parent in the past, although not determinative, is a strong predictor that the future care of the children will be of the same quality. *Id.* at 697. It is apparent from the record that Nicole has provided the majority of care for both Isabella and Austyn despite James's assertions to the contrary.

Although James recognizes Austyn has been in Nicole's care since he was born, he argues he was "Isabella's primary caregiver for nearly three years" because he cared for Isabella while Nicole attended "beauty school and began working at a salon." The record, however, reveals Nicole completed her cosmetology schooling six months after returning to school, and she did not begin working at a salon until almost six months after she graduated. Nicole was fired from that job six months later. In addition, even when she was attending school and working, Nicole provided care for Isabella at night and on the weekends while James worked for his uncle. We also note that James acknowledged he spent a significant amount of time at his mother's residence when Isabella was in his care following the parties' separation.

We likewise reject James's argument that he should be awarded physical care of the children because he "is more supportive of the children's relationship

with the other parent.” In support of his argument, he cites Nicole’s statement that he needed to obtain a court order before she would allow him to have visitation with Isabella. The denial by one parent of the children’s opportunity to have meaningful contact with the other parent is a significant factor in determining the custody or physical care arrangement. Iowa Code § 598.41(1)(c); *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). We do not believe Nicole’s actions at the inception of these proceedings demonstrate an unwillingness to allow James access to the children. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996) (“[T]he court must consider the willingness of each party to allow the child access to the other party.”).

Indeed, the record shows James did have visitation with Isabella before a temporary order was entered in this matter. In addition, Nicole attempted to notify him when she went into labor with Austyn so that he could be present at the birth, but “the only person we were able to get a hold of was his mother.” James testified he is always able to telephone Isabella when she is in Nicole’s care, while Nicole testified she is “lucky to get a hold of [Isabella] once a week or if at all” when she is in James’s care because “[n]obody answers the phone and nobody calls me back.” She acknowledged at trial that James is a good father, but she is concerned about his “care techniques . . . [Isabella] coming home dirty . . . the head lice and . . . bouncing around from home to home.” In light of the foregoing, we reject James’s argument that “Nicole will not encourage and support the relationship between” him and the children. *Cf. In re Marriage of Downing*, 432 N.W.2d 692, 694-95 (Iowa Ct. App. 1988) (awarding father physical care where mother intercepted children’s mail from father, interfered

with visitation with father, and removed telephone when she left to prevent children from calling their father).

After considering the parties' arguments on appeal and reviewing the evidence anew, we ultimately agree with the district court that Nicole and James are both competent and loving parents. Each is capable of providing for the children's long-range best interests. In close cases such as this, we give careful consideration to the district court's findings. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993) (noting the trial court was in a better position to evaluate the parties as custodians because it was able to observe their demeanor). We accordingly affirm the district court's decision to place physical care of Isabella and Austyn with Nicole.

#### **B. Visitation.**

The next assignment of error is whether the visitation schedule set by the district court allows sufficient contact between James and the children. In determining the appropriate amount of visitation, we are guided by the principle a court should order such visitation as will ensure a child the opportunity for maximum continuing physical and emotional contact with the noncustodial parent. See Iowa Code § 598.1(1); *id.* § 598.41(1)(a). In this case, the district court ordered that James would have visitation with the children every other weekend from 5:00 p.m. on Friday until 5:00 p.m. on Sunday, four weeks during the summer, and alternating holidays.

James seeks additional weekend and summer visitation. He also seeks visitation during spring break and on the parties' and children's birthdays. We note, as did the district court, the visitation schedule set forth in the parties'

decree “is the minimum amount of visitation to which James is entitled. Request for additional visitation should not unnecessarily be denied.” We find no reason to add to or otherwise modify the weekend and summer visitation provided by the trial court.

However, we agree with James that he should have been given “time with the children during spring break and birthdays.” We find the decree should be modified to allow James visitation with the children on the first half of spring break in even years and the second half in odd years. Spring break is to be determined by the school calendar for the school district in which the children are enrolled. Both parties testified at trial that birthdays are special events in their families that they enjoy celebrating. We therefore find the visitation schedule set forth by the district court should also be modified to allow each party several hours with the children on the children’s birthdays and on the party’s birthday. This visitation shall take precedence over regularly scheduled visitation time.

### **C. Paternity Test Costs.**

James claims the district court abused its discretion in denying his request that Nicole pay one-half of the costs for the paternity test for Austyn.<sup>2</sup> Iowa Code section 600B.41(7) provides, “All costs [for the paternity test] shall be paid by the parties or parents in proportions and at times determined by the court. . . .” We find the district court’s decision to assess costs for the paternity test against James to be reasonable in light of the facts presented by this case.

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<sup>2</sup> We assume without deciding that we review a district court’s assessment of paternity test costs under section 600B.41(7) for an abuse of discretion, as the parties agree to this scope of review.

**D. Attorney Fees.**

Nicole requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *Markey v. Carney*, 705 N.W.2d 13, 26 (Iowa 2005). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Applying these factors to the circumstances in this case, we find Nicole should be awarded \$500 in appellate attorney fees.

**IV. CONCLUSION.**

Upon our de novo review, we agree with the district court's decision to place Isabella and Austyn in Nicole's physical care. We modify the visitation schedule set forth by the district court to provide for visitation during spring break and on the birthdays of the children and the parties. Finally, we conclude the district court did not abuse its discretion in denying James's request that Nicole be responsible for half of the cost of the paternity test for Austyn. We therefore affirm the judgment of the district court as modified.

We award \$500 in appellate attorney fees to Nicole and assess three-fourths of the costs on appeal to James and one-fourth to Nicole.

**AFFIRMED AS MODIFIED.**