

**IN THE COURT OF APPEALS OF IOWA**

No. 7-916 / 07-0891  
Filed January 30, 2008

**IN RE THE MARRIAGE OF AMY H. THOMPSON AND THEODORE TIMOTHY THOMPSON**

**Upon the Petition of  
AMY H. THOMPSON,**  
Petitioner-Appellant,

**And Concerning  
THEODORE TIMOTHY THOMPSON,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,  
Judge.

Amy Thompson appeals from the physical care, property division, and attorney fee provisions of the decree dissolving her marriage to Theodore Thompson. **AFFIRMED AS MODIFIED AND REMANDED.**

Dawn Long of Howes Law Firm, P.C., Cedar Rapids, for appellant.

Sheree Smith of Wilson, Matias, Hauser & Adams, Cedar Rapids, for appellee.

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

**MILLER, J.**

Amy Thompson appeals from the physical care, property division, and attorney fee provisions of the decree dissolving her marriage to Theodore (Ted) Thompson. We affirm the judgment of the district court as modified herein and remand for further proceedings.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Amy and Ted were each twenty-six years of age at the time of the February 2007 dissolution of marriage trial. Each graduated from high school in 1999, Amy in Illinois and Ted in Iowa. Amy attended a community college in Illinois from 1999 to about 2002, but has not received a degree. Ted entered the Coast Guard shortly after high school.

Amy and Ted met and began dating in about July 2001, while Ted was stationed in Kenosha, Wisconsin. Amy was living with her mother in Round Lake, Illinois. Amy shortly became pregnant with the parties' first child, Emily. Ted moved in with Amy and Amy's mother in October 2001.

Emily was born April 10, 2002. Amy was working part-time. She received eight weeks off work and then returned to part-time work. By about the end of 2002 Amy was pregnant with the parties' twins, Kelsey and Madison.

Amy experienced problems with her pregnancy and by June 2003 had been hospitalized two times. Ted finished his duty with the Coast Guard in June 2003, secured employment in Iowa, and moved to a home near Walker, Iowa, that the parties had purchased with assistance from Ted's parents. The parties were married on July 12, 2003.

Amy was placed on bed rest the last three months of pregnancy, from about June 2003 until the twins were born September 9, 2003. In October 2003 Amy and the parties' three young daughters moved to Iowa and joined Ted. Ted shortly thereafter obtained employment at Maytag, where he continued to work the second shift at the time of trial.

Amy filed a petition for dissolution of marriage in February 2006. In about May 2006 Amy's twenty-nine-year-old brother, William, moved from Illinois to Iowa to be closer to Amy and to assist her. He moved in with the parties in about July 2006. Amy's application for temporary custody and support resulted in an August 31, 2006 order. As the parties were still living together, the district court ordered that they share custody of the children, alternating weeks of visitation, beginning with Amy, from 6:00 p.m. on a Sunday to 6:00 p.m. the following Sunday. The court reserved the issue of child support and ordered that the matter of attorney fees be determined upon final hearing.

Amy and Ted separated in September 2006 when Amy moved, with the parties' children and William, to a mobile home in Marion, Iowa, that she had purchased with funds for the down payment provided by her grandmother. Ted remained in the parties' residence near Walker. In November 2006 Amy again requested temporary support, alleging under oath that she had not received any voluntary support from Ted. On November 16, 2006, the district court ordered Ted to pay temporary child support of \$679 per month, beginning December 1, 2007.

Amy and William plan that William will remain with Amy until the twins begin school in the fall of 2008. At the time of the February 2007 trial Amy's mother was planning to move to Iowa to be near Amy and the children.

## **II. THE DISTRICT COURT DECISION.**

Following a multiple-day trial, the district court in relevant part (1) ordered joint legal custody of the children, (2) placed the children in Ted's physical care, subject to Amy's rights of visitation, (3) ordered Amy to pay child support, (4) divided the parties' property, and (5) denied Amy's request for attorney fees.

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

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). Because we review both the facts and the law de novo, we need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but instead make such findings and conclusions as from our de novo review we find appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

#### **IV. MERITS.**

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

When deciding issues of physical care, the controlling consideration is always the best interest of the children. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998). The objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The critical issue in determining children's best interests is which parent will do better in raising them; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). We consider a number of factors, including the children's needs and characteristics, the parents' abilities to meet the children's needs, the relationship of the children with each parent, the nature of each proposed home environment, and the effect of continuing or disrupting the children's current status. See Iowa Code § 598.41(3) (2007); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

While not the singular factor in determining which placement would best serve the children's best interests, we give significant consideration to placing them with the primary caregiver. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). We also examine who can and will best support the other parent's relationship with the children. See *In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988) (stating a parent's attempt to isolate and alienate children from the other parent is a factor to be given weight in a custody determination).

Emily claims the trial court erred in awarding Ted physical care of the children. Upon our de novo review, for the following reasons we agree.

The evidence clearly and convincingly shows that as between the parties Amy has accepted and had the very great majority of the responsibility for the care and nurture of the parties' children. From Emily's April 2002 birth until June 2003 Amy was working only part-time while Ted was in the Coast Guard full-time and gone from home for periods of twenty-four and forty-eight hours. Ted was involved in Emily's care during this time, but Amy provided the very great majority of her care.

From June 2003 to October 2003 Amy, with the assistance of her family, provided Emily's care and later the twins' care, as she remained in Illinois while Ted had moved to Iowa.

Amy moved to Iowa in October 2003, at about the time Ted began employment at Maytag, on the second shift, employment that continued at the time of trial. From then until Amy obtained part-time, seasonal employment in September 2004, she was responsible for the very great majority of the children's care as Ted was working full-time and she was not working outside the home.

Amy worked part-time from September 2004 to January 2005. Her work hours were from 5:00 a.m. until 9:00 a.m., hours that the children spent part of sleeping. Ted cared for the children from when they awoke until Amy returned home by 9:30 a.m. Amy was largely responsible for the children's care the remainder of the day, as Ted often napped and then left for work by about 2:30 p.m.

From January 2005 to September 2005 Amy remained at home with the children and had the very great majority of the responsibility for their care. In September 2005 she again secured part-time employment, at a Menard's store, again with work hours of 5:00 a.m. to 9:00 a.m., employment that continued at the time of trial. Her work includes some weekends, and she has Wednesdays off. Because of the parties' work hours she maintained primary responsibility for the children's care until the August 31, 2006 temporary custody order. For the five months from the temporary custody order until trial the parties had approximately equal responsibility for the children's care.

Until the temporary custody order, as between the parties Amy had and accepted the almost exclusive responsibility for child care matters such as food shopping, cooking, clothes shopping, laundry, and making and keeping appointments with physicians. She has taken the children to church more than Ted has.

We find that Amy has been the children's primary caregiver, as the duration and amount of care she has provided for them greatly exceeds the duration and amount provided by Ted.

We are also convinced that Amy can and will better support Ted's relationship with the children than Ted can or will support Amy's relationship with them. When asked whether he could tell the children anything good about Amy, Ted replied in the negative. He readily acknowledged he had done nothing to encourage the relationship between the children and Amy.

Ted's actions both before and following the parties' separation support his acknowledgement. Prior to the separation he participated only minimally in any

interaction that Amy and the children had with Amy's extended family. On weekends that Amy worked in the early morning hours Ted would take the children and leave home for the day or both days, neither leaving a message nor calling to tell Amy where he and the children were. He would keep the children away from home until late in the evenings, and occasionally overnight. Although Ted asserts that Amy always knew where he and the children were, the evidence shows that they would at times be at his parents' home, at times at a cousin's home, at times at another cousin's home, and at times yet elsewhere, all without Ted informing Amy of the location or locations at which they would be.

Since the parties separated Ted has refused all requests from Amy to exchange visitation times. These have included reasonable requests to allow her and the children to visit an elderly, sick grandmother; to allow her and the children to travel during daylight hours when going to Illinois to visit at Christmas time; and to allow her and the children to attend a grandmother's funeral. Although Amy does not work on Wednesdays, Ted has refused her requests to have the children with her at times while he is working on Wednesdays. He justifies his behavior by explaining that it is, "Because the courts told me to have one week here and one week there," and acknowledges his intent that Amy have no time with the children "other than what's ordered."

On Amy's birthday Ted did not provide the children any time with her or have them call her. When the children are with Ted he does not have them call Amy. Amy calls to visit with the children, but Ted sometimes does not return her calls and other times greatly delays any response.



Ted does not inform Amy of medical care the children receive while in his physical care. Amy testified that on one occasion she became aware Ted had taken Kelsey to a doctor and received medication. She testified she asked Ted what was going on, what the medicine was, and when Kelsey needed to take it, and his response was, "Don't worry about it. You didn't pay for the bills. I did."

By way of contrast, Amy has supported and will support Ted's relationship with the children. She feels it is important that the children have a relationship with him. Prior to the parties' separation Amy encouraged and participated in the children's interaction with Ted's parents and other members of Ted's extended family. After the separation, for Ted's birthday Amy and the children made a picture frame, put a picture of the children in it, and gave it to Ted. For Christmas Amy and the children picked out a Christmas ornament, put the children's picture on it, and gave it to Ted.

Amy does keep Ted informed of how the children are doing while in her care. When a doctor recommended that Emily see a dentist and Amy took her to one, Amy wrote a note to Ted telling him she had done so. Amy recently took Kelsey to an emergency room for what turned out to be pneumonia. Upon leaving the emergency room she called Ted and left a message.

When the parties were together and the children were hurt, they would go to Amy. When they were upset, they would go to Amy. Amy is the parent to whom the children looked to meet their physical needs, take care of their physical pains, and meet their emotional needs.

We are not unaware of either Ted's concerns about Amy (and Amy's brother William) or Amy's concerns about Ted, all as mentioned in the trial court's

ruling. Among these the court noted that Amy had incurred an OWI charge shortly after the parties' separation, while further noting that the episode appeared to be "situational" and not "habitual;"<sup>1</sup> that Amy had arguably over-extended herself financially; and that Amy had exposed the children to a "relationship that is not their best interest to witness."<sup>2</sup> We note that with the exception of the three we have just listed, the trial court merely mentioned these matters as "concerns" of the parties and made no express findings that such "concerns" were well-founded or were a deciding factor in its physical care decision. We also note that Ted agreed that since the August 31, 2006 temporary custody order, "[T]he only thing that's been concerning is Amy got an OWI."

We have found that as between the parties Amy has provided the very great majority of the children's care, Amy can and will better support Ted's relationship with the children, and when the parties were together the children looked to Amy for their care and comfort. We conclude these facts outweigh the "concerns" of Ted noted by the trial court, and respectfully disagree with its conclusion that Ted will better support the relationship between the children and Amy than Amy will support the relationship between the children and Ted. We accordingly modify the trial court's ruling and place responsibility for the physical

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<sup>1</sup> Amy testified the incident occurred on her birthday, after the parties separated, when she did not have the children, and that she had never had any other criminal charge and did not regularly drink.

<sup>2</sup> Amy had developed a friendship or relationship with a male co-employee at Menard's. The district court did not mention, and apparently did not view with similar disapproval, the fact Ted had developed a friendship or relationship with a female, recently a co-employee of his, who with her small son was at times present in Ted's home when the parties' children were there and at times spent the night there.

care of the children with Amy, subject to Ted's rights of visitation and obligation to pay child support as determined by the district court on remand.

**B. Property Division.**

Amy claims the trial court failed to make a just and equitable property division, erring in determining the market value of the parties' home. The parties purchased the home in 2003 for \$81,000. Ted, with assistance from his father, did some renovating and remodeling, which would appear to add some value. However, there was testimony that the market value of homes on small, rural acreages, such as the parties' home is, had "really gone down" between the date of purchase and the date of trial.

The trial court valued the home at \$82,000. Although this figure is clearly at the low end of the possible values shown by the evidence, it is within the permissible range of the evidence. Where the value is within the permissible range of the evidence we will not disturb it on appeal. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999); *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997); *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994). We therefore affirm the trial court on this issue.

**C. Trial Attorney Fees.**

Amy claims the trial court abused its discretion by failing to award her trial attorney fees. An award of attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award must be for a fair and reasonable amount, and based on the parties'

respective abilities to pay. *In re Marriage of Coulter*, 502 N.W.2d 168, 172 (Iowa Ct. App. 1993).

The trial court found that Ted earned \$37,812.00 in 2006, and expected to earn a comparable amount in 2007, and that Amy earned \$10,960.10 in 2006, and it was reasonable to expect her income would remain near that level.

Amy had already paid her attorney \$1,500.00. The trial court ordered that each party be responsible for his or her own attorney fees. Although the trial court would not have abused its considerable discretion by awarding Amy additional attorney fees, we are unwilling to conclude that under the circumstances its decision abused that discretion.

#### **D. Appellate Attorney Fees.**

Amy requests an award of \$4,000 appellate attorney fees, in part “incurred for the preparation of the Application for Stay Order and supporting brief . . . .”<sup>3</sup> Such an award rests in this court’s discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party’s ability to pay, and the relative merits of the appeal. *Id.* We award Amy \$2,500 in appellate attorney fees.

#### **V. DISPOSITION.**

We affirm the trial court’s award of joint legal custody and modify the physical care provisions of the court’s decree by placing responsibility for the physical care of the children with Amy. Because our resolution of the physical care issue will require modification of the decree’s child support, visitation, and related provisions, we remand those issues to the trial court for such further

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<sup>3</sup> Amy filed an application seeking a stay of the trial court’s order placing physical care of the children with Ted. Our supreme court denied the stay in a July 25, 2007 order.

proceedings not inconsistent with our decision as may be necessary. In all other respects we affirm the trial court's decree.

We award Amy \$2,500 in appellate attorney fees. Costs on appeal are taxed one-fourth to Amy and three-fourths to Ted.

**AFFIRMED AS MODIFIED AND REMANDED.**