

IN THE COURT OF APPEALS OF IOWA

No. 8-007 / 06-1490
Filed May 14, 2008

JEREMY RHYAN,
Petitioner-Appellant,

vs.

KELLIE PASCHKE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla Schemmel,
Judge.

A father appeals a district court decree granting physical care of his child
to the mother and denying his request to change the child's last name.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Jane Odland and Lee Walker of Walker & Billingsley, Newton, for
appellant.

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des
Moines, and Theodore F. Sporer of Sporer & Ilic, P.C., Des Moines, for
appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

A father appeals a district court decree granting physical care of his child to the mother and denying his request to change the child's last name. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

Jeremy Rhyan and Kellie Paschke are the unmarried parents of Olivia, born in 2004. Once friends, their relationship soured after Kellie became pregnant. Following the child's birth, Jeremy filed a paternity action that included a request for sole custody. Jeremy alternately sought termination of his parental rights, a claim he later abandoned.

In the ensuing months, the parents mediated several disputes about visitation. The mediation sessions culminated in temporary custody and support orders that included detailed and conditional visitation provisions.

Trial focused on joint physical care, physical care, visitation, and the name change issue. The district court denied Jeremy's request for joint physical care, granted Kellie physical care of Olivia, awarded Jeremy liberal visitation without the conditions imposed on temporary visits, and refused Jeremy's request to change the child's last name. This appeal followed.

II. Joint Physical Care and Physical Care

Jeremy argues he should have been awarded joint physical care or physical care of Olivia.¹ With either care arrangement, the controlling consideration is the best interests of the child. *In re Marriage of Hansen*, 733 N.W.2d 683, 700-01 (Iowa 2007).

¹ Kellie contends Jeremy has not preserved error on this issue. We disagree.

We begin our analysis by noting, as the district court did, that both parents were suitable caretakers. Jeremy was initially resistant to becoming a parent but, soon after the child's birth, he acknowledged his status as a father and worked to develop a relationship with Olivia. Similarly, Kellie nurtured and appropriately cared for Olivia throughout her young life. As a custody evaluator concluded, "each of these parents is, by the vast majority of standards, truly exemplary in their parenting abilities."

The problem lay in the parents' relationship with each other. The custody evaluator summarized that relationship as follows:

[I]t appears indisputable that negativity has permeated most of their interactions for a significant period of time. The negativity appears to be fueled by a fundamental mistrust each has for the other, possibly triggered by the lack of clear definition in their relationship from the onset of knowing one another.

The evaluator continued:

[T]here is truly no question brought to light through this evaluation process that would indicate any concerns about either of the parent's direct parenting of their daughter. Rather, the point of contention lies in the ability of these two very capable individuals to engage in a proactive co-parenting arrangement on their daughter's behalf.

The evaluator concluded the parents' animosity toward each other precluded a joint physical care arrangement. The district court reluctantly agreed with this conclusion. The court opined, "[i]t is frustrating to the court that these individuals, who are so highly successful in all other areas of [their] lives, have been unable to work together for Olivia's benefit."

Joint physical care requires a high degree of effective communication. See *In re Marriage of Hynick*, 727 N.W.2d 575, 580 (Iowa 2007) ("The critical

question in deciding whether joint physical care is . . . appropriate is whether the parties can communicate effectively on the myriad of issues that arise daily in the routine care of a child.”). The record is replete with evidence, in addition to the custody evaluation, that demonstrates Jeremy and Kellie’s unwillingness to engage in this type of communication. Their rancor, evident on the written page, raises serious doubts about whether the parents could insulate Olivia from it as she matures. The custody evaluator mentioned this concern, stating the parents’ animosity had not yet affected Olivia but might cause her distress “as [she] becomes older and more astute at recognizing the dynamics between her parents.” On our de novo review, we fully concur with the district court that joint physical care was not a viable option. *See Hansen*, 733 N.W.2d at 700.

We proceed to Jeremy’s request for physical care of Olivia. Jeremy argues he should have been granted physical care because Kellie “interfered with visitation on a regular basis.”

Generally, we have considered liberal visitation rights to be in a child’s best interests. *In re Marriage of Ryhoek*, 525 N.W.2d 1, 4 (Iowa Ct. App. 1994); *see also* Iowa Code § 598.1(1) (2003) (stating “[b]est interest of the child” includes, but is not limited to, the opportunity for maximum continuous physical and emotional contact possible with both parents, unless direct physical or significant emotional harm to the child may result from this contact). “Refusal by one parent to provide this opportunity without just cause shall be considered harmful to the best interest of the child.” Iowa Code § 598.1(1). Such a refusal shall constitute “a *significant* factor in determining the proper custody arrangement.” Iowa Code § 598.41(1)(c) (emphasis added). Additionally, a

parent's visitation should only be subject to conditions "when visitation without the placement of conditions is likely to result in direct physical harm or significant emotional harm to the child." *Ryhoek*, 525 N.W.2d at 5; see also *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990) (deleting condition that father could only exercise visitation if no unrelated adult was present). Conditions on visitation may be considered demeaning and may be used to improperly restrict visitation. *Ryhoek*, 525 N.W.2d at 4.

On the question of visitation, the district court found:

Kellie . . . resisted Jeremy's involvement at many levels, has tried to control Jeremy's contact with the child, and clearly remains distrustful of Jeremy to the extent it has interfered with the child's ability to have maximum exposure to her father.

. . .
Unfortunately . . . actions by Kellie often frustrated Jeremy's efforts to see and parent the child.

These findings are supported by the record. Kellie obstructed Jeremy's visitation rights with Olivia from the beginning. For example, in the months immediately following the child's birth, Kellie did not allow Jeremy to take her out for visits. Instead, she insisted Jeremy visit the child in her home and under her supervision. She also insisted Jeremy attend these supervised visits by himself, unless she approved of his friends. On the advice of his attorney, Jeremy refused to come alone. As Kellie vetoed certain of Jeremy's friends, visits were sometimes cut short or missed entirely. Jeremy did not have an overnight visit with his daughter until Olivia was almost one year old.

Kellie also insisted on onerous temporary visitation provisions in the mediated agreements. We recognize Jeremy agreed to these provisions, but we

are persuaded by his assertion that he did so to maintain a relationship with his daughter.

Under an early order approving on of these agreements, Jeremy had to complete the Children in the Middle course before having any further visitation with his daughter. The order also conditioned Jeremy's "graduation" to unsupervised visits on (1) his completion of nine visits, supervised by Kellie, (2) his completion of a parenting class for fathers, and (3) his constant personal presence during all visits. These conditions were imposed despite scant evidence of inadequate care-giving by Jeremy or evidence that Jeremy had placed other children at risk of physical or emotional harm. Notably, Jeremy filed his certificates of completion of the Children in the Middle and the parenting classes three days after the district court entered the order approving this agreement. Kellie nonetheless cut short the first visit following entry of the order because Jeremy had not brought with him "the information to indicate that he had completed it."

Kellie also forced Jeremy to forfeit entire visitation periods if he was gone for any amount of time during the period. Jeremy was a member of the National Guard and had Guard duties during parts of two weekends a month. Although these duties did not take him away from his home for the entire weekend and Jeremy's wife was ready and willing to care for the child in his absence, Kellie required him to forego visitation on those weekends. Jeremy suggested that if Kellie wanted him present during the entire visit she should allow him to exercise visitation on weekends when he did not have Guard duty. Even though Jeremy gave Kellie his Guard schedules a month in advance, Kellie testified, "I didn't

want to be mandated to work around his schedule because sometimes I only got a few hours' notice that his schedule was changing." While she asserted these changes disrupted her schedule and Olivia's routine, the custody evaluator stated Olivia transitioned easily between the two homes and Olivia's daily routine at each household was "relatively similar."

Within three months of the first temporary order, Kellie petitioned to modify it, alleging Jeremy used visitation to "harass, annoy, and vex" her and "to disrupt the minor child and to interfere with the minor child's sleeping and feeding schedule." She sought to "further limit and define [Jeremy's] visitation rights," and requested that he be ordered to disclose the locations of his unsupervised visits. The parties agreed to a new visitation schedule and another temporary order was entered to reflect this agreement.

Under the order, Jeremy was to exercise visitation on Father's Day from 8:00 a.m. to 8:00 p.m. Kellie did not allow this visit. She reasoned that Jeremy was ill and the child would contract the illness. However, Jeremy's doctor had already provided a note attesting that it was safe for Olivia to be around him.

The order also stated Jeremy would be entitled to visitation on the first Christmas after its filing. The order was signed in mid-2005 but, at the time of trial in mid-2006, Jeremy had yet to spend a Christmas with his daughter.

The order set forth a detailed visitation schedule by days of the week. While Kellie deviated from the schedule when it served her interests, she insisted on enforcing it at times when equity demanded flexibility. For example, Kellie denied Jeremy visitation for several days after his return from a six-week tour of duty in Qatar. Jeremy's wife informed Kellie in advance of Jeremy's scheduled

date of return and of the general arrival time, within a two-hour window. Because this arrival time was in the evening, she suggested Jeremy keep Olivia overnight. Kellie declined the request for this unscheduled overnight visit, stating Jeremy could see Olivia on his next scheduled visit four days after his return.

Similarly, when Jeremy's wife gave birth to a son, Kellie did not allow Olivia to visit her half-brother in the hospital because she had made dinner plans. She stated Jeremy could have Olivia the next day for a previously scheduled three-hour visitation. Jeremy asked if he could have Olivia the entire next day. Kellie responded that she did not want Olivia in the hospital for the entire day. The following exchange, memorialized in a taped telephone conversation,² is instructive:

J: Well I was wondering if I could pick up Olivia to come see her new brother.

K: When?

J: Tonight.

K: Well we've already got plans tonight, but you just want to do it tomorrow during your normal visitation time?

J: What plans do you have with her tonight?

K: We've got company coming over.

J: And, and . . .

K: Had I, had I known about this earlier today I wouldn't have made those plans, but I just made them a little while ago, and it's not possible for me to cancel now.

J: Is it, is it someone her age?

K: It's none of your business who it is.

J: Well if it's nobody her age I think you could make time for her to come see her new little brother.

K: And I just said, can she do it tomorrow?

J: Have a nice night Kellie. I appreciate your cooperation. Yeah, absolutely she'll do it in her normal visitation tomorrow night. I was hoping we could do it tonight and she could come down to the hospital and see him.

² Jeremy began openly recording his telephone conversations with Kellie, and had some conversations transcribed for trial.

K: Well then why didn't you, why didn't you tell me earlier so I didn't make plans? I asked you to tell me right away.

J: Because. And I did. He was just born an hour ago.

Both the original and modified orders also limited Jeremy's ability to change Olivia's health care or daycare. The orders stated,

Notwithstanding his joint legal custody of the child, Petitioner shall not change the child's daycare provider or have the child seen by any physicians or health care providers without the written consent of the [Respondent], except for such emergency medical treatment as the child may require.

Kellie used this provision to her advantage by refusing to inform Jeremy of doctor appointments until after they took place. The following exchange provides concrete evidence of her actions:

K: Hi. Umm I just—(inaudible) to the doctor because she started to get a little worse, started throwing up and stuff. So I just took her right away rather than . . .

J: Why didn't you call me?

K: Wait around.

K: Because I just took her. I didn't think about it. I just took her.

J: What's that?

K: Because I just took her. She started to get sicker, and I just took her.

J: How come you do that every time? You don't ever tell me you just take her?

K: Okay. I'm going to let you go. I'm not going to fight with you about it.

J: No. I just asked you a question.

K: Well. I felt like that was the right thing to do was to go, and I did.

J: Yeah, but why didn't you even call me on your way?

K: I don't know.

. . .

J: You called me before, and you called me after.

K: Yeah.

J: You just didn't tell me you took her. Do you see the problem there Kellie?

K: Jeremy I'm not going to argue.

J: Tell me what the doctor said and don't hang up on me.

Two days later, the following conversation took place:

J: You just got back from the doctor's office?

K: Yes, Jeremy.

J: And why didn't you call me?

K: Because they asked me to come in right away. So I went.

J: Why didn't you call me when you left or on your way?

K: Okay, have a good afternoon Jeremy.

J: How is she doing?

K: I'm not going to argue with you.

J: I'm asking how's Olivia doing?

...

J: I mean, it's to the point where you've missed so many of these to call me that I almost need to have Dr. Brady's office call me anytime you're going to come in, just so that I know, because I never know. You refuse to call me on these visits Kellie. It's unacceptable. Does that make sense to you?

K: I'm not going to discuss it with you on the telephone. You said you were going to contact your attorney about it. You go ahead and do that, and Ted will be more than happy to respond if you've got a problem about the way I'm treating Olivia's medical care.

J: I've got a problem that I can't be involved. That you refuse to allow me to go with you to the hospital when Olivia has to go to the hospital or to the doctor's office or to be with her when she's in the hospital.

...

J: I wish that you could work with me

...

K: Let's let our attorneys handle it.

As alluded to in the transcript above, Kellie also impeded Jeremy's efforts to spend time with Olivia when she was hospitalized for respiratory illnesses. During the three separate hospitalizations, Jeremy sought to stay overnight, but Kellie would not permit it. The conditions she imposed were, as characterized in *Ryhoek*, "demeaning" to Jeremy and destructive of his relationship with Olivia. 525 N.W.2d at 4.

Kellie additionally declined to consider daycare options proffered by Jeremy. After the birth of his son, Jeremy indicated he and his wife would be available to care for both children on most days, with an in-home provider in their neighborhood taking over on the days when neither of them was available.

Jeremy gave Kellie the name of the neighborhood provider. Kellie's response was, "I appreciate your offer but I am certain that I already told you a week or two ago that I have hired a nanny. Please let me know if you have any questions." Kellie's refusal to investigate this option, which would have allowed Olivia to spend more time with Jeremy, evinces a disregard for Olivia's best interests.

On this record, we are convinced Kellie significantly impeded Jeremy's relationship with his daughter. Her actions warranted physical placement of Olivia with Jeremy.

In reaching this conclusion, we recognize "stability and continuity of care-giving are important factors that must be considered in custody and care decisions." *Hansen*, 733 N.W.2d at 696. The district court found that this factor weighed in favor of maintaining the status quo, but warned Kellie that continued interference with visitation might result in a contempt citation or modification of physical care. As the Iowa Supreme Court stated in *Hansen* in the context of its joint physical care analysis,

The fact that the district court found it necessary to include such provisions, and thereby raise the possibility of contempt in the event of violation, does not reflect a high degree of confidence in the ability of the parties to have a smooth, working relationship.

Id. at 701. We believe this language is equally pertinent to our physical care analysis.

As we noted at the outset, Kellie was an exemplary caretaker in most respects. She was loving, nurturing, and went to great lengths to create a stable environment for Olivia. While her insistence on stability may have been well-intentioned, it became enmeshed with her acrimonious feelings toward

Jeremy. As a result, actions meant to protect Olivia, minimized Jeremy's relationship with her. If these actions had been short-lived, we would be more inclined to overlook them. Unfortunately, they began with Olivia's birth and continued unabated for two-and-a-half years. Most troubling is Kellie's lack of concern or remorse for impeding Jeremy's contact with Olivia. At trial, she went so far as to suggest that Jeremy's legal right to make decisions concerning his daughter should be restricted. Her testimony was as follows:

I think there does need to be, with the two of us, one decision-maker. Otherwise, I fear with everything that is decided between two joint legal custodians, we will never come to an agreement. We will end up in mediation all the time.

We conclude Kellie showed a continuing unwillingness to support Jeremy's relationship with Olivia. In light of this attitude and in light of Jeremy's suitability as a caretaker, we conclude Olivia's best interests would be best served by reversal of the physical care decision, notwithstanding Kellie's role as primary caretaker.

III. Name change

When Olivia was born, Kellie gave her the Paschke last name. At trial, Jeremy asked the district court to change her name to Rhyan. The court denied the request, finding Jeremy failed to provide sufficient support for this request. On appeal, Jeremy asks us to reverse this decision. Reviewing the issue de novo, we find no reason to do so.

Jeremy first requested the name change at trial. He testified:

I would like [Olivia] to have the last name of Rhyan. I think I don't plan on changing it—my last name—ever. I am happily married. I think my family's name will be Rhyan. And if Kellie decides to get

married and take the last name, then Olivia can always have an identification with one of her biological parents.

When asked why he thought Kellie would change her last name, he answered, “I don’t know. Maybe just traditional, or if she found somebody that she liked their name better.”

We have repudiated the notion that the sex of a parent should govern whose last name a child is given. See *Montgomery v. Wells*, 708 N.W.2d 704, 708 (Iowa Ct. App. 2005). Courts may consider a variety of other factors, including a mother’s assertion that she would not change her name if she married or re-married, the length of time the last name was used, and any delay in requesting or objecting to the name change. *Id.* at 708-09.

The record contains no evidence of an intent by Kellie to marry and change her name. *Cf. id.* at 710 (where mother planned to marry and take new husband’s surname, child’s best interest was to have biological father’s surname and not mother’s birth name). Olivia knew her last name and, by the time of trial, it had been her name for approximately two-and-one-half years. Jeremy was aware of the name from the time of her birth, yet did not object to it until trial. Under these circumstances, we conclude the district court acted in the child’s best interests by declining to change it.

IV. Disposition

We affirm the district court’s denial of Jeremy’s request to change Olivia’s last name. We reverse the district court’s grant of physical care to Kellie and remand for further proceedings consistent with our opinion that Jeremy should exercise physical care of Olivia.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Sackett, C.J., and Vaitheswaran, J. concur. Vogel, J. dissents.

VOGEL, J. (dissenting)

I dissent in part and would affirm the district court in all respects, including granting physical care of Olivia to Kellie. While I acknowledge our de novo review, this is a prime example of a close custody case where we should defer to the trial court's detailed fact findings and credibility assessment. See, e.g., *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007) ("We give weight to the findings of the district court, especially to the extent credibility determinations are involved."); *In re Marriage of Vrban*, 359 N.W.2d 420, 423-24 (Iowa 1984) ("In deciding . . . the question of child custody, we have relied heavily on the trial court's findings of fact.").

There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding [child custody] cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984) (citations omitted).

As with so many custody disputes, there are two sides to every story and this record is replete with conflicting testimony from Jeremy and Kellie as to their rendition of various events. For every negative point the majority makes concerning Kellie's behavior, a balancing explanation exists. The district court recognized this back-and-forth evidence and found that the parties' testimony "did little to aid the court in determining custody and visitation, other than to highlight the continuing difficulties and distrust between the parties." The district court's decision was guided in large part by its credibility assessments, as

explicitly stated in the ruling: “The court relies upon its own observations as well as the custody recommendation of Doctor Sheila Pottebaum in determining custody.” As we on appeal are only able to review the cold record before us, I would therefore defer to the district court’s credibility assessments. See *In re Marriage of Vrbán*, 359 N.W.2d at 423.

Olivia was born in February 2004, two-and-one-half years prior to the hearing on this matter.³ Much of the conflict between the parties occurred early on. Prior to Olivia’s birth, and because of his unwillingness to co-parent with Kellie, Jeremy proposed three options: adoption, terminate his parental rights, or terminate Kellie’s parental rights. After Olivia’s birth, Kellie phoned him to inform him of his daughter’s arrival. Jeremy visited her at the hospital, and then filed the current petition, asking the court to either grant him sole custody of Olivia or terminate his parental rights⁴.

After initially visiting Olivia, Jeremy disappeared from Olivia’s life for the next several weeks. However, Kellie responded by encouraging Jeremy to visit Olivia. When Jeremy began to exercise visitation, Kellie requested that she initially supervise visits, as she was uncomfortable leaving one month-old Olivia. Jeremy wanted Olivia to come to his home, so Kellie offered a compromise where he would visit with Olivia a couple of times, either at her house or at a public place, and then Olivia could go to his house. Jeremy did not agree to this. He visited Olivia at Kellie’s home, but refused to attend visitation alone, insisting

³ Trial was in June 2006, with the district court ruling issued on August 24, 2006; the appeal was transferred to this court on January 11, 2008.

⁴ Olivia was born on February 2nd; Jeremy signed the petition February 5th and it was filed on February 18th.

on bringing another person with him. Jeremy testified that if he could not find someone to accompany him on a visit, then he would simply choose to forego the visit.

Kellie did not object to Jeremy being accompanied by his family and friends, but did initially inform Jeremy that she did not want one specific friend, Gentry Collins, accompanying him. She knew Collins professionally and was uncomfortable having him involved in her personal life. Additionally, she discovered that Collins had complained about her to her supervisors and she believed that Collins had attempted to have her fired from her job. Even after she informed Jeremy of Collins's actions, he continued to bring Collins with him on two more visits.

A temporary order regarding visitation was entered in July 2004. Kellie requested Jeremy complete a parenting class because he refused to speak to her even about issues concerning Olivia's care. The order also required that Jeremy exercise ninety percent of his visitation before having unsupervised visitation. Jeremy and Kellie both testified that this was included because Jeremy had been inconsistent in exercising his visitation over the preceding months, missing the entire month of April and many visits in June 2004. Kellie believed that this would encourage visitation and a bond between Jeremy and Olivia. Shortly after the temporary order was entered, in August 2004, Jeremy began exercising unsupervised visitation.

Even with a visitation schedule in place, following it was not possible, due to Jeremy's inconsistent work schedule and his service in the National Guard. However, many of the complaints Jeremy made concerned how visitation could

be arranged to accommodate his changing schedule. He admitted that he missed vastly more visitation due to his schedule than any changes Kellie requested. In July and August 2005, while Jeremy was on a six-week tour of duty in Qatar, Kellie made arrangements for Jeremy's wife, Susan, to have weekly visitation with Olivia. Kellie also took Olivia to Colorado to visit Jeremy's parents during this time. In August 2005, Kellie made travel plans to visit her family but cancelled her trip upon learning that Jeremy would be coming home early. Jeremy contacted Kellie to inform her of his expected arrival time at the airport which was subsequently delayed. In an email, Kellie wrote that she didn't think it was wise to make plans to bring Olivia to the airport based upon his uncertain arrival time. When his arrival time changed to Wednesday at noon, Kellie suggested visitation on Wednesday night. Later, Susan contacted Kellie to tell her that Jeremy's arrival time had again been pushed back to sometime between six and eight p.m. on Wednesday night. Susan further stated that visitation would not work unless they were able to keep Olivia overnight. Kellie declined, explaining that she knew from experience that Jeremy's flight arrival times were not fixed and she did not want Olivia, who was seventeen months old at the time, sitting in an airport for hours on end. Kellie did agree for Jeremy to immediately resume the visitation schedule in place and arranged for him to have additional visitation time in the following month and over the upcoming Labor Day weekend.

The majority points out that Jeremy had yet to spend Christmas with Olivia, faulting Kellie. However, the only holiday in question was Christmas 2005. Both Jeremy and Kellie testified that Jeremy voluntarily exchanged weeks

with Kellie so that they each would have Olivia for an entire week near the Christmas holiday in 2005. Jeremy testified “it made sense that Olivia not be trucked back and forth between houses the whole vacation.”

Although, in its ruling, the district court warned Kellie that interference with visitation might result in a contempt citation or modification of physical care, this warning was simply given to Kellie as she was the party that was granted physical care. The district court reasoned that “I believe that there has been a pattern to almost one-up one another on who’s going to have [Olivia] It is clear that the custody and visitation arrangement must be specifically set out to foreclose *either* party from using it to frustrate rather than facilitate visitation.” (emphasis added).

While Jeremy was critical of Kellie’s control over the visitation with Olivia, Kellie has actually allowed Jeremy to make up missed visitation. In total, Jeremy has exercised far more visitation than provided in the temporary court orders. Jeremy also testified that whenever Kellie has a conflict or is working, she either contacts him or Susan to care for Olivia as a first resource. Jeremy added, “there have been months where it’s been 70 percent of days I have Olivia.”

The district court aptly noted the ongoing conflict between the parties did little to serve Olivia’s best interests. The way the parties interacted with each other enhanced their animosity. Jeremy testified that he tape-recorded all of his telephone conversations with Kellie, yet many of the recordings were not available at trial to support his allegations and he admitted that he only transcribed the recordings that were favorable to his position. Kellie testified that she often felt Jeremy was attempting to start an argument during the recorded

conservations in order to provoke her. The custody evaluator noted that “Jeremy may have a tendency to ‘harangue’ Kellie; for example, calling her repeatedly to ask the same questions.” Some emails between the parties also indicated this tendency.

Jeremy also complains that Kellie did not inform him of doctor’s appointments and prevented his attempt to visit Olivia when she was hospitalized in 2005 for respiratory illness. The record demonstrates that Kellie did inform Jeremy of Olivia’s doctor’s appointments on nearly every occasion. Kellie also indicated that she only recalled a couple of times where she did not phone Jeremy before taking Olivia to the doctor. She explained that these were times where she had phoned Jeremy earlier in the day and left messages for him, but received no response. In January 2005, Olivia was hospitalized for three days, during which time Jeremy visited Olivia on the first day for three hours, the second day for eleven hours, and the last day for one hour. However, on that last day, Jeremy requested that Kellie leave so he could hold his scheduled visitation with Olivia. Kellie explained that she did not want to leave Olivia as she was very young and this was her first hospitalization. An argument ensued and Jeremy left. In April 2005, Olivia was again hospitalized and Kellie phoned Jeremy from the doctor’s office to inform him that Olivia was being hospitalized. Shortly after that, she phoned him again and asked him to bring movies for Olivia to watch. However, Jeremy refused to visit Olivia during that hospitalization. Although Jeremy stated that he wanted to stay overnight every time Olivia was hospitalized but was prevented from doing so, the record simply does not support

this. He testified that as to Olivia's third hospitalization: "The whole record of that event at the hospital, I don't recall."

Jeremy has also been less than forthcoming about issues that could affect Olivia's health. Kellie asked Jeremy on several occasions to provide his family medical history to Olivia's doctor, but Jeremy has failed to do so. Although Jeremy also had two health insurance policies that covered Olivia, he never informed Kellie of this coverage. In June 2005, Jeremy emailed Kellie, informing her that Olivia had been exposed to the strep virus. Kellie replied to the email and then phoned Jeremy asking for more details, such as who had the strep virus and when had Olivia been exposed. Jeremy never responded to Kellie's attempts to gather this information. The next day, Kellie took Olivia to the doctor, and when Olivia's strep test came back negative she phoned Jeremy from the doctor's office to again ask when Olivia had been exposed. Jeremy informed her that it was not strep but Olivia had actually been exposed to his own hand, foot and mouth disease. Olivia's doctor recommended that she not have contact with Jeremy for seven to ten days. Later that afternoon Jeremy informed Kellie that he had been medically cleared for Father's Day visitation in two days, which was based upon Jeremy's report to his doctor that he was no longer experiencing symptoms. However, Kellie wanted Olivia's doctor to approve of the visitation in light of Olivia's reoccurring respiratory illness and the deceit Jeremy had perpetrated. The record supports Kellie's skepticism as Jeremy's medical records indicate that he was still experiencing symptoms on that date, although he claimed to be symptom free. As Jeremy did not attempt to contact Olivia's

doctor until the Monday following Father's Day, he did not have medical clearance from Olivia's doctor for the visit.

Both parents love Olivia, but have not learned how to work with each other in a mature fashion for the benefit of their daughter. The record demonstrates that each has contributed to the ongoing discord without one being assigned more responsibility for the conflict than the other. As the custody evaluator noted, they each have a fundamental mistrust for one another and the "point of contention lies in the ability of these two very capable individuals to engage in a proactive co-parenting arrangement on their daughter's behalf." The district court concluded "that these parents are unable to cooperate at any significant level to resolve their differences concerning custody and visitation." Regardless of the parents' hostile relationship, both parents love Olivia and are capable of providing her a loving home. The district court considered all of the appropriate factors under Iowa Code section 598.41(3) (2007). See *Hansen*, 733 N.W.2d 696. The district court also noted that its "objective in making this [custody] determination is to maximize the time Olivia has with both her families without interference or disruption from the other parent." Ultimately, the district court had the opportunity to observe the parties and witnesses and concluded that it was in Olivia's best interests to grant physical care to Kellie. See *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007) (discussing that both parents were suitable but the district court had the opportunity to observe the witnesses). Kellie "has provided Olivia with a secure and loving home since her birth" and, as the custody evaluator found, Olivia has thrived under Kellie's care. See *Hansen*,

733 N.W.2d 700 (“In making [a physical care decision], the factors of continuity, stability, and approximation are entitled to considerable weight.”).

Olivia has lived with Kellie since her birth, in February 2004. She has had visitation with Jeremy over and above that mandated in the temporary orders. After reviewing the record, I would conclude that the extensive trial testimony reveals strengths and weaknesses of both Kellie and Jeremy. Our de novo review is somewhat tempered by the function of the district court to make credibility determinations from its first-hand observations of the parties. Clearly the district court’s findings turned on its credibility assessments of the witnesses coupled with the licensed psychiatrist’s custody evaluation recognizing the tension created by both Jeremy and Kelly. When reviewing such a close custody case, we should not be reversing the district court’s decisions based upon our reevaluation of the record, without the benefit of the live testimony. Therefore, I respectfully dissent and would affirm the district court’s custody determination.