

IN THE COURT OF APPEALS OF IOWA

No. 9-067 / 08-1314
Filed April 22, 2009

**IN RE THE MARRIAGE OF AMY JEAN STARR
AND KOLBY JOHN STARR**

**Upon the Petition of
AMY JEAN STARR,**
Petitioner-Appellant,

**And Concerning
KOLBY JOHN STARR,**
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Dale B. Hagen,
Judge.

The petitioner appeals from the district court's order modifying physical
care of the parties' children. **AFFIRMED.**

Tammy Westhoff Gentry of Parrish, Kruidenier, Dunn, Boles, Gribble,
Parrish, Gentry, & Fisher, L.L.P., Des Moines, for appellant.

Robert A. Wright of Wright & Wright, Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Mansfield, JJ.

MANSFIELD, J.

Amy Starr appeals from the district court's order modifying the physical care provision of the parties' dissolution decree. She asserts that she should have been granted physical care of the parties' child. We affirm.

I. Background Facts and Proceedings.

Amy Starr and Kolby Starr's marriage was dissolved in October 2005. They had one child, Johnathan (born May 2003). The dissolution decree granted the parties joint legal custody and joint physical care, with the physical care of Johnathan alternating weekly between Amy and Kolby. The decree also designated a home school district and primary care physician, unless the parties agreed otherwise. Neither party was ordered to pay child support, but Amy and Kolby were ordered to split Johnathan's medical expenses.

Following the entry of the dissolution decree, the parties had difficulty communicating regarding the care of Johnathan. One ongoing issue between the parties has been Johnathan's medical care and resulting bills. In one instance, Kolby took Johnathan to a doctor who was not his primary care physician set forth in the dissolution decree and did not notify Amy. Amy used certified mail to provide Kolby with Johnathan's medical bills, but Kolby refused to pick up his certified mail. Twice Kolby was found to be in contempt of the dissolution decree for his failure to pay half of Johnathan's medical expenses.

In February 2007, Kolby made a report to the Iowa Department of Human Services (DHS) that Johnathan had been sexually abused by Amy. DHS workers investigated the report, which resulted in a finding that the abuse was "not confirmed." The DHS worker also found that Kolby appeared to have an

agenda in the assessment apart from determining whether Johnathan was sexually abused and was not credible. The worker stated: "I believe Kolby coached Johnathan and then lied about the events . . . Further, this worker believes Kolby lied to the therapist about Johnathan's statements, and lied to her about past events in the relationship with Amy." The worker discussed that Kolby was capable of causing mental injury to Johnathan by coaching him to lie about his mother.

Beginning on March 8, 2007, Kolby took Johnathan to a social worker who specializes in play therapy, Teresa Wilkinson. Kolby informed Wilkinson of the sexual abuse allegations, and Wilkinson had four sessions of play therapy with Johnathan. Wilkinson reported that during play therapy Johnathan made statements that his mother had touched him inappropriately. She also noted that Johnathan appeared to be conflicted about his relationship with his mother.

From March 9, 2007, to March 21, 2007, Kolby refused to return Johnathan to Amy's care. Ultimately, Kolby was found in contempt for his failure to turn over physical care according to the child custody provisions of the dissolution decree.

On March 28, 2007, Amy filed a petition to modify the child custody provisions of the parties' dissolution decree, alleging a change in circumstances and requesting physical care of Johnathan. Kolby filed a counterclaim agreeing that there was a change in circumstances but requesting physical care of Johnathan.

On April 4, 2008, Kolby made a second report to DHS that Johnathan was being sexually abused by Amy, which also resulted in a finding that abuse was “not confirmed.”

On May 14, 2008, a child custody evaluation was completed by Keri Kinnaird, Ph.D., an independent expert who had actually been contacted first by Amy. Dr. Kinnaird discussed the abuse allegations in her report. She reported Kolby believes Amy is abusing Johnathan and Amy’s parents have threatened to hurt Johnathan if Johnathan told about the abuse. Amy, on the other hand, contends Kolby is coaching Johnathan to report abuse. Dr. Kinnaird could not determine if Johnathan was being abused or if Johnathan was being coached to report abuse. However, when Dr. Kinnaird spoke with Johnathan, he consistently assigned negative attributes to Amy (even though he was currently in Amy’s physical care and thus less susceptible to “coaching”). Dr. Kinnaird found that Amy and Johnathan had a troubled mother-son relationship. Further, in her view, Johnathan has a greater emotional attachment with Kolby.

Dr. Kinnaird found Amy and Kolby were not good candidates for joint physical care because of their inability to communicate and collaborate. Additionally, “neither trusts the other enough to be fully supportive of the other’s relationship with Johnathan.” Thus, Dr. Kinnaird concluded a plan with one parent having physical care was in Johnathan’s best interests and recommended Kolby be granted physical care of Johnathan, with Amy having visitation on alternating weekends and every Tuesday afternoon.

On June 4 and 5, 2008, a trial was held to determine physical care of Johnathan. Dr. Kinnaird, Amy, and Kolby all appeared and testified, as did

several other witnesses. On July 23, 2008, the district court found the parties' inability to communicate and cooperate was a change not contemplated at the time the dissolution decree was entered. The district court noted that "there is little that separates the parties as far as determining which would be the better custodian of the child." After considering the reports regarding alleged abuse and alleged coaching to report abuse, the district court said it could not make a determination as to whether Johnathan had been abused or coached to report abuse, so it did not consider the allegations of abuse or allegations of coaching in making a custody determination. The district court mentioned that Dr. Kinnaird expressed concern over the relationship between Amy and Johnathan. The district court noted it shared the same concerns regarding a troubled mother-son relationship. However, the district court also noted that it shared Amy's concern that she would have difficulty seeing Johnathan if Kolby was awarded physical care. Ultimately, the district court granted Kolby physical care of Johnathan, with Amy having regular visitation. Amy was ordered to pay child support. On August 12, 2008, the district court entered an order confirming its prior findings. Amy appeals.

II. Standard of Review

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *Zebecki*, 389 N.W.2d at 398. Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). Our

overriding consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(o).

III. Analysis

Amy asserts that she should have been granted physical care. In making a physical care determination, the best interests of the child is the principal consideration. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2007), as well as factors set forth in *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). *Id.* The ultimate objective of a physical care decision is to place the child in an environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

Amy contends the district court did not give enough weight to (1) evidence that Kolby has attempted to alienate Amy from Johnathan's life by making false allegations of abuse and by coaching Johnathan; (2) Kolby's lack of respect for Amy and the dissolution decree, as evidenced by Kolby being found in contempt on several occasions; and (3) the fact that Amy has a more stable employment and housing history.

After careful consideration, we affirm the district court. Like the district court, we do not find this to be an easy, clear-cut case. However, like that court, we ultimately find the testimony of Dr. Kinnaird to be compelling and persuasive here. In her careful, nuanced testimony, which did not display favoritism for either side, Dr. Kinnaird indicated that there appear to be significant problems in the mother-son relationship based on her personal observations. To her credit,

although Dr. Kinnaird stated her opinions thoughtfully and explained her reasoning, she allowed for the possibility that she could be wrong.

We also do not agree with Amy's contentions that the district court failed to give sufficient weight to the points noted above. The district court considered the allegations of coaching, as well as Dr. Kinnaird's testimony that she did not believe Johnathan was being coached when she spoke to him. The district court also took into account Kolby's previous examples of noncompliance with the dissolution decree—and specifically cautioned Kolby about the need to comply with Iowa law. Lastly, the district court did consider the parties' employment and housing arrangements, and we believe gave them appropriate weight. In the end, we believe the district court made the right call here, recognizing (as Dr. Kinnaird put it) that this call is not without "risk."

We also disagree with Amy's assertion in her reply brief that the district court improperly made a physical care determination based on a five-year-old's "preference." To the contrary, the record indicates that physical care was ultimately determined by Johnathan's needs, not his wants.

In his brief to this court, Kolby also asks us to give him sole legal custody of Johnathan (in addition to physical care) and to strike the current designations of Johnathan's home school district and primary physician from the decree. These matters are not properly before us, and we decline Kolby's requests.

Finally, both parties request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but lies within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other

party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Id.* We deny each party's request for appellate attorney fees. Costs on appeal are assessed against Amy.

AFFIRMED.