

IN THE COURT OF APPEALS OF IOWA

No. 9-072 / 08-1479
Filed April 22, 2009

**IN RE THE MARRIAGE OF CINDY RAE EMERSON
AND TIMOTHY SCOTT EMERSON**

**Upon the Petition of
CINDY RAE EMERSON,**
Petitioner-Appellee,

**And Concerning
TIMOTHY SCOTT EMERSON,**
Respondent-Appellant.

Appeal from the Iowa District Court for Hardin County, David R. Danilson,
Judge.

Timothy Emerson appeals from the decree dissolving his marriage to
Cindy Emerson. **AFFIRMED.**

Lynn J. Wiese of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellant.

George A. Cady III, Hampton, for appellee.

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

VAITHESWARAN, P.J.

Cindy and Timothy Emerson married in 1986, had two children, and divorced in 2008. At the time of the dissolution proceedings, one of the children was eighteen years old and the other was eight. The district court granted Cindy physical care of the younger child, with Timothy receiving visitation on alternating weekends and holidays and for four weeks in the summer. Timothy appealed this portion of the dissolution decree, arguing the court's decision was not in the child's best interests. This is indeed the ultimate consideration in resolving custody disputes. Iowa R. App. P. 6.14(6)(o).

Cindy and Timothy raised their children in Iowa Falls in a home next to the home of Timothy's mother. Before trial, Cindy was diagnosed with a severe health condition that required her to end her employment. She applied for and began receiving Social Security disability benefits of \$778 per month. The benefit amount was insufficient to allow her to live independently. For that reason, she expressed her intention to move in with her sister in Bondurant, Iowa.

At trial, Timothy requested joint physical care of the child. The district court found that Cindy's imminent relocation made this an untenable option. On appeal, Timothy does not take issue with this conclusion. Instead, he contends the district court should have granted him physical care so that the child could continue living in the only community he knew.

The child is fortunate to have two loving parents, as well as extended family members who care about his welfare. To that extent, he would be well served in the physical care of either parent. In the end, the district court chose to

grant Cindy physical care, as she was the primary caretaker in the past, she fulfilled that role effectively, and she was physically able to continue in that role despite her disability.

On our de novo review, we agree with this decision. Although the effect is to remove the child from familiar surroundings, Cindy is available to ease him through the transition. See *In re Marriage of Vrban*, 359 N.W.2d 420, 425 (Iowa 1984) (“We have noted that stability in the lives of young children can be nurtured as much by leaving them with the person who has been their primary parent figure as by requiring them to live in a neighborhood from which that person has moved.”) In addition, the district court ordered liberal visitation, which allowed the child to maintain regular contact with his brother and Timothy’s side of the family. Finally, while the parents’ testimony was not significantly divergent, we believe this is the type of case in which we should pay heed to the district court’s ability to see and hear the witnesses. See *id.* at 423 (“[A]ppellate 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.”).

Timothy also challenges the district court’s order requiring him to pay \$600 towards Cindy’s trial attorney fees. He points out that Cindy did not make a record on the amount of fees she incurred. “Although testimony as to time spent and specific services rendered is helpful, we have held judges serve as their own experts in fixing fees.” *In re Marriage of McBee*, 244 N.W.2d 327, 329 (Iowa 1976). Based on this principle, we conclude the district court did not abuse its

discretion in ordering the payment of trial attorney fees. See *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993).

Cindy requests an award of appellate attorney fees. Considering her limited income, we order Timothy to pay \$500 towards her appellate attorney fees.

AFFIRMED.