

IN THE COURT OF APPEALS OF IOWA

No. 9-1010 / 09-0551
Filed February 24, 2010

**IN RE THE MARRIAGE OF JOHN STOCK
AND BARBARA STOCK**

**Upon the Petition of
JOHN STOCK,**
Petitioner-Appellee,

**And Concerning
BARBARA STOCK,**
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

A mother appeals from the custodial provisions of a dissolution decree.

AFFIRMED.

Thomas G. Reidel, Muscatine, for appellant.

M. Leanne Tyler, Davenport, for appellee.

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

VAITHESWARAN, P.J.

John and Barbara Stock married in 2004 and divorced four-and-a-half years later. The district court granted John physical care of their two children, born in 2005 and 2006. On appeal, Barbara contends the court should have granted her physical care. On our de novo review of the record, we disagree. See Iowa R. App. P. 6.907 (2009); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007).

Barbara's past included daily drug use, regular visits to internet sex sites that culminated in sexual liaisons with strangers, a prior marriage to a man with troubling behaviors, and charges that she neglected her children from other relationships. While Barbara maintains the district court placed too much emphasis on her past, there is ample evidence to suggest she did not chart a new course after her marriage to John.

First, we consider a court-ordered custody evaluation. Though not controlling, the "recommendation of an independent custodial investigator may be considered in determining primary physical [care]." *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993).

The custody evaluator who was appointed in this matter reported:

It is Barbara's personality style that is the source of serious difficulty in the current study, and her ability to respond truthfully and objectively in a manner that reflects serious concern about the best interest of her children is questionable.

He continued, "Even though Barbara has been punished in the past, she seems to fail to learn from these past life experiences [T]he prognosis of the treatment outcome for her is negative."

At trial, the evaluator testified that

[Barbara] is drawn to that kind of lifestyle and that she—she is not a different person from the person that she has been. You know, this is a . . . straight line so to speak It is a continuation of a deviant pattern of behavior.

When asked if he would be comfortable “under any circumstances recommending Barbara have physical care of [the children,]” he answered, “No, I would not.”

A social worker involved in the evaluation seconded this opinion. She stated, “[I]t doesn’t appear as if Ms. Stock is able to provide the type of home that the children would benefit from growing up in.” She found “disturbing” the fact that Barbara had a recent affair with her former husband, a man she characterized as “not the most stable individual in the world.” She also noted Barbara was not forthcoming and honest with the interview team, in contrast to John, who she characterized as “[g]enuine and straightforward.”

The district court concluded the information contained in the evaluation was credible and entitled to some weight. Although our review is *de novo*, “we defer to the district court’s assessment of the appointed investigating agent.” *Id.*

We turn to Barbara’s treatment of her children after her marriage to John. Several witnesses, including Barbara’s mother, reported that Barbara constantly used foul language in front of them. John’s child from a previous marriage described the home as “chaotic,” with not “a moment of peace.” He reported having witnessed Barbara hitting her children “on the back of the head, on the back on the wrist.” John similarly testified that he often heard Barbara call her children names and threaten to hit them. This evidence supports the district

court's finding that Barbara "continued and probably escalated her patterns of yelling and swearing at her older children and as their relationship deteriorated," she directed vulgar language at John in the children's presence and "encouraged them to do likewise."

In our view, the custody evaluation and the evidence of Barbara's behaviors around the children were sufficient to support the district court's physical care decision. Additionally, there was evidence that Barbara continued to use illegal drugs and continued to act out sexually after her marriage to John. We find it unnecessary to detail that evidence other than to note that it provides further support for the district court's decision.

We affirm the physical care decision notwithstanding Barbara's testimony that she served as primary caretaker of the children. *See In re Marriage of Hansen*, 733 N.W.2d 683, 696–97 (Iowa 2007) (stating "stability and continuity of caregiving are important factors" that tend to favor a parent who, prior to the parties' separation, was primarily responsible for the physical care of the minor children). While this fact is essentially undisputed, the district court also found, and we agree, that John was "substantially and regularly involved with [the children's] care." As for the nature of his care, the social worker who was involved in the custody evaluation stated she had no concerns about the safety of the children in his care and she believed he would administer to their emotional well-being. Additionally, John had no history of substance abuse, questionable lifestyle choices, or neglect of the children. Although Barbara testified that John lost his temper with the older children, the district court "did not generally find [her] to be credible." We defer to this credibility finding. *See In re*

Marriage of Berning, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). We also note the custody evaluator's finding that John "is not an angry, explosive individual. Even though he might be impulsive in some areas of his life, he is not expected to be overtly, physically angry unless provoked." Finally, John's ex-wife testified that John did not verbally or physically abuse her or their children during his marriage to her.

Barbara cites several other factors that, in her view, militate in favor of a different result. The district court gave "due consideration" to these factors but found they were "substantially outweighed" by other evidence. We agree with the court's thoughtful appraisal of the facts and its analysis.

John requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Given our view that there was ample support for the district court's ruling, we order Barbara to pay John \$1500 towards his attorney fee obligation.

AFFIRMED.