**IN THE COURT OF APPEALS OF IOWA**

No. 9-948 / 09-0851
Filed February 10, 2010

**IN RE THE MARRIAGE OF LINDA M. KING AND MARK D. KING**

**Upon the Petition of**

**LINDA M. KING,**
Petitioner-Appellant,

**And Concerning**

**MARK D. KING,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Carroll County, Joel E. Swanson, Judge.

The petitioner appeals the district court's decision granting the parties joint physical care of their two minor children, claiming she should have been awarded physical care. **AFFIRMED.**

A. Eric Neu of Neu, Minnich, Comito & Hall, P.C., Carroll, for appellant.

Andrew Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellee.

Heard by Vogel, P.J., Eisenhauer, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**ZIMMER, S.J.**

Linda King appeals from the provisions of a dissolution decree that granted the parties joint physical care of their two minor children. She contends she should have been awarded physical care. Upon our review, we affirm the decision of the district court.

## I. Background Facts & Proceedings

Mark and Linda King were married in 1990. They have two minor children, a daughter born in 1995, and a son born in 1997. Linda filed a petition for dissolution of marriage on August 6, 2008. An order on temporary matters, dated September 17, 2008, placed the children in the parties' joint physical care. Under the terms of the temporary order, the parties cared for the children on alternating weeks. The parties were to alternate major holidays, and spend equal time with the children at Christmas. The parties could not resolve their differences and a dissolution hearing was held on April 28 and 29, 2009. At the hearing, Linda asked the court to place the children in her sole physical care, while Mark requested the court to place the children in his and Linda's shared physical care.

Mark was forty years old at the time of the dissolution hearing. He had various jobs throughout the marriage, including farming, construction, and working at a packing plant and warehouse. Mark drove a truck for Casey's General Stores for several years. This job required him to be away from home three nights each week. Mark is currently self-employed as the owner and operator of Iowa Spray Foam Insulators. Although he travels outside the county

bidding on and completing jobs, he is at home every evening and his job affords him some flexibility. Mark earns about $36,000 per year. He is a hard worker and he is good health.

Linda was thirty-eight years old at the time of the hearing. She has been employed in the field of nursing during the marriage. Linda is currently the Director of Nursing at the Carroll Health Center, where she has an annual income of $78,000. She is a highly skilled worker and she is valued by her employer. Linda was hospitalized in May 2008 for depression after she had suicidal ideation.[1] Linda is being treated for depression with medication and therapy, and her condition has improved. Her condition has not affected her employment.

The parties' daughter is doing well in school and has no health problems. The parties' son has been diagnosed with attention deficit hyperactivity disorder (ADHD) and other behavioral problems. He was taken to the emergency room in November 2007 when he threatened to harm himself. He was hospitalized for a few days in June 2008 after he threatened his sister and a babysitter with a knife. The son is being treated with medication and therapy for his problems. Mark was initially reluctant to medicate the son, but now accepts the need for medication.

Soon after the temporary shared care order was entered, Linda moved to a two-bedroom apartment. During the weeks the children spend with her, she shares a bedroom with the daughter. Mark remained in the marital home after the parties separated.

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[1] Linda first reported symptoms of depression soon after Joey was born in 1997. Her primary physician diagnosed her with depression in 2003.

The district court issued a dissolution decree for the parties on May 20, 2009. The court determined the parties should have joint legal custody of the children, and joint physical care. The court ordered the parties to alternate care of the children in two-week periods. During the evening of the second Monday of each two-week period, the noncustodial parent for that week has visitation. The parties were also ordered to alternate holidays. Linda is to have the children on Mother's Day and her birthday, and Mark is to have the children on Father's Day and his birthday. On the children's birthdays, each parent is to spend one-half of the day with the child. Linda is to provide medical insurance for the children, and to pay child support of $615 per month. Linda appeals the physical care provision of the dissolution decree.

## II. Standard of Review

In this equity action our review is de novo. Iowa R. App. P. 6.907 (2009). In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(*g*). "In child custody cases, the first and governing consideration of the courts is the best interests of the child." Iowa R. App. P. 6.904(3)(*o*).

## III. Joint Physical Care

Linda contends the district court should not have given the parties joint physical care, but instead should have placed the physical care of the children with her. She points out that she was the primary caretaker for the children until the parties' separation. She asserts Mark was not as involved in the care of the children until the commencement of the dissolution proceedings. Linda alleges

Mark was physically abusive to their son on several occasions, and had a hard time accepting the son's diagnosis and his need for treatment. She claims Mark drinks to excess. She further asserts that under the temporary shared physical care order Mark did not share expenses and would not agree to give her equal time with the children at Christmas.

When physical care of minor children is an issue in dissolution proceedings, the district court may grant the parents joint physical care, or choose one parent to be the caretaker of the children. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). Joint physical care is a viable option when it is in the children's best interests. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The court considers the following factors in determining whether to grant joint physical care: (1) the historical care giving arrangement for the children between the parents, (2) the ability of the spouses to communicate and show mutual respect, (3) the degree of conflict between the spouses, and (4) the degree to which the parents are in general agreement about their approach to parenting. *In re Marriage of Hansen*, 733 N.W.2d 683, 697-99 (Iowa 2007); *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

With regard to the first factor, the district court noted that Linda "was primarily the care giver on a daily basis." We agree with this conclusion. The court also found, however, that Mark became more heavily involved in the daily lives of the children after the dissolution was filed. We agree that the evidence shows Mark was often away from home when he was a truck driver. As a result, he was not as involved in the children's lives during that period of time as he is

now. When Mark's jobs required him to be away from home, he spent time with his family whenever possible. Mark is now self-employed. This gives him more flexibility to spend time with the children. Thus, while historically Linda was the primary caretaker for the children, recently Mark has assumed a more vital role in their care.

The second factor looks to communication between the parents and whether they show mutual respect for each other. "A lack of trust poses a significant impediment to effective co-parenting." *Hansen*, 733 N.W.2d at 698. Other than a slight misunderstanding about how to divide their time with the children at Christmas, there was no evidence in the record showing significant problems with communication. Although the parties did not always agree, they appear to be able to communicate.

In discussing this factor, our supreme court has stated, "[e]vidence of untreated domestic battering should be given considerable weight in determining custody and gives rise to a presumption against joint physical care." *Id.* At trial, Linda alleged Mark was physically abusive to their son on several occasions and verbally abusive toward her.[2] After the dissolution was filed, Linda reported Mark to the Department of Human Services, but the department determined there was insufficient evidence to proceed with an investigation.

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[2] In her appellate brief Linda recognizes Mark's discipline of the son may fall "within the realm of reasonable corporal punishment." Mark admitted he had spanked the children in the past, but indicated he did no longer, stating, "I've learned ways to deal with them that, you know, there's a lot better ways to deal with them and make them think about what they're doing instead of spanking them."

The district court did not directly address Linda's allegations of physical abuse toward the son. The court stated, "As is characteristic of custodial disagreement, each party attempts to provide the Court with information which would suggest that the other spouse is not the appropriate custodial parent." After considering the evidence, the court ultimately concluded that both Mark and Linda are fully capable of caring for the children. It is clear the district court did not believe the evidence presented at trial was sufficient to exclude Mark from consideration as a joint physical caretaker. We agree with the district court's conclusion. We note that at the dissolution hearing Linda agreed that Mark could be a good dad.

The next factor is the degree of conflict between the parties. *Id.* When asked whether he could get along with Linda well enough to co-parent, Mark stated, "I try very hard to leave all the divorce stuff on one part of my brain and I focus on the children, what I can do best for the children on the other part of my brain." On this same issue Linda testified:

> Q. How is it that the two of you can get along now? A. Because I do it for the welfare of the children.
> Q. And Mark does the same thing, doesn't he? A. Yes.

We believe the record supports the conclusion that the parties' are able to cooperate regarding parenting because they recognize this is in the best interests of the children.

The final factor set forth in *Hansen* is the degree to which the parents are in general agreement about their approach to parenting. *Id.* at 699. "The greater the amount of agreement between the parents on child rearing issues, the lower

the likelihood that ongoing bitterness will create a situation in which children are at risk of becoming pawns in continued post-dissolution marital strife." *Id.*

In the past Mark was reluctant to begin treatment of the son by medication. He has come to accept, however, that the son needs medication to stabilize his behaviors. The record also reveals that the parties relied on each other's help during their marriage in disciplining the children, and their son in particular.

After considering all of the factors discussed in *Hansen*, 733 N.W.2d at 697-99, we believe the district court's conclusion that joint physical care is appropriate is a reasonable conclusion in this case. Both parties are loving and caring parents. They clearly have their children's best interests at heart. The parties have been able to put their differences aside and cooperate as parents, recognizing this is in the best interests of the children. Overall, the shared care arrangement has worked well since it was implemented. Mark and Linda live close to each other, and the parenting schedule established by the court will allow the children to continue to attend the same school and associate with the same friends. In the months preceding trial, it appears that the parties' son's behavior has improved. We believe that a shared care arrangement will effectively promote the children's long term best interests. Accordingly, we affirm the district court's decision placing the children in the parties' joint physical care. In reaching this conclusion, we recognize that the district court had the opportunity to hear the evidence and view the witnesses firsthand. This provides the court with a distinct advantage over an appellate court, which must

necessarily rely on a cold transcript. *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989).

**IV. Appellate Attorney Fees**

Mark seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 767 (Iowa 1997). On a request for appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We determine Linda should pay $1000 toward Mark's appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Linda.

**AFFIRMED.**