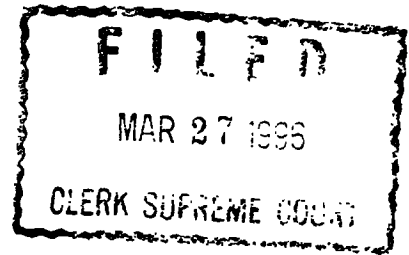


IN THE COURT OF APPEALS OF IOWA

No. 6-039 / 95-0920



**IN RE THE MARRIAGE OF DUSTIN REID TRESSLAR
AND DEEANNA LYNN TRESSLAR**

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Upon the Petition of
DUSTIN REID TRESSLAR,

Appellee,

And Concerning
DEEANNA LYNN TRESSLAR,

Appellant.

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs,
Judge.

Mother appeals from the child custody provisions of a dissolution decree.

AFFIRMED.

Patricia C. Kamath, Iowa City, for appellant.

Constance Peschang Stannard, Iowa City, for appellee.

Heard by Habhab, P.J., Huitink, J., and Peterson, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the
Iowa Supreme Court.

PETERSON, S.J.

DeeAnna and Dustin are the parents of Dillon. DeeAnna appeals from the district court's award of primary care. Dustin seeks an award of appellate attorney fees. In this equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa App. 1993). We have a duty to examine the entire record and adjudicate anew the issues properly presented. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.* Upon our de novo review of the record, we affirm the award of primary care and find equity does not warrant an award of appellate attorney fees.

I. Custody.

DeeAnna and Dustin were married on March 20, 1993. Their son, Dillon, was born September 4, 1993. The parties separated in February 1994, and a petition for dissolution was filed March 10, 1994. DeeAnna was awarded temporary custody of Dillon on April 21, 1994. Following the parties' separation, and prior to entry of the order setting temporary custody and visitation, DeeAnna wanted no contact with Dustin which inhibited his efforts to visit Dillon. Following entry of the temporary order, DeeAnna would allow Dustin to have no more visitation with Dillon than the minimum required by the order, although she had been admonished

by the court at the temporary hearing visitation by Dustin could be in excess of that specified in the order.

The dissolution trial was held in March 1995 and a decree of dissolution was filed April 26, 1995. At the time of trial DeeAnna was twenty-five years old and Dustin was twenty-four. DeeAnna had previously been married and had a son Tyler, born April 16, 1990. She and her former husband shared physical care of Tyler and alternated Tyler's custody on a daily basis. In May 1995, DeeAnna was to assume the full physical care of Tyler.

Both DeeAnna and Dustin have steady employment. It is not disputed they both love Dillon and could provide him with a home and adequate care to meet his physical needs. The trial judge found neither of the parents had shown emotional stability, both had engaged in illegal conduct in the past, and both were lacking in their ability to meet Dillon's emotional, social, and moral needs.

The trial court further found DeeAnna had made many representations at trial which, upon examination, were found not to be true. These misrepresentations put DeeAnna's credibility in issue. DeeAnna lied about being instructed by her tax preparer to forge Dustin's name on their tax returns. She also misrepresented she had a restraining order against Dustin when no such order had yet been entered.

Both Dustin and DeeAnna had smoked marijuana in the past, though substance abuse does not appear to presently be a problem for either party. Dustin

was arrested for operating a motor vehicle while intoxicated in 1992, and DeeAnna lost her license in 1992 due to charges of speeding and public intoxication arising from an unrelated incident. DeeAnna admitted she had continued to drive even after she had lost her driver's license.

DeeAnna was arrested for shoplifting from a grocery store in 1990. She admitted she had shoplifted before but this was the first time she had been caught. This incident is troubling because she had her infant son, Tyler, with her when she shoplifted and was arrested. Her lack of good judgment is further demonstrated by the fact she was later arrested for criminal trespass when she returned to the same grocery store, despite having been ordered not to return to that business.

During the course of the dissolution proceedings, DeeAnna and Dustin both raised allegations of physical abuse against the other. The evidence is disputed and not conclusive. Dustin is alleged to have physically assaulted DeeAnna and he claims she hit and threw things at him. The trial court's findings on this matter provide an accurate summation of the situation.

[T]he Court does by no means condone the violence which took place between these parties. Those violent incidents were inexcusable. The Court is not convinced by the accounts of either of the parties that only one or the other was the aggressor. The Court is convinced that the parties became involved in arguing which escalated to physical contact between them. The Court is no more convinced that Dustin was the sole aggressor than the Court is convinced that DeeAnna was the sole aggressor. Both of the parties participated. Fortunately, violence was not directed to Dillon. However, such violence between parents is unacceptable.

In her reply brief DeeAnna cites the recently amended provisions of Iowa Code section 598.41 as support for awarding her custody. Specifically, she relies on the consideration a court is to give a “history of domestic abuse” when making a custody determination. Iowa Code §598.41(1)(b), (2)(c), (3)(j) (Iowa Code Supp. 1995). It is well-established domestic abuse is a factor in custody determinations. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). The violent tendencies of a parent adversely impact on the fitness of that parent to be a primary caretaker of a child. *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa App. 1994). However, the trial court was not persuaded Dustin was the sole aggressor in the parties’ physical altercations. The evidence supports this view. Section 598.41 does not appear to contemplate a case in which both parents have engaged in domestic assault. Given that DeeAnna also initiated physical confrontations with Dustin, there is no presumption she is entitled to the primary care of Dillon.

DeeAnna also complained about Dustin’s efforts to contact her and see their son after the parties separated. She characterizes Dustin’s efforts as “stalking.” Once again, the trial court had a first-hand opportunity to observe the parties and assess their credibility. The trial court found --

The evidence is uncontroverted that Dustin’s sole purpose in contacting DeeAnna during this period of time was to see Dillon and that when directed to do so by law enforcement or by DeeAnna he left. One can only wonder what DeeAnna’s demeanor would have been had Dustin taken the child with him when the parties separated and then refused DeeAnna any contact with Dillon during the period prior to the

Court's order. The evidence indicates this behavior was not to frighten or menace DeeAnna but, rather, Dustin's effort to see Dillon.

Dustin was contacting DeeAnna in order to make arrangements to see his son. While his efforts may have proven inconvenient or uncomfortable for DeeAnna, they did not rise to the level of stalking.

In reviewing a custody decision we keep in mind, one parent's denial of the child's opportunity to have meaningful contact with the other parent is a significant factor in determining custody and physical care. *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). The trial court made specific findings of fact regarding DeeAnna's inability to encourage and foster Dillon's relationship with his father.

DeeAnna, through her actions, has shown a very possessive attitude concerning Dillon. This almost proprietary attitude was apparent through her testimony in the things she said as well as in her demeanor and response to questioning. Illustrative of DeeAnna's attitude of her possessory right to Dillon was her response to a question by Dustin's attorney regarding whether or not DeeAnna had ever offered Dustin additional time with Dillon above and beyond what the temporary order provided. She gave a quick, clipped response of "no" and exhibited an incredulous facial expression that the question had been asked. This attitude concerns the Court about DeeAnna's ability to encourage Dillon's relationship with both his parents. . . . She has been aggressive in her efforts to keep Dillon from spending time with Dustin prior to the Court's order, and equally aggressive in making sure that Dustin had no more than the minimum amount ordered.

The trial court had "serious doubts" about DeeAnna's ability to support and foster Dillon's relationship with Dustin. DeeAnna did not provide Dustin with her current address or phone number. Twice she withdrew Dillon from day care with the intent

of depriving Dustin of the opportunity to have access to his son. We find the record supports the trial court's concerns about DeeAnna's unwillingness to allow Dustin to have contact with Dillon.

We are aware of the presumption siblings should not be separated. *Will*, 489 N.W.2d at 398. This presumption extends to cases involving the physical care of half siblings. *See In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). However, this rule is not ironclad if it appears the separation of siblings may better promote the long-range interests of the children. *See id.*

On several occasions our appellate courts have affirmed the separation of half-siblings. *See In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993); *Brauer*, 511 N.W.2d at 647; *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa App. 1993). While there is a strong interest in keeping the children of broken homes together, we find the separation of Tyler and Dillon is more likely to promote Dillon's long-term best interests. Dillon was only eighteen months old at the time of trial and was nearly three and one-half years younger than his brother. While the children may have some bond, it is not a strong factor in this case. More compelling, and central to our decision to affirm the trial court, is our conclusion that Dustin, not DeeAnna, is more likely to foster Dillon's relationship with his noncustodial parent.

In child custody cases, the best interests of the child is the first and governing consideration. *Brauer*, 511 N.W.2d at 647. The factors a court is to consider in awarding custody are enumerated in the Iowa Code and in our case law. All the factors bear on what will be in the long-term best interests of the child. *Id.*

“The critical issue in determining the best interests of the child is which parent will do better in raising the child.” *Riddle*, 500 N.W.2d at 719. We do not minimize the fact both DeeAnna and Dustin have serious shortcomings. Both have engaged in conduct which bears on their fitness to be Dillon’s caretaker. They behave immaturely and have resorted to physically abusive behavior in the past. In some cases, including this one, “[d]etermining what custodial arrangement will best serve the long-range interest of a child becomes a matter of choosing the least detrimental available alternative for safeguarding the child’s growth and development.” *In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974).

Custody decisions of this kind are not easy, and we are keenly aware of the superior vantage point of the trial court due to its ability to consider firsthand the demeanor and appearance of the parties. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). The trial court’s assessment of the parties’ credibility is particularly important in a case like this where there are conflicting allegations of abuse. Upon our de novo review, we find Dillon’s placement with Dustin is the least detrimental alternative as Dustin is more likely than DeeAnna to foster Dillon’s

relationship with his noncustodial parent. We affirm the district court's award of physical care.

II. Appellate Attorney Fees.

Dustin requests an award of \$2,500 in appellate attorney fees. An award of attorney fees is not a matter of right but rests within the court's discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award 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 making the request was obligated to defend the trial court's decisions on appeal. *Id.* Given the relative circumstances of the parties in this action, we find equity does not warrant an award of appellate attorney fees.

AFFIRMED.