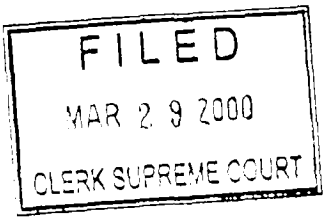
IN THE COURT OF APPEALS OF IOWA

No. 0-114 / 99-1007
Filed March 29, 2000

IN RE THE MARRIAGE OF THOMAS D. HARE and BRADY J. HARE



Upon the Petition of
THOMAS D. HARE,
Petitioner-Appellant,

And Concerning
BRADY J. HARE,
Respondent-Appellee.

Appeal from the Iowa District Court for Clay County, Patrick M. Carr, Judge.

Thomas Hare appeals the custody and property provisions of the parties' dissolution decree. **AFFIRMED.**

Eric Borseth of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Bradford Kollars, Sioux City, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

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HECHT, J.

Thomas Hare appeals the custody provisions of the parties' dissolution decree. He contends the district court erred in (1) awarding primary physical care of the children to Brady Hare, and (2) ordering him to pay Brady's attorney fees and the guardian ad litem's fees. We affirm.

I. Factual Background and Proceedings. Thomas and Brady Hare married on March 21, 1981. The parties adopted two children of African-American descent: Samuel who is now nine years old and Elizabeth ("Libby") who is now six years old. The children were adopted soon after their births and have lived most of their lives with Thomas and Brady. Samuel has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). Currently, Brady home schools both children.

Brady has a history of very serious health issues. She suffers from Type I Diabetes Mellitus. She controls the diabetes by monitoring her blood glucose level four times daily and giving herself injections if needed. She is blind in her left eye as a result of diabetic retinopathy. She also suffered from diabetic nephropathy, or kidney disease, resulting in two kidney transplants. The first transplant was in 1984, and her body rejected the kidney in 1989. After two and a half years of dialysis, she received a second kidney in 1991 that is presently functioning normally. Brady must take multiple anti-rejection medications to maintain the kidney. These drugs suppress her immune system, and she is at an increased risk of infectious disease.

In 1987, Brady developed carcinoma of the ovary and had a hysterectomy. She also has been diagnosed with Charot's joint disease. This disease causes her to have no feeling in her ankles and feet. While she can walk, she walks slowly, putting most of the pressure on her ankles. She depends on a wheelchair for getting around in most situations. She has had two leg fractures: a right femur fracture in 1990, and right tibia fracture in 1994. One of these fractures took two years to heal. Despite these medical issues, Brady is able to be independent and assumed most of the traditional homemaker roles while she and Thomas were married. She was employed outside the home at times during the marriage but has discontinued this because of her health problems. Her income comes from monthly social security payments.

Thomas is in good health and is currently self-employed as a painter and sandblaster. In addition to this business, during the marriage he worked the night shift full-time at Eaton Corporation. Although he assumed the more traditional role of a husband and father as the "breadwinner," the record shows he was actively involved with the children, often taking on extra care giving duties when Brady had health difficulties.

In early July 1997, Brady left the home with the children and went on vacation for several weeks. During this time, Libby indicated verbally and demonstratively to her maternal grandmother that Thomas had "tickled" her inner thigh or vaginal area. Thomas filed a petition for dissolution of marriage on July 25, 1997. Almost simultaneously with this filing, Brady filed a domestic abuse petition and, on the advice of her parents and two of her attorneys, also filed a

sexual abuse report with the Department of Human Services ("DHS") alleging Thomas had sexually abused Libby. DHS investigated the sexual abuse allegation, which resulted in a founded sexual abuse report. The district court permitted Thomas to exercise only supervised visitation with Libby.

Trial commenced in this matter on June 2, 1998. The parties hired four psychologists to evaluate the parents and the children. Two medical doctors testified through deposition as to Brady's medical condition and prognosis. Both Thomas and Brady called several lay witnesses as well. The district court entered its findings, conclusions, and decree on May 5, 1999, and awarded the parties joint custody. The district court placed primary physical care with Brady. Based on the reports of several psychologists and Libby's therapist, the district court concluded it could not "find that indecent sexual contact occurred between Thomas and Elizabeth." The district court then granted Thomas liberal visitation rights with both Samuel and Libby and ordered supervision of visitation should cease. In addition, the district court ordered Thomas to pay child support of $178.77 per month, alimony of $500 per month, $7500 of Brady's attorney's fees, and the guardian ad litem's fees totaling $2,874.96. Thomas appeals the custody, attorney's fees, and guardian ad litem's fees provisions of the decree.

II. Standard of Review. Because this is an equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Williams,* 589 N.W.2d 759, 761 (Iowa App. 1998); *In re Marriage of Steenhoek,* 305 N.W.2d 448, 453 (Iowa 1981). We give weight to the fact-findings of the trial

court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Custody. Thomas contends the district court erred by granting primary physical custody of the children to Brady. Samuel and Libby's best interests are paramount in determining which parent has primary physical care. *See In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999). The court determines placement according to which parent can minister more effectively to the children's long-range interests. *In re Marriage of Rebouche,* 587 N.W.2d 795, 797 (Iowa App. 1998). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel,* 555 N. W.2d 250, 253 (Iowa App. 1996).

We must consider several factors when determining which parent should be the primary physical caregiver of the children in a divorce. *See* Iowa Code § 598.41(3) (1997); *In re Marriage of Barry,* 588 N.W.2d 711, 713 (Iowa App. 1998). We give some factors more weight than others and the weight ultimately assigned to each factor depends on the particular facts of each case. *In re Marriage of Will,* 489 N.W.2d 394, 397 (Iowa 1992).

We initially note both Thomas and Brady exhibit positive parenting skills and Samuel and Libby have a strong bond with each of them. They seem genuinely concerned with the welfare of their children and want to do the best they can for them. They both are appropriate caregivers for Samuel and Libby. To both parents' credit, Samuel and Libby are growing up well. Although Samuel has special challenges due to ADHD, he tested at a normal level for mathematics

and two grade levels above his age group in reading. By all accounts, Libby is a bright, well-mannered little girl. Some of the family friends who testified indicated they were "perfect children."

To support his contention the district court should have awarded him primary physical care, Thomas first argues he has a superior ability to support Brady's relationship with Samuel and Libby. He asserts Brady has intentionally interfered with his relationship with the children by filing baseless domestic and sexual abuse allegations, denying visitation, demonstrating hostility during transfers of custody, and "generally casting [him] in a bad light." With regard to the domestic abuse allegation, Brady filed the petition not because Thomas had actually assaulted her but because she was fearful that he would. We agree with the district court neither party presented evidence at trial indicating whether a history of physical abuse exists as contemplated by section 598.41(3)(j). At trial Brady claimed she filed the petition based on advice from counsel. With regard to the sexual abuse allegation, the parties spent much time at trial and in their briefs discussing the founded sexual abuse report against Thomas with relation to Libby. We cannot find fault with Brady for taking Libby's statements seriously and reporting them to DHS. However, like the district court, we cannot conclude improper sexual contact occurred.

In considering Thomas's assertions, we note the dissolution proceedings in this case were hotly contested and contentious. While we do not condone Brady's actions in filing the domestic abuse petition based on vague allegations of abuse, the record indicates her actions were born from feelings of anger

normal during a divorce and not indicative of a continuing intent to interfere with Thomas's visitation with the children.

When awarding primary physical custody, we seriously consider which parent will encourage the most contact between the non-custodial parent and the children. *See In re Marriage of Liebuch,* 547 N.W.2d 844, 848 (Iowa App. 1996). The record further shows both Brady and Thomas acted inappropriately toward the other at times throughout the proceedings. This is a case where the evidence shows both parents have not been completely supportive of the other's relationship with their children. We note our concern about Brady's hostility toward Thomas during visitation exchanges in the presence of third parties. Likewise, we note Brady's testimony about Thomas's anger toward her. Such acrimony is unfortunately prevalent during dissolution proceedings. We expect both parents to overcome these attitudes, and to cooperate with each other in the future especially regarding issues involving the children.

Thomas next asserts he has the superior physical and emotional health and stability to provide for the long-range best interests of Samuel and Libby. He claims Brady's health issues prevent her from maintaining an active, stable, and healthy environment for Samuel and Libby. Ample evidence points to the contrary. Brady assumed the traditional role of wife and mother during the marriage, often despite grave medical problems. While we have some concerns about how she could perform the role of primary physical care provider if her condition were to deteriorate in the future, the evidence shows Brady is in better health now than she was when the children were babies. Like the district court,

we admonish Brady to be realistic about her health. Should there come a time when she can no longer physically or emotionally be Samuel and Libby's primary caregiver, Brady should turn to Thomas for assistance with the children's care. At the present time, however, with the evidence currently before us, it is clear Brady has adequate physical and emotional health to continue her role as primary caregiver for Samuel and Libby.

We must consider whether a parent has been the primary caregiver prior to, and during the pendency of, dissolution proceedings when making a custody determination. *See In re Marriage of Pothast,* 539 N.W.2d 199, 202 (Iowa App. 1995). Samuel and Libby have been in their mother's full-time care on a regular basis since they were adopted, and have a positive and stable relationship with her. Now that they are both of school age, the children spend the majority of their time with Brady being home schooled. The district court considered Brady's history of physical care by Brady and decided this factor made permanent primary physical care placement with her more in the children's best interests. In making this determination, the district court noted the desire to avoid further disruption to the lives of the children. We share this concern and believe the children should not be removed from their current environment. Brady lives in the family home where the children have lived for their entire lives. This also provides stability for Samuel and Libby who clearly need it after being in the midst of familial discord during the marital breakdown and dissolution proceedings.

Thomas also contends he should be granted primary physical care because the custody evaluators and long-term friends of the couple recommended him as the primary physical caretaker. The parties consulted several psychologists during the course of these proceedings: Dr. Michael Baker, Dr. Rolf Carlson, Dr. Dan Rogers, and Dr. Steven Mayhew. Only Dr. Rogers and Dr. Baker conducted custody evaluations and assessed both parents and both children. They concluded Thomas should be Samuel and Libby's primary caregiver. However, they agreed both Thomas and Brady are strongly motivated to be good parents and show no serious negative parenting styles. While we consider the opinions of expert witnesses, those opinions are certainly not controlling. *In re Marriage of Rebouche,* 587 N.W.2d 795, 799 (Iowa App. 1998); *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa App. 1995).

The lay witnesses, mostly family friends from church, mentioned Brady's role as primary caregiver and teacher in the children's lives. Many noted both Thomas and Brady were excellent parents. Witnesses also stated there was a strong bond between Brady and Samuel and Libby. Like most witnesses in these types of cases, they expressed positive and negative opinions about both parties. Therefore, resolution of the custody issue rests heavily on the credibility of the witnesses. We give deference to the position of the trial judge to assess the demeanor and credibility of the witnesses. *In re Marriage of Knight,* 507 N.W.2d 728, 731 (Iowa App. 1993).

We find the decision in this case is extremely close. Although the district court might have awarded primary physical care to Thomas, the operative facts

are essentially in equipoise. In such circumstances, the scales are tipped in Brady's favor by our rule giving weight to the district court's findings. *In re Marriage of McDowell*, 244 N.W.2d 238, 239 (Iowa 1976); *Wilson*, 532 N.W.2d at 496. We conclude the best interests of the children warrant placement of primary physical care with Brady. We note after considering all of the evidence and observing the parties and witnesses at trial, the guardian ad litem also recommended placing primary physical care with Brady. We affirm the district court's placement of primary physical care of Samuel and Libby with their mother, Brady. We also affirm the district court's decision granting liberal visitation rights to Thomas.

However, notwithstanding our disposition of this case, we have several concerns regarding the welfare of Samuel and Brady. The parties agreed during the marriage to home school Samuel and Libby. Thomas now contends the children should attend public schools because they are African-American and need to be exposed to their peers in the community. Kathleen Baysinger, a special education teacher in the public schools and Brady's home school advisor, opined home schooling was one of the best options for Samuel's education because of his ADHD diagnosis. She also testified Samuel is responding very well to a home school education and is progressing exceptionally. However, because Libby was not of school age at the time of trial, the parties presented no evidence as to whether home schooling would be equally beneficial for her. Our concerns echo those of the custody evaluators who indicated both Samuel and Libby feel isolated due to inadequate contact with their peers. We encourage

both parties to be vigilant of this situation and to take appropriate steps to include Samuel and Libby in the community. We also encourage the parties to utilize dual enrollment in public school when appropriate for activities and programs not otherwise available in the home.

IV. Attorney Fees.

A. Brady's Trial Attorney Fees. Brady incurred attorney fees in the amount of $14,061.31 at the trial level. The district court ordered Thomas to pay $7500 toward those fees. Attorney fees are not awarded as a matter of right. *In re Marriage of O'Rourke,* 547 N.W.2d 864, 867 (Iowa App. 1996). An award of attorney fees is based on the parties' respective needs and ability to pay. *In re Marriage of Lattig,* 318 N.W.2d 811, 817 (Iowa App. 1982). The district court has considerable discretion in awarding attorney fees. *In re Marriage of Schettler,* 455 N.W.2d 686, 689 (Iowa App. 1990). We will not interfere unless there is a manifest abuse of discretion. *O'Rourke,* 547 N.W.2d at 867. Though the parties have relatively equal amounts in monthly income, Brady lives on a fixed income while Thomas has the demonstrated capacity to increase his monthly income. Brady will have a significant attorney fee burden even after Thomas pays the portion ordered by the district court. Seeing no abuse of discretion on this issue, we affirm the attorney fee award.

B. Guardian Ad Litem's Fees. The district court ordered Thomas to pay the guardian ad litem's fees. Although Brady made the motion for appointment of the guardian ad litem, the record indicates Thomas did not resist the motion and apparently agreed such representation was necessary. Thomas was

unsuccessful in his efforts to gain primary physical care of Samuel and Libby and his ability to pay the fees exceeds that of Brady. We find no abuse of the district court's discretion in ordering Thomas to pay all of the guardian ad litem's fees.

AFFIRMED.