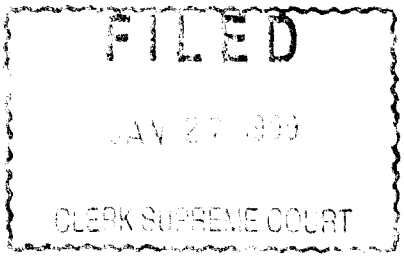
IN THE COURT OF APPEALS OF IOWA

No. 8-672 / 98-0946
Filed January 27, 1999



JILL MARIE BAKER,
Appellee,

vs.

LARRY DOUGLAS KING,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Father, Larry King, appeals from portions of district court order granting primary physical care of the parties' child to the mother, Jill Baker. **AFFIRMED.**

Charles P. Augustine of Dunakey & Klatt, P.C., Waterloo, for appellant.

Thomas W. Langlas of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

STREIT, J.

Father, Larry King, appeals the award of primary custody of his daughter, Jadyn, to Jadyn's mother, Jill Baker. Because we find it in Jadyn's best interest to remain with her mother, her primary caregiver since birth, we affirm.

I. Procedural Background & Facts.

Jill Baker and Larry King began living together in late winter 1994. Shortly thereafter, Baker became pregnant. The two were never married. Jadyn King was born in January 1995.

King graduated from the University of Northern Iowa. He is studying for a second degree in actuarial science and will graduate in 1999. King is engaged to be married to his current girlfriend.

Baker lives in Waterloo with her boyfriend, Chad Scarborough, and works thirty-five to forty hours per week, making six dollars per hour. She is pregnant with Scarborough's child and they plan to marry after the child is born. After the new baby's birth, Baker intends to stay home and care for the baby and Jadyn.

In April 1995, the couple moved to Des Moines because of a job opportunity for King. While in Des Moines, the couple's relationship was turbulent. King often used violence to control Baker when they had disputes. He threw things at Baker, left bruises on her arms from grabbing her, and slapped her in the face at least once. On one occasion, while in a fight, King punched a picture of Jadyn hanging on the wall and shattered the glass. He was emotionally controlling as well, demonstrated by

taking Baker's paychecks, insisting only his name appear on the apartment lease, and buying a house in his name only.

Both parties admit to past illegal drug use; King's involvement was greater than Baker's. King used marijuana, cocaine, methamphetamine, ecstasy, and steroids. He sold at least some of these drugs. Baker admits she used marijuana on occasion and tried cocaine once.

Baker and Jadyn moved to Cedar Falls in April 1996. King stayed in Des Moines. The parties worked out a visitation arrangement whereby they each kept Jadyn on alternate weeks. The arrangement did not work and was discontinued. Baker filed a petition to establish custody, visitation, and support in May of 1997. The trial court awarded Baker primary physical care of Jadyn with King receiving liberal visitation. King was ordered to pay child support of $50 per month, and contribute to Baker's attorney fees. King appeals.

II. Primary Physical Custody of Jadyn.

We review child custody determinations de novo. Review of the custody provisions of a divorce decree is de novo. Iowa R. App. P. 4. *See In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.; In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992). The controlling consideration in child custody cases is always what is in the best interests of the

children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). Although King and Baker never wed, the criteria for determining custody is the same as if the parties were married. *Heyer v. Peterson,* 307 N.W.2d 1, 7 (Iowa 1981).

The parent who can administer most effectively to the long-term best interests of the child and place them in an environment that will foster healthy physical and emotional lives is chosen as primary physical care giver. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997). We are not bound by the district court's findings but give them deference because the district court had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *See id.*

We identify numerous factors to help determine which parent should serve as the primary care giver. *See* Iowa Code § 598.41. Among these are the characteristics of the parents, as well as the capacity and desire of each parent to provide for the needs of the children. *Id.* Each factor, however, does not necessarily impact the decision with equal force. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997). To the contrary, some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Id.*

After de novo review of the record we determine it is in Jadyn's best interests for Baker to be awarded primary physical care of Jadyn. Several factors have entered into our decision, including Baker's status as primary caregiver of Jadyn; King's

admitted use of physical force to control Baker; and that Baker will best meet Jadyn's emotional and social needs.

Although King argues he was Jadyn's primary caregiver prior to the couple's separation, the record speaks otherwise. King does not dispute that until Jadyn was eight months old, Baker was Jadyn's primary caregiver. Baker and Jadyn moved out of King's residence when Jadyn was fourteen months old. When Jadyn was three years old, a trial court awarded King temporary visitation every weekend. Throughout Jadyn's relocations and changes in visitation, Baker remained Jadyn's primary caregiver and, as a result, has developed a stronger interpersonal relationship with Jadyn.

Baker's role as primary caregiver weighs heavily upon our decision to award her custody. The parent who has been the primary caregiver of the children during the marriage will not necessarily be designated by the court to be primary caregiver at the time of the divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the role the primary caregiver has played in the life of a child is given consideration in custody disputes. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). Allowing a parent to continue as the primary caregiver after the divorce gives continuity to the lives of children. *Id.*

Another factor which has weighed on our decision is what Jadyn's daily routine would be with Baker as opposed to King. Baker plans to stay home with

Jadyn and the new baby after the baby is born. She will keep Jadyn enrolled in a part-time preschool program to maintain her socialization skills. King is a full-time student at UNI and does not plan to stay in the home and care for Jadyn after graduation. He would be dependent on third parties for the majority of her care during the week. When possible, it is preferable to have a parent rather than a third party care for a child.

We have also considered the domestic abuse which occurred between King and Baker and King's pattern of drug involvement in coming to our decision. King contends Baker was as violent as he and that she sold and used drugs. The more credible evidence displayed it was King who was the impetus of the abuse and the illegal drug use, and only he sold illegal drugs. It appears both parties have mended their ways and do not currently use illegal drugs; however, King has never received counseling or treatment to help manage his anger or treat his extensive drug abuse.

Domestic abuse is a factor in determining the custodial parent. *In Re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997). Evidence of domestic abuse creates a rebuttable presumption against awarding custody to the abuser. *See In re Marriage of Ford*, 563 N.W.2d 558 (Iowa 1997). Untreated or repeated battering is given considerable weight in determining the primary caretaker and in some circumstances may foreclose an award of primary care to a spouse who batters. *Daniels,* 568 N.W.2d at 558.

King alleges Baker and Scarborough have an abusive relationship and it is likely Jadyn will be abused if she lives in their home. King filed a complaint with the Department of Human Services (DHS) alleging Jadyn was being abused in Baker's home. DHS found the complaint was unfounded. There is no substantial evidence in the record Baker and Scarborough have an abusive relationship and no evidence Jadyn has been harmed in any way by living in their home. To the contrary, the record shows Jadyn to be a bright, happy, well-adjusted child who relates well to others.

With all these factors in consideration, we find it in Jadyn's best interest that primary physical care be awarded to Baker, her primary caregiver since the time of her birth.

King claims the district court abused its discretion by ordering him to pay $500 for Baker's attorney fees. Iowa courts have considerable discretion in awarding attorney fees. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App.1991). We find no abuse of discretion in the award of attorney fees to Baker.

Baker contends she should be awarded appellate attorney fees. In determining whether to award appellate attorney fees we consider, among other things, the needs of the party making the request and the ability of the other party to pay. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App.1997). Both parties are financially strained. King is a student with limited resources. Baker makes a modest

living which will cease once her new child is born. King shall pay $750 toward Baker's attorney fees on appeal.

The trial court's ruling is affirmed in all respects.

AFFIRMED.

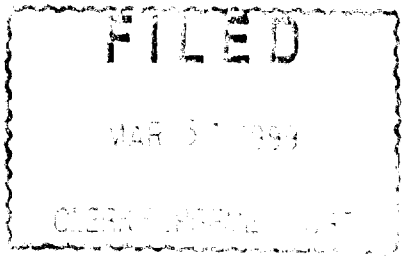
IN THE COURT OF APPEALS OF IOWA

No. 8-672 / 98-0946
Filed March 31, 1999

JILL MARIE BAKER,
Appellee,

vs.

LARRY DOUGLAS KING,
Appellant.



Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Father, Larry King, appeals from portions of district court order granting primary physical care of the parties' child to the mother, Jill Baker. **AFFIRMED.**

Charles P. Augustine of Dunakey & Klatt, P.C., Waterloo, for appellant.

Thomas W. Langlas of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

STREIT, J.

Father, Larry King, appeals the award of primary custody of his daughter, Jadyn, to Jadyn's mother, Jill Baker. Because we find it in Jadyn's best interest to remain with her mother, her primary caregiver since birth, we affirm.

I. Procedural Background & Facts.

Jill Baker and Larry King began living together in late winter 1994. Shortly thereafter, Baker became pregnant. The two were never married. Jadyn King was born in January 1995.

King graduated from the University of Northern Iowa. He is studying for a second degree in actuarial science and will graduate in 1999. King is engaged to be married to his current girlfriend.

Baker lives in Waterloo with her boyfriend, Chad Scarborough, and works thirty-five to forty hours per week, making six dollars per hour. She is pregnant with Scarborough's child and they plan to marry after the child is born. After the new baby's birth, Baker intends to stay home and care for the baby and Jadyn.

In April 1995, the couple moved to Des Moines because of a job opportunity for King. While in Des Moines, the couple's relationship was turbulent. King often used violence to control Baker when they had disputes. He threw things at Baker, left bruises on her arms from grabbing her, and slapped her in the face at least once. On one occasion, while in a fight, King punched a picture of Jadyn hanging on the wall and shattered the glass. He was emotionally controlling as well, demonstrated by

taking Baker's paychecks, insisting only his name appear on the apartment lease, and buying a house in his name only.

Both parties admit to past illegal drug use; King's involvement was greater than Baker's. King used marijuana, cocaine, methamphetamine, ecstasy, and steroids. He sold at least some of these drugs. Baker admits she used marijuana on occasion and tried cocaine once.

Baker and Jadyn moved to Cedar Falls in April 1996. King stayed in Des Moines. The parties worked out a visitation arrangement whereby they each kept Jadyn on alternate weeks. The arrangement did not work and was discontinued. Baker filed a petition to establish custody, visitation, and support in May of 1997. The trial court awarded Baker primary physical care of Jadyn with King receiving liberal visitation. King was ordered to pay child support of $50 per month, and contribute to Baker's attorney fees. King appeals.

II. Primary Physical Custody of Jadyn.

We review child custody determinations de novo. Review of the custody provisions of a divorce decree is de novo. Iowa R. App. P. 4. *See In re Marriage of Miller,* 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.; In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992). The controlling consideration in child custody cases is always what is in the best interests of the

children. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). Although King and Baker never wed, the criteria for determining custody is the same as if the parties were married. *Heyer v. Peterson,* 307 N.W.2d 1, 7 (Iowa 1981).

The parent who can administer most effectively to the long-term best interests of the child and place them in an environment that will foster healthy physical and emotional lives is chosen as primary physical care giver. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997). We are not bound by the district court's findings but give them deference because the district court had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *See id.*

We identify numerous factors to help determine which parent should serve as the primary care giver. *See* Iowa Code § 598.41. Among these are the characteristics of the parents, as well as the capacity and desire of each parent to provide for the needs of the children. *Id.* Each factor, however, does not necessarily impact the decision with equal force. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997). To the contrary, some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *Id.*

After de novo review of the record we determine it is in Jadyn's best interests for Baker to be awarded primary physical care of Jadyn. Several factors have entered into our decision, including Baker's status as primary caregiver of Jadyn; King's

admitted use of physical force to control Baker; and that Baker will best meet Jadyn's emotional and social needs.

Although King argues he was Jadyn's primary caregiver prior to the couple's separation, the record speaks otherwise. King does not dispute that until Jadyn was eight months old, Baker was Jadyn's primary caregiver. Baker and Jadyn moved out of King's residence when Jadyn was fourteen months old. When Jadyn was three years old, a trial court awarded King temporary visitation every weekend. Throughout Jadyn's relocations and changes in visitation, Baker remained Jadyn's primary caregiver and, as a result, has developed a stronger interpersonal relationship with Jadyn.

Baker's role as primary caregiver weighs heavily upon our decision to award her custody. The parent who has been the primary caregiver of the children during the marriage will not necessarily be designated by the court to be primary caregiver at the time of the divorce. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). However, the role the primary caregiver has played in the life of a child is given consideration in custody disputes. *In re Marriage of Burkle*, 525 N.W.2d 439, 441 (Iowa App. 1994). Allowing a parent to continue as the primary caregiver after the divorce gives continuity to the lives of children. *Id.*

We have also considered the domestic abuse which occurred between King and Baker and King's pattern of drug involvement in coming to our decision. King contends Baker was as violent as he and that she sold and used drugs. The more

credible evidence displayed it was King who was the impetus of the abuse and the illegal drug use, and only he sold illegal drugs. It appears both parties have mended their ways and do not currently use illegal drugs; however, King has never received counseling or treatment to help manage his anger or treat his extensive drug abuse.

Domestic abuse is a factor in determining the custodial parent. *In Re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997). Evidence of domestic abuse creates a rebuttable presumption against awarding custody to the abuser. *See In re Marriage of Ford*, 563 N.W.2d 558 (Iowa 1997). Untreated or repeated battering is given considerable weight in determining the primary caretaker and in some circumstances may foreclose an award of primary care to a spouse who batters. *Daniels,* 568 N.W.2d at 558.

King alleges Baker and Scarborough have an abusive relationship and it is likely Jadyn will be abused if she lives in their home. King filed a complaint with the Department of Human Services (DHS) alleging Jadyn was being abused in Baker's home. DHS found the complaint was unfounded. There is no substantial evidence in the record Baker and Scarborough have an abusive relationship and no evidence Jadyn has been harmed in any way by living in their home. To the contrary, the record shows Jadyn to be a bright, happy, well-adjusted child who relates well to others.

With all these factors in consideration, we find it in Jadyn's best interest that primary physical care be awarded to Baker, her primary caregiver since the time of her birth.

King claims the district court abused its discretion by ordering him to pay $500 for Baker's attorney fees. Iowa courts have considerable discretion in awarding attorney fees. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App.1991). We find no abuse of discretion in the award of attorney fees to Baker.

Baker contends she should be awarded appellate attorney fees. In determining whether to award appellate attorney fees we consider, among other things, the needs of the party making the request and the ability of the other party to pay. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App.1997). Both parties are financially strained. King is a student with limited resources. Baker makes a modest living which will cease once her new child is born. King shall pay $750 toward Baker's attorney fees on appeal.

The trial court's ruling is affirmed in all respects.

AFFIRMED.