IN THE COURT OF APPEALS OF IOWA

No. 0-919 / 10-1071
Filed February 9, 2011

IN RE THE MARRIAGE OF MEGAN M. JABENS AND PAUL A. JABENS

Upon the Petition of
MEGAN M. JABENS,
Petitioner-Appellant,

And Concerning
PAUL A. JABENS,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill, Judge.

Megan M. Jabens appeals the district court's order of joint physical care in the parties' dissolution decree. **AFFIRMED.**

Mark D. Fisher and Frank J. Nidey of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

John Mossman of Mossman & Mossman, L.L.P., Vinton, for appellee.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Megan Jabens appeals the physical care provision of the parties' dissolution decree, in which the district court awarded joint physical care[1] of the parties' three children. We affirm.

***I. Background Facts and Proceedings*.**

Paul and Megan were married in May 1999. They have three children together, born in 1999, 2004, and 2005. Early in the parties' relationship, Megan worked days and Paul worked second shift. At the time they had one child and shared in her care, with Paul caring for the child during the day and Megan caring for the child during the night.

In approximately 2001, Paul obtained a new position as a supervisor with his employer, which required him to work twelve-hour shifts Saturday through Monday. Paul also worked overtime. Megan continued working the day shift. The parties continued the same shared care arrangement.

In 2006, Paul obtained new employment. Following his orientation and training, Paul began working a rotating shift, where his work shifts varied from week to week but were scheduled a year in advance. Megan continued working the day shift. Paul cared for the children when Megan was at work and he was home, and Megan cared for the children when Paul was at work.

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[1] We note the district court actually referred to its physical care arrangement as "shared" rather than "joint" physical care. Although the terms are synonymous, we will refer to the arrangement in this opinion as "joint physical care," as set forth in the Iowa Code. *See* Iowa Code § 598.41(5) (2009) (allowing the court to award "joint physical care to both joint custodial parents upon the request of either parent"); *see also* Iowa Code § 598.1(4) ("Joint physical care" means an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child . . . .").

Megan filed for dissolution of marriage on September 22, 2008. While the dissolution proceeding was pending, the parties continued to reside together in the marital home, sharing in the care of the children until the home was sold in May 2009. The parties then began residing separately, and they shared visitation with the children.

During the pendency of the dissolution, a dispute arose during the parties' visitation schedule. On one occasion Paul kept one of the children longer than the parties' agreed upon time, and Megan then withheld the children from Paul completely for over a month, until the district court entered a temporary order setting a schedule. In its temporary order, the court placed temporary primary physical care[2] with Megan and set a visitation schedule for Paul, finding:

> [Paul's] work schedule is such that a "traditional" every other week [joint] care arrangement is not in the best interests of the children because it would require an unusual amount of non-family child care when [Paul] is at his place of employment, coupled with the acrimony between the parties.

The dissolution trial was held over two days in April 2010. Megan testified that Paul regularly drank during the marriage, but during a six-week period in 2004, Paul drank to a point of intoxication nightly. Megan testified she caught Paul and one of the children playing a drinking game, which Paul denied. Paul acknowledged he had received three convictions for operating a vehicle while intoxicated (OWI) prior to the parties' marriage and he was convicted of OWI in 2008. Paul testified he successfully completed treatment following his latest

[2] Although the term "primary physical care" is not defined in chapter 598 of the Iowa Code, we recognize the term is commonly used by both the bench and bar.

OWI. Paul further testified that due to having a stent put in his heart and medication he was taking, he was no longer able to drink.

Megan also testified Paul was verbally abusive to her during the marriage. Megan's family members testified that Megan had told them Paul verbally abused her, but Megan's sister testified she had only witnessed Paul make snide or sarcastic remarks to Megan. Paul denied that he verbally abused or threatened Megan during their relationship.

Paul testified that Megan failed at times to properly supervise the children when he was at work and that Megan spent a great deal of her time on the computer rather than with the children. A few of their previous neighbors testified to minor incidents with the children, wherein the neighbors stated Paul was at work and Megan had not properly supervised the children. Megan disputed their allegations.

Both Megan and Paul testified as to the closeness of Paul's relationship with the children, particularly the eldest child. Megan's and Paul's parents testified as to their support of their child in caring for the children after the dissolution was finalized.

In June 2010, the district court entered its decree and awarded the parties joint physical care of the children. The court found:

> Despite . . . friction during the marriage, . . . since they have split, Paul and Megan have been able to work together and communicate regarding visitation and other issues with the children. While there have been disagreements and disputes regarding the children during this time period, none of the disputes rise to a level that prevents the parties from successfully sharing the physical care of the children. Additionally, both parties have family willing to assist with child care when needed.

The district court concluded:

> After carefully considering the credible evidence presented in this case, the court finds awarding the parties joint legal custody and [joint] physical care is in the best interests of the children. Paul's work schedule is complicated, but predictable. Paul has a good job and indicated he is willing to give it up in order to have a more normal work schedule so that he could share in his kids' care. Financially providing for children is an important aspect of parenting. Paul should not be forced to give up a good paying job with good benefits simply because his work schedule does not conform to the standard 9:00 a.m. to 5:00 p.m., Monday through Friday format. The court finds the predictability of Paul's schedule and the willingness of family members to help with the care and transportation of the children will facilitate the successful execution of joint physical care in this case. The court is confident that Paul, Megan, and their respective families will make this work because they all have the children's best interests at heart.

The district court set forth a physical care schedule, in which the parties alternated physical care essentially every other week but starting on different days of the week based upon Paul's rotating shifts.

Megan now appeals.

***II. Scope and Standards of Review*.**

We review the district court's decision de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). We examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart,* 704 N.W.2d 677, 680 (Iowa 2005). We give weight to the district court's fact findings, especially regarding witness credibility, but they are not binding. *McKenzie*, 709 N.W.2d at 531.

***III. Discussion*.**

***A. Physical Care*.**

The sole issue on appeal involves the physical care provision of the parties' dissolution decree awarding the parties joint physical care of their children. Megan contends she should be awarded physical care because she "has historically been the primary care provider of the children," the parties cannot communicate and have a conflicted relationship, and Paul's "revolving and complex" work schedule does not provide the children with stability and continuity.

The primary consideration in any physical care determination is the best interests of the children. Iowa R. App. P. 6.904(3)(*o*). "[T]he courts must examine each case based on the unique facts and circumstances presented to arrive at the best decision." *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007). The following nonexclusive factors are to be considered when determining whether a joint physical care arrangement is appropriate: (1) "approximation," or what has historically been the care giving arrangement for the children between the parents; (2) the ability of the parents to "communicate and show mutual respect"; (3) the "degree of conflict" between the parents; and (4) the ability of the parents to be in "general agreement about their approach to daily matters." *Id*. at 697-99; *see also In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

If the court denies a request for joint physical care, "the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interests of the child." Iowa

Code § 598.41(5)(a) (2009). The court shall then determine placement according to which parent can minister more effectively to the children's long-term best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). "The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *Hansen*, 733 N.W.2d at 695; *see also In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998) ("The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other.").

Here, there is no dispute that both parties genuinely love and care for the children. Additionally, both parties are suitable custodians. The focus, therefore, is on whether the interests of the children are better served by substantial and nearly equal contact with both parents through a joint care arrangement or by naming one parent the physical care parent, and providing the other with visitation. After a de novo review of the record and considering the foregoing factors and parties' arguments, we agree with the district court that joint physical care is in the best interests of the children under the facts presented here.

The testimony at trial indicated that both parents worked outside the home throughout the children's lives, and they both historically shared in their children's care. Although the parties have had some difficulties in communicating with one another, the district court, which had the opportunity to listen to and observe the parties, came to the conclusion that none of their disputes rose to a level that would prevent the parties from successfully sharing the physical care of the

children. We find no reason to disagree with the district court's careful assessment of the issue. Additionally, although Megan argues that Paul's "complex" work schedule is disruptive and confusing to the children, Paul has been working a rotating shift since 2006. Paul's schedule may be untraditional, but it is known far in advance and thus relatively stable. Moreover, any other visitation or physical care arrangement would still need to be adjusted to accommodate Paul's work schedule. On balance, we find the ordered schedule serves the children's best interests as it provides the children with the maximum amount of contact with their two loving parents. On our de novo review of the record, we conclude the district court acted equitably in granting the parents joint physical care of the children.

***B. Appellate Attorney Fees*.**

Megan seeks an award of appellate attorney fees. We enjoy broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In exercising this discretion, we consider several factors: the financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id*. We decline to award appellate attorney fees in this case.

***IV. Conclusion*.**

On our de novo review of the record, we conclude the district court acted equitably in granting the parents joint physical care of the children. We decline to award attorney fees.

AFFIRMED.