IN THE COURT OF APPEALS OF IOWA

No. 1-315 / 10-1985
Filed June 29, 2011

Upon the Petition of

JESSICA FLANIGAN,
Appellee,

And Concerning

GREGORY J. GERWITZ,
Appellant.

Appeal from the Iowa District Court for Wapello County, Michael R. Mullins, Judge.

A father appeals, challenging the custodial provision of a decree fixing custody and visitation. **AFFIRMED AS MODIFIED.**

Heather M. Simplot of Harrison, Moreland & Webber, P.C., Ottumwa, for appellant.

Michael O. Carpenter of Gaumer, Emanuel, Carpenter & Goldsmith, P.C., Ottumwa, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Mullins, J., takes no part.

SACKETT, C.J.

Gregory appeals from the district court judgment and decree providing that his child's mother, Jessica Flanigan, should have primary physical care of their son, who was born in December of 2007. Gregory contends the district court should have ordered joint physical or shared care. Alternatively, Gregory contends additional visitation should be ordered. We affirm as modified.

Background. Jessica and Gregory are parents of a son, Gavyn, born in December of 2007. The parties were in a relationship and were living together prior to the child's conception. At the time of the child's birth Jessica, who had been working full time at an area nursing home, resigned her employment. She remained in the parties' home and was the child's primary care provider until July of 2008 when she returned to weekend employment at the nursing home. Gregory cared for the child on weekends while she worked. In August of 2008 Jessica began attending the area community college, working towards becoming a licensed practical nurse. She had twenty hours of clinic on Monday and Tuesday and classes on Wednesday and Thursday. During this time the child was in daycare. Jessica assumed substantial responsibility for delivering him and picking him up from a daycare provider. On weekends Jessica worked at the nursing home from two in the afternoon until ten at night. Gregory cared for the child during that period.

The parties established separated homes in July of 2009. They arrived at an agreement without court involvement to share care of their son. One week Jessica would have him on Monday and Tuesday. Then on Wednesday and

Thursday he would be with Gregory. Then he would spend Friday, Saturday, and Sunday with Jessica. The next week Gregory would have him on Monday and Tuesday, Jessica would have him on Wednesday and Thursday, and Gregory would have him on Friday, Saturday, and Sunday. Both parties were employed and/or in school while this arrangement was in place and both used the services of the same daycare provider. The parties utilized their shared care arrangement without court involvement until the hearing in August of 2010 on the petition Jessica had filed a shortly after the parties established separate residences, seeking to establish custody, visitation, support, and related matters.

At the August hearing Jessica contended she should have primary care and Gregory contended that the shared care arrangement should continue. Jessica advanced a number of reasons against Gregory having shared care. She recognized the importance of Gregory in their child's life but wanted Gregory's time with the child to be on her terms. Gregory supported a shared care arrangement and is supportive of Jessica's presence in the child's life.

In October of 2010 the district issued an order that provided for joint legal custody and placed Gavyn in Jessica's physical care. Gregory was ordered to pay child and medical support. The court provided substantial visitation for Gregory, but set the following specific minimum visitation if the parties could not agree, saying: "Absent agreement of the parties," Gregory's visitation is "not less than" the following:

> Alternating weekends from 6:00 p.m. Friday until Monday morning.
> Mid-week either Monday or Wednesday from 5:00 to 8:00 p.m., depending on whether it is the week following or the week before his weekend visitation.

Alternating major holidays.
Three, two-week periods during summers.

Scope of Review. Our review of equity cases is de novo. Iowa R. App. P. 6.907. We give weight to the findings of the district court, "especially when considering the credibility of witnesses," but are not bound by them. Iowa R. App. P. 6.904(3)(*g*). Generally, we give considerable deference to the district court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

Physical Care. Gregory contends the child should have been placed in the parties' joint or shared physical care. Joint physical care is an option if it is in the best interest of the child.[1] *In re Marriage of Hansen*, 733 N.W.2d 683, 692 (Iowa 2007). The district court is charged with determining the best interest of the child and the child's best interest is the overriding consideration. *Id*. at 695-96; *see also Fennelly v. Breckenfelder*, 737 N.W.2d 97, 101 (Iowa 2007).

Gregory recognizes Jessica assumed the majority of his son's care in the child's early months of life but argues that since that time the parties have shared the child's care as well as utilized childcare.

The district court found this to be a close case and we agree. Gregory and Jessica are dedicated, hard-working people who provide excellent care for their son. Gregory holds a Bachelor of Science degree in welding engineering

[1] While a best-interest standard is laudable, realistically the best interest of this child would be served by living with both of his loving parents in a stable home. This is not an available option. Rather, we need to decide whether the child's interests are better served by being in the primary care of his mother or in the joint physical care of both of his parents.

and metal fabrication from an eastern college. He has a well-paying job with John Deere in Ottumwa and provided support for Jessica and their son during the early months Jessica stayed home as a full-time mother. Jessica is taking classes and was employed before the child was born. Once she returned to work and school the care was shared by Jessica, Gregory, and the child care provider. After the parties established separate residences, Jessica and Gregory shared care of their son. For nearly a year and a half prior to trial the parties both were outside their homes for work and/or educational purposes and each assumed the role of caretaker. In the year prior to the hearing they shared care on a nearly equal basis without court involvement. While each parent has certain strengths and weaknesses, we cannot say that at the time of trial either party had the role of a primary caregiver. *See In Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007). There the court found the time spent with the parents was mitigated because the child spent a considerable portion of his life in daycare or preschool and noted that the short spans of time where the mother stayed home with her son was outweighed by the amount of time he had spent in daycare or preschool while both parents worked.

The district court, complimented the parties for working hard and trying to communicate and show mutual respect and sharing joint outings and holiday gatherings with the child, but noted concern that while they have managed conflict, they have not reduced the conflict—just kept it below the surface. The court noted this was done, "perhaps under the pressure of trial considerations."[2]

[2] We give more weight to the parties' history of cooperation than opinions that there will be future conflict.

The district court also pointed out that Gregory originally was not compliant with medications that the child apparently needed to control allergies and sinus infections, but he is now more compliant. The court also noted the parents disagreed about the approach to potty-training including, whether they should use pull-ups or underwear, and whether the child should still be in a crib or a bed. Jessica testified she used time-outs and Gregory spankings, although Gregory denied using any physical discipline. Gregory believed the communication was good, although they argued about little things, and he believed Jessica was exaggerating the conflict between them. They have, among other things, accommodated each other's schedules, shared a birthday party, and exchanged the child without difficulty. There is no evidence that either party has ever harmed the child.

Jessica complains the first time Gregory had the child alone while the couple was still living together that he called her because he could not find a matching bottle top and needed to know how long to warm food or milk for the child. She also complained that originally he did not understand how to deal with diapers but that he did get in the routine. She testified that generally she and Gregory disagreed about household chores and, while they lived together, she felt she bore the burden practically alone. Disagreements of this kind between parents, even those living in the same household, are not unexpected. It is difficult to imagine a child would be harmed by wearing pull-ups one week and underwear the next and sleeping in a crib one week and in a child's bed the next.

Both parties grew up on the east coast. Gregory got a good job in Iowa and Jessica came to Iowa to be with Gregory. Both indicate a desire to return there. If Jessica moves Gregory would plan to move to be close to her.

Gregory testified he respects Jessica. There was testimony Gregory gets along with people and gets along at work, he values Jessica as the child's mother figure, and that he is a caring and thoughtful dad.

After a thorough review of the record, we find there is no reason to conclude the existing communication or level of respect between the parties would be a significant impediment to joint physical care. *See Berning*, 745 N.W.2d at 93. The child has a strong bond with each parent, and it is in the child's interest that these bonds continue. Both parents intend to continue working outside the home, Jessica as a nurse when she completes her education, and Gregory in a job similar to the one he now holds. Consequently, they both will need to utilize child care. The parties have good communication and are committed to having the other parent in their child's life. Potentially they have the ability to structure a shared care arrangement that would minimize the need for outside child care.

We modify to provide the parties have joint physical or shared care. If they cannot agree to a program that allows each to have equal time with the child, then they shall exchange custodial care on a weekly basis except in the summer when each should have the child for an uninterrupted two-week period and they shall alternate major holidays.

We remand to the district court to fix child support. We do not retain jurisdiction. We award no appellate attorney fees. Appellate court costs should be allocated one-half to each party.

AFFIRMED AS MODIFIED.