IN THE COURT OF APPEALS OF IOWA

No. 1-367 / 10-1984
Filed July 13, 2011

Upon the Petition of

MICHAEL A. PETESCH,
Petitioner-Appellant,

And Concerning

SHANNAN J. FITZPATRICK,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Michael A. Petesch appeals the grant of physical care of his daughter to the child's mother, Shannan Fitzpatrick. **AFFIRMED AS MODIFIED.**

Robert Joseph Murphy of Murphy Law Office, Dubuque, for appellant.

Natalia Hope Blaskovich of Reynolds & Kenline, L.L.P., Dubuque, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Michael A. Petesch appeals, challenging the grant of primary physical care of his daughter, born in February of 2008, to the child's mother, Shannan Fitzpatrick. He contends he should either have primary physical care of the child, the parties should have joint physical or shared care, or he should have extraordinary visitation. He also contends the district court erred in not changing his daughter's last name pursuant to his request. We affirm as modified.

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).

BACKGROUND AND PROCEEDINGS. Michael, who was twenty-four, and Shannan, who was thirty-four at the time of trial, established a common home in July of 2007. At the time Shannan was pregnant with Michael's child. There were problems with the pregnancy and the child was delivered by cesarean section two months early. Less than four pounds at birth, she spent some five weeks in the hospital. She was first brought to her parents' home in mid-March of 2008. In June of that year financial difficulties caused Michael to move in with his parents and Shannan to move in with her mother. The parties' romantic relationship ultimately ended.

In April of 2009 Michael filed a petition seeking physical care of his daughter with Shannan having liberal visitation. Shannan responded seeking physical care and child and medical support.

In June of 2009 Michael filed an application for temporary custody of his daughter. He represented that he had full-time employment and the means to support the child. He alleged the child then lived with Shannan and he sought temporary joint legal custody of his daughter.

On December 2, 2009, the parties filed with the court a temporary stipulation. They agreed that they have joint physical care of the child and that she reside with Michael from Sunday at 11 a.m. to Monday at 7 p.m. and from Thursday at 11 a.m. until Friday at 7 p.m. and that the balance of the time she would be with Shannan or in day care. Michael was to pay Shannan $216 a month for child support, provide health insurance for the child, and pay half of all medical expenses not covered by insurance.

The matter came on for hearing on September 13 and 14 of 2010. On October 27 the district court filed its decree. At the time of trial Shannan had left her mother's home and Michael was living with a woman to whom he was engaged.

The court placed the child in the parties' joint custody. The court found both parents capable and noted they each provide food, shelter, and nurturing for the child and both wished to be her primary custodian. The court also found that Shannan had been the child's primary care giver and named Shannan as the primary custodian. The district court found that communication between the

parties was problematic, noting that Michael testified about seventy percent of his communications with Shannan were not good and there were a number of issues the parties are unable to agree upon. Most particularly, the court pointed out a disagreement about potty-training where the parents had a disagreement over whether pull ups or training pants should be used, noting the parties brought it up despite the fact it was a moot issue.[1]

One of Michael's primary concerns is that Shannan is a recovering alcoholic. She admittedly had a serious problem with alcohol. At the time of trial she testified she had been sober for sixteen months and a day. She has religiously attended AA meetings since May 11, 2009, and has an excellent relationship with her sponsor with whom she frequently communicates. Michael's other concerns are that Shannan has mental health issues. According to Shannan's therapist Shannan suffers from depression and anxiety, managing stress and coping skills, and is stressed by school, parenting, and work. The therapist also testified Shannan has problems with sleep, nervousness, worry, sadness, and frustration, and has difficulty concentrating. Shannan has been on a series of different medications and currently takes Prestique and Clonazepam and sees a therapist twice weekly. The district court found that none of these conditions negatively impact her parenting ability. The court noted Shannan was responsible enough to get help for her problems and she takes appropriate medication and regularly attends AA meetings.

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[1] Whether the child wears pull ups when with one parent and training pants with the other does not seem to an issue of such magnitude as to preclude an award of shared care and we give this fact little if no consideration.

The court, in denying shared care and awarding primary care to Shannan said:

> [B]ased primarily on the history and pattern of care giving to date. Shannan has been the primary caregiver since [the child's] birth, taking care of her on a daily basis, shopping for her needs and making her doctor and dentist appointments. She has the support of her mother, she has been involved with [the child's] care and who sees her regularly. Shannan is not perfect, but in the Court's view she has succeeded as a single parent.
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> Michael is not perfect either, but he also has succeeded in his parental role. Although he has not spent as much time caring for [the child] as Shannan has, it appears to the Court that the time he has spent with her has been quality time. A relationship with her father is in [the child's] best interest, and that relationship can and should be fostered through extraordinary visitation.

JOINT OR SHARED PHYSICAL CARE. Michael 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[2]. *In re Marriage of Hansen*, 733 N.W.2d 683, 692 (Iowa 2007).

Michael, at the time of trial, was employed by Sara Lee in Dubuque and worked Tuesday, Wednesday, Thursday, Saturday, and Sunday, from 2 a.m. until 10 a.m. He has had steady employment in his adult life.

Shannan has worked at different jobs and has tried different educational programs. At the time of the dissolution hearing she was taking seventeen hours of course work, with all her classes on Tuesdays and Thursdays, and working at a restaurant on Friday and Sunday.

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[2] 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.

This is a close case. We recognize and give weight to the fact that the child has spent more time since birth in Shannan's care than in Michael's. We have concerns about Shannan's mental state but consider that she is active in AA, has a strong relationship with her sponsor, and visits with a therapist every two weeks as mitigating factors. We are bothered by evidence she has not been particularly supportive of Michael's relationship with the child.

Michael is stable. He is engaged to a woman, and they share a home. She is supportive of Michael's relationship with his daughter, and she has a good relationship with the child.

We agree with the district court that the difficulty in communicating that the parties recognize militates against a shared care relationship. Giving the required deference to the district court, we affirm the award of physical care to Shannan.

EXTRAORDINARY VISITATION. Michael contends if he does not received shared care that he should have extraordinary visitation. The district court said that Michael's relationship with the child can and should be fostered through extraordinary visitation.

The district court provided that:

> Michael shall have regular visitation every week from 10 a.m. Wednesday to 9 a.m. Thursday. He shall also have visitation every other weekend from Friday at 6 p.m. to Monday at 9 a.m.

In addition, the district court provided a specific schedule for visitation that results in the parties basically sharing holiday time and provides that Michael shall have a two-week summer visitation.

Michael contends the court, in fixing visitation, did not consider that his days off work are Monday and Friday. He also contends the court did not address "Christmas or spring break." He contends his visitation should be increased to include one-half of the summer and one-half of school breaks. He also contends his visits should be better coordinated with his free days. Unfortunately, he does not give us any suggestions on how his work days and visits would be better coordinated.

Michael is given Christmas day in odd-numbered years and Christmas Eve in even-numbered years. We find no reason to modify that visitation provision. We do believe that Michael should have additional summer visitation. We increase his summer visitation to four weeks to be taken two weeks at a time. Michael shall advise Shannan as soon as possible and in writing of the weeks he wishes to take in the summer of 2011. Beginning in calendar year 2012 Michael shall advise Shannan in writing before April 15 of each year of the weeks he intends to take. We modify the decree accordingly.

REQUESTED NAME CHANGE. Michael contends the district court erred in not changing his daughter's last name. At or near the close of the hearing Michael's attorney said he wanted to address Michael's request for a name change. Shannan's attorney correctly pointed out there was no mention of the request in Michael's petition and objected for lack of notice to it being considered as a part of the proceedings then before the court. Michael's attorney responded that because they were in equity it did not have to be pleaded.

The district court said, "All right. I will take that issue under advisement." The district court did not address a name change in its ruling. Michael filed two post-trial motions but did not bring the issue of the name change to the district court's attention and it was not addressed by the district court. When a court ruling fails to address an issue, a party must preserve error by filing a post-trial motion. *See In re N.W.E.*, 564 N.W.2d 451, 455-56 (Iowa Ct. App. 1997). In order to preserve error, a party seeking to appeal an issue presented to, but not decided by, the district court, must call the court's attention to the issue. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). The record must show the court was aware of the claim or issue, and decided it. *Id.* A party may file a post-trial motion, such as a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), to draw the court's attention to its failure to rule on an issue. *Id.* at 539. Error on this issue is not preserved and we do not address it.

COSTS. Cost on appeal shall be paid one-half by each party. We award no attorney fees.

AFFIRMED AS MODIFIED.