IN THE COURT OF APPEALS OF IOWA

No. 1-835 / 11-0994
Filed November 23, 2011

IN RE THE MARRIAGE OF CORY ROBERT CLEVENGER AND SHERRI CLEVENGER

Upon the Petition of
CORY ROBERT CLEVENGER,
Petitioner-Appellant,

And Concerning
SHERRI CLEVENGER,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Darell Goodhue, Judge.

Cory Clevenger appeals from the physical care provision of the parties' dissolution decree. **AFFIRMED.**

James S. Blackburn of Williams & Blackburn, P.L.C., Des Moines, for appellant.

Catherine Dietz-Kilen of Harrison & Dietz-Kilen, P.L.C., Des Moines, for appellee.

Heard by Tabor, P.J., Mullins, J.J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

Cory Clevenger appeals the physical care provision of the October 2010 decree dissolving his marriage to Sherri Clevenger. He contends he and Sherri should have joint physical care of their three children. Considering Cory's reliance on Sherri as the primary parent during the marriage, and Sherri's pre-separation involvement with the children compared to Cory's lack thereof, we find the children's long-term best interests will be more effectively ministered to by placing their physical care with Sherri than by placing them in joint physical care. Cory argues that if joint physical care is not ordered, then he should be awarded additional visitation. We affirm the district court's visitation schedule, finding it provides Cory with a substantial and reasonable amount of overnights and other time with the children, particularly given the court's well-reasoned preference under the facts to avoid overnights followed by school days. We affirm the ruling of the district court.

I. Background Facts and Proceedings.

Cory and Sherri Clevenger were married in April 1996. They have three children: born in June 2000, March 2003, and February 2008. The older two children attend school and the youngest attends daycare. Both parties are thirty-nine years old and are in good health, other than Cory's high blood pressure, high cholesterol, and diabetes. However, beginning in 2008 Cory has worked out and lost weight, and these issues became more manageable for him.

Both parties are employed: Cory works for Nationwide Insurance, and Sherri works for Pioneer Hi-bred. Cory travels occasionally for work. During the marriage, Sherri turned down advancements offered by her employer to allow her

to maintain an extremely flexible schedule.[1] Sherri would work from home for about an hour before the children awoke, take the children to school/daycare, and at times pick them up after school. Sherri stayed home when the children were ill and unable to go to school. She also arranged and transported the children to doctors' appointments. Cory and Sherri alternated who stayed home with the children on snow days. Both parties were involved in the children's progress at school. Cory coached the middle child's soccer team.

Cory filed for divorce in April 2010. He moved out of the family home, but lives close enough to the family home that he can provide transportation to the children's school. The district court entered a temporary order in May 2010, ordering the children while still in school to be with Sherri from 7:00 p.m. each Sunday through Friday, and then spend each weekend with Cory. When the school year ended in June, the children were to spend alternating weeks with each parent, with the exchange taking place on Friday evening, and each parent having visitation with the children on Wednesday evening from 6:00 p.m. to 9:00 p.m. on those weeks the children were with the other parent.

The dissolution trial was held on September 30 and October 1, 2010, the court filed written findings and conclusions shortly thereafter, and the decree directed by the court was not entered until several months later. The court found both Cory and Sherri are good parents and are more than capable of meeting the children's daily needs. Ultimately, the court placed responsibility for physical care of the children with Sherri. In reaching its decision, the court explained:

[1] At trial, Cory described Sherri's job as "extremely" flexible.

> The primary issue in this matter revolves around child custody and visitation. The evidence indicated that when the parties were together, Cory may have provided more childcare than the traditional father. It was fairly clear, however, that Sherri has been the primary care provider. She has worked on a flexible schedule which allowed her to work from home early in the morning, then get the children up, take them to school, and take off time when doctors' appointments or school activities required her presence. When the children were ill and unable to go to school, once again, Sherri is the one who would take time off in order to care for them.

The district court set forth a visitation schedule for Cory that included: (1) During the school year (a) every other weekend from when school is out (or as soon as he can pick up the children) until Sunday at 6:00 p.m., and (b) every weekend on which he does not have the children for the weekend from when school is out on Friday (or whenever he can pick up the children) until noon on Saturday[2]; (2) alternating holidays; and (3) five weeks each summer.[3]

Cory filed an Iowa Rule of Civil Procedure 1.904(2) motion to reconsider, amend, enlarge, or modify the court's ruling. He requested the court grant the parties joint physical care of the children, or, in the alternative, allow him more than "the traditional every other weekend and one night per week" visitation. Sherri resisted the motion. In November 2010, the court entered its order on the motion, confirming its previous ruling. In the order, the court further explained its physical care decision:

> [T]he Court's temporary order and permanent decree both coincided in an effort to give the children a home base with their historical primary care provider when overnights were followed by

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[2] Sherri was allowed to eliminate Cory's overnight Friday visitation three times throughout the calendar year by giving Cory a thirty-day written notice.

[3] The district court ordered that Cory have such reasonable visitation as to which the parties may agree, and the schedule goes into effect only in the absence of an agreement. Cory thus might have more visitation than provided by this schedule.

> school days while giving the other party substantial visitation. Cory's contention that he is receiving less than customary visitation is simply inaccurate. He will have the children for a period of time on almost every weekend and extensive summer visitation.
>
> In summary, it is Sherri's pre-separation heavy involvement and Cory's lack of pre-separation involvement, Cory's reliance on Sherri as the primary parent, and the lack of any co-parenting plan except for the skeleton laid out in the temporary order that are the critical factors in the Court's determination that joint physical care is not appropriate.

Cory now appeals the physical care provision of the dissolution decree.

II. Standard of Review.

Review of a dissolution case is de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). We are not bound by the district court's findings of fact, but we give them deference because the district court has a firsthand opportunity to view the demeanor of the parents and evaluate them as custodians. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). Decisions are primarily based on the circumstances of the parties in the case, so precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

III. Physical Care.

Cory contends the district court erred in failing to order joint physical care of the parties' three minor children. He argues the district court's physical care decision is "restrictive," "penalizes the children from contact with their father," and "den[ies] the girls the fortunate opportunity to interact with and learn from two loving parents." Cory emphasizes "there is not much negative to report on the parental habits and skills of the parties" and "there is nothing significant in the record which would work against shared care in this case."

Specifically, Cory argues the court should have ordered joint physical care as it had in its temporary order, rather than place physical care of the children with Sherri as it did in its final order. He argues "[t]he 4 months of week-on, week-off custody that the court ordered in its temporary order seems to have generally gone as well for the children as did the years of living with both parents under the same roof." Cory does not acknowledge the testimony that the youngest child, in particular, was adversely affected by the week-on, week-off care arrangement. He also does not acknowledge the court's temporary order took place mostly over the summer—beginning in June when the school year ended and ending just after the beginning of the school year.

As the district court explained, the temporary order allowed each party to establish they were suitable custodians, but was not a determination of what was in the best interests of the children on a permanent basis. And in reaching its final physical care decision, the court stressed the importance for these children to have "a home base with their historical primary care provider when overnights were followed by school days while giving the other party substantial visitation."

The primary consideration in determining the placement of a child is the child's long-term best interests. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The court is guided by the factors set forth in Iowa Code section 598.41(3) (2009), *see Hansen*, 733 N.W.2d at 696 (stating the custodial factors in section 598.41(3) apply equally to physical care determinations), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). "Gender of the respective parents is irrelevant." *Murphy*, 592 N.W.2d at 683. The ultimate objective is to place the children in the environment most likely

to bring them to healthy physical, mental, and social maturity. *Hansen*, 733 N.W.2d at 695. With these principles in mind, we conclude the district court was correct in placing the children's physical care with Sherri.

As the district court recognized, both parents have remained committed to their respective relationships with the children. It is clear both parties love the children and are more than capable of fulfilling their daily needs. Both parents shared in the children's upbringing.

However, the court found the scales tipped in favor of Sherri primarily based on her role over more than a decade of being the primary care provider for the children. Although the court observed that Cory "may have provided more childcare than the traditional father," the court found it clear that Sherri "has been the primary care provider." Indeed, the court noted that Cory relied on Sherri for the majority of pre-separation parenting responsibilities, including most of the children's day-to-day care, staying home with the children when they were ill, transporting the children to and from school and daycare, and organizing the children's appointments and activities. Cory became more involved with the children after the parties' separation, but as the court observed, Cory's "interest in child care seems to be late in arriving."

Fortunately, communication does not appear to be a problem for the parties. Yet Cory states that "Sherri has adopted a punishing attitude towards [him] since the divorce began in the spring of 2010 and when he disclosed to Sherri that he had a relationship with another woman." He alleges that "Sherri's testimony made it apparent that she seems to want to restrict Cory from seeing the children." We acknowledge that the court is to consider "the denial by one

parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement." Iowa Code § 598.41(1)(*c*); *see also In re Marriage of Shanklin*, 484 N.W.2d 618, 619 (Iowa Ct. App. 1992) ("In reaching our decision we must consider which parent will encourage the most contact between the noncustodial parent and the child."). However, Cory cites no specific examples of Sherri's "restrictive" behavior, and we find his claims to be unsupported by the record. We also find it telling that the district court's orders did not cite such concerns.

In close cases, we give careful consideration to the district court's findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495–96 (Iowa Ct. App. 1995). We give considerable deference to the district court's credibility findings and weight of the evidence determination, as the district court had the benefit of hearing and observing the parties firsthand. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("[The district court] is greatly helped in making a wise decision about the parties by listening to them and watching them in person. In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.").

Upon our review, we agree with the district court's decision that physical care with Sherri will best provide for the children's long-range best interests. The district court had the opportunity to consider the evidence, view the parties, and reach its conclusion. We accordingly affirm the court's decision to place physical care of the children with Sherri.

IV. Visitation.

Cory also argues that if joint physical care is not ordered he should be awarded additional visitation. Cory does not appeal the summer (five weeks) and holiday (alternating holidays) visitation provisions. Rather, he focuses on the weekly school-year visitation, which he describes as "a harsh and almost punitive schedule." Cory does not set forth a specific request, but contends this court should "adopt a visitation schedule that comes as close to shared care as possible." As support for his contention, Cory states "the parties can communicate," "there have been no issues with transfers or transportation," he is "a loving attentive father," and "[t]he girls deserve substantial continuing contact with [him]."

The district court's visitation schedule includes two overnights every other weekend and one overnight on Friday of the other weekends (in addition to alternating holidays and five weeks of summer visitation—provisions Cory does not appeal). Sherri is allowed to eliminate Cory's overnight Friday visitation three times throughout the calendar year by giving Cory a thirty-day written notice, in order to allow Sherri, for example, "to take the children to see her family in Nebraska." The district court had the chance to review its order regarding the visitation schedule in its ruling on Cory's rule 1.904(2) motion. The court confirmed its ruling, and observed that "Cory's contention that he is receiving less than customary visitation is simply inaccurate." We agree. The visitation schedule in this case is neither "punitive" nor "restrictive," and allows Cory a substantial amount of time with the children, considering the court's preference "to give the children a home base with their historical primary care provider when

overnights were followed by school days."[4] In fact, the Saturday mornings that Cory will have with the children on the every-other-weekend that he does not have them for the whole weekend is time he would not have with them if he exercised overnight visitation on a comparable number of nights followed by school days. We affirm the district court's visitation schedule.

V. Appellate Attorney Fees.

Sherri seeks an award of appellate attorney fees. Cory resists Sherri's request. 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.* Cory earns a gross salary of $72,000 per year, and Sherri $52,000 per year. We decline to award appellate attorney fees.

Costs of this appeal are taxed to Cory.

AFFIRMED.

[4] Both parties testified about the oldest child's ADHD, tutoring, and her difficulty in completing homework. In addition, there was testimony that both older children were not as organized for classes or school activities following overnight visitation, and that all children were not as rested following overnight visitation.