IN THE COURT OF APPEALS OF IOWA

No. 1-879 / 11-0978
Filed December 21, 2011

IN RE THE MARRIAGE OF SARAH JANE POHL AND TRENTON JOHN POHL

Upon the Petition of
SARAH JANE POHL,
Petitioner-Appellee,

And Concerning
TRENTON JOHN POHL,
Respondent-Appellant.

Appeal from the Iowa District Court for Boone County, Kurt J. Stoebe, Judge.

Appeal from the child custody provision of the decree dissolving the parties' marriage. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Stephen M. Terrill of Terrill, Richardson, Hostetter & Madson Law Offices, Ames, for appellee.

Heard by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

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

MAHAN, S.J.

Trenton (Trent) Pohl appeals from the decree dissolving his marriage to Sarah Pohl, contending the court erred in not placing the children in his "sole physical care."[1] We affirm.

I. Background.

The parties began dating in 1998 when Trent was in high school and Sarah was in college. After Trent's graduation in 1999, the couple began cohabiting in what became the marital home. Trent and Sarah married in September of 2001. They purchased the home from Sarah's mother in 2002. The parties have two minor children, Taryn, born in February of 2008, and Sydney, born in January of 2010.

Sarah filed a petition for dissolution of marriage in April of 2010. Trent filed his answer in August. The parties continued to live together in the family home, but conflict increased. In November of 2010, Sarah requested temporary custody of the children and possession of the marital home. Trent resisted and sought temporary custody of the children. In December, the court granted joint legal custody and temporary shared physical care of the children, with the parents having alternating four-day periods caring for the children in the home. The four-day rotation increased tensions in the family to the point that at the time of trial, the court noted "there was virtually no civil communication between the parties" and shared physical care was not a viable option.

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[1] Possession of the marital home was raised as an issue on appeal, but the parties agree it is moot. We do not address it.

After a three-day trial, the court issued its "judgment" dissolving the marriage, dividing the marital property and debts, giving the parties joint legal custody of the children, placing the children in Sarah's physical care in the family home, and setting Trent's child support obligation and visitation. Trent appeals.

II. Scope and Standards of Review.

We review dissolutions of marriage de novo. Iowa R. App. P. 6.907; *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). "Precedent is of little value as our determination must depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Physical Care of the Children.

Trent contends the district court erred in placing the children in Sarah's physical care instead of his.

1. Credibility. He first argues the court's credibility assessment was faulty because Sarah's untimely response to discovery "clouded the district court's evaluation of the case." Trent asserts the record does not support the court's credibility determination, pointing to how Sarah's demeanor differed between direct and cross-examination.

The district court made explicit, detailed credibility findings. We generally 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). In this case, the court heard hours of testimony from both parties and had ample time to form an opinion concerning the credibility of each witness. Trent argues that Sarah's demeanor differed between direct examination and cross-examination. Having read the entire transcript, not just the substantial excerpts included in the appendix, we can observe that both Trent and Sarah differed in how they responded to direct examination and cross-examination. Both tended to give short, sometimes evasive, not always consistent answers on cross-examination. But we have only the printed record of what was said as a basis for evaluating the parties' credibility. Even with just the printed record, we fully agree with the district court's determination that Sarah is more credible than Trent. Given the district court's opportunity to watch and listen to the parties, in addition to considering what they said, we give weight to its determination Trent was not as credible as Sarah.

2. Best Interests. Trent next asserts the court's decision to place the children in Sarah's physical care rather than his is not in their best interests. He characterizes Sarah as "distant and disinterested in caring for them" in contrast to his world "revolv[ing] around them."

The court placed the children in the joint legal custody of Trent and Sarah. *See* Iowa Code § 598.41(1) (2009). It does not appear either party challenges

the legal custody. In its temporary order, the court provided for the parties to have alternating four-day periods of physical care of the children in the family home. The court determined from the experience of this family during the temporary period that joint physical care is not a viable option for this family. We have reviewed the nonexclusive factors listed in section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), and the evidence from the temporary period. We agree with the court—and the parties—that joint physical care is not an option in this case and would not be in the best interests of the children.

The court, based on the factors in section 598.41(3) and (5)(a), determined the “most viable option” was “primary care in Sarah.” Although we review numerous factors in determining which parent should have physical care of a child, *see id.* § 598.41(3); *Winter*, 223 N.W.2d at 166–67, our primary consideration, is the best interests of the child. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003). Specifically, we look to which parent can minister most effectively to the child’s long-term interests. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). We also consider the emotional and environmental stability each parent offers. *Id.* at 762. There is no inference favoring one parent over the other. *Decker*, 666 N.W.2d at 177. The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain physical care in an original dissolution proceeding. *Id.* While not the single factor in determining which placement would best serve the

children's best interests, we give significant consideration to placing them with the physical caregiver. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

The record reveals Sarah was the primary caregiver for both children prior to the rotation in the temporary period. She was the main provider for the family. All things considered, we believe Sarah will do a better job raising the children and provide them with more emotional and environmental stability. Sarah has continued to care for the children and has drawn on family support during the temporary period, thus laying a stable foundation for the children's care. We recognize that Trent loves his children and wants to be a good father to them, but he has not established the same record of caring for them when he had the opportunity prior to the separation and temporary rotation during the pendency of this action. We conclude the factors weigh heavily in favor of Sarah having physical care of the children.

3. Supporting Relationship with Parent. Finally, Trent argues he is more likely to support Sarah's relationship with the children than she is to support his. He points to photos being removed or turned around during Sarah's four-day rotation in the home. We note the record contains plenty of negative testimony from both parties. It does not appear to us that either party had done much during the pendency of the dissolution or will do much in the future to support and encourage the children's relationship with the other parent beyond what the court orders. Although support of the other parent's relationship is a factor to consider, we do not see the basically equally negative actions and attitudes

exhibited in the record necessitating a change in our conclusion the district court correctly determined Sarah should be the physical caregiver of the children. In other words, our evaluation of this one factor does not change the result we reached from our evaluation of multiple factors in the preceding section.

We affirm the district court's determination of physical care.

Sarah seeks an award of appellate attorney fees. An award of attorney fees is not a matter of right. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). The determination rests within our sound discretion. *See In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). In determining whether to award appellate attorney fees, we consider the parties' financial positions and whether the party making the request was obligated to defend the district court's decision on appeal. *Id.* We determine Trent should pay $1000 of Sarah's attorney fees.

Costs on appeal are taxed to Trent.

AFFIRMED.