IN THE COURT OF APPEALS OF IOWA

No. 3-618 / 12-2149
Filed August 21, 2013

BRADLEY GENE GASWINT,
Plaintiff-Appellant,

vs.

DIANE ROBINSON,
Defendant-Appellee.

Appeal from the Iowa District Court for Plymouth County, Steven J. Andreasen, Judge.

A father appeals from the district court's order granting joint physical care of his minor child. **AFFIRMED AS MODIFIED AND REMANDED.**

Rebecca A. Nelson of Rawlings, Ellwanger, Jacobs, Mohrhauser & Nelson, L.L.P., Sioux City, for appellant.

Brian B. Vakulskas of Vakulskas Law Firm, P.C., Sioux City, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Brad Gaswint appeals the findings of fact, conclusions of law, judgment, and order entered by the district court. He contends the district court erred in granting joint physical care of his and Diane Robinson's son, NBG, and in its determination of a school for the minor child. With the proposed change of custody agreement, he requests child support pursuant to the Iowa Child Support Guidelines. He also requests appellate attorney fees. In response, Diane requests we affirm the order of the district court and seeks an award of appellate attorney fees. Because neither party requested joint physical care, we modify the award and grant Brad sole physical care of NBG. Upon our de novo review, we affirm the order as modified and remand for further proceedings.

I. Background Facts and Proceedings.

Diane and Brad had an eleven-year romantic relationship but were never married. Near the end of the relationship, in 2007, Diane gave birth to their son, NBG. Although the parties never lived together after the birth of their child, they shared parenting responsibilities. At times, when NBG was an infant, Brad would spend the night at Diane's house to help care for NBG. Similarly, when Brad underwent back surgery and was on bed rest, Diane brought NBG and stayed with him at Brad's home so the two could still spend time together. The parties had an informal parenting schedule in which each party was responsible for NBG about half the time. They shared the responsibility of transporting NBG—both to and from daycare, and also to and from each other's homes—and providing all necessary care for him. NBG slept at each parent's home about half the time.

The informal agreement continued until Brad filed a petition to establish custody, child support, and medical support on October 10, 2011. Following a hearing, the court issued a temporary order which granted the parties joint legal custody and shared physical custody. The parties each had alternating weeks with NBG with some mid-week visitation provided for the noncustodial parent each week.

Trial in this matter was held on June 13, 2012. The issues at trial included the physical care arrangement, child support, and determining which school NBG would attend for kindergarten. Each party asked the court to discontinue the shared physical care award and to award primary care of the minor children to that party. After trial, but prior to the entry of a final record, Brad filed a petition to reopen the record. Diane resisted the motion. However, the district court granted the motion and a hearing was held on October 11, 2012. The request was granted to permit additional evidence relative to the child's behavior issues that had arisen since the trial and before the court had entered its ruling.

At the time of the trial, Diane had been employed as a secretary for Woodbury County Social Services for approximately three years. She had recently surrendered her home to the bank because she could no longer afford the mortgage payments. She and her seventeen-year-old son from a previous relationship had moved to an apartment in the same general area of Sioux City, Iowa. Brad was employed as a terminal operator for Magellan Pipeline and had

been employed with the company since 1994. He lived on a rural acreage just north of Sioux City in a home he had purchased in February 2009 and on which he subsequently completed significant improvements.

On November 2, 2012, the district court entered its findings of fact, conclusion of law, judgment, and order. In it, the court granted the parties joint physical care of NBG, stating:

> In reaching this conclusion, the Court again recognizes that neither party requested joint physical care. This fact is certainly evidence weighing against an award of joint physical care, as it reflects a lack of agreement between the parties. The Court believes, however, that much of the "disagreement" is prompted by the custody proceeding. Considering all of the factors outlined in *Hansen*,[1] the Court concludes that joint or shared physical care is warranted, appropriate, and in the child's best interest.

The court then set a parenting schedule for the parties, ordered Brad to pay Diane $278.18 per month in child support, and determined NBG should attend the Sioux City Community school district, unless the parties otherwise agreed, because of its geographic proximity to both parties' homes. Brad appeals.

II. Standard of Review.

We review custody decisions de novo. *In re Marriage of Olson*, 705 N.W.2d 312, 313 (Iowa 2005). We give weight to the district court's findings, especially regarding the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). "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).

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[1] *In re Marriage of Hansen*, 733 N.W.2d 683, 696–97 (Iowa 2007).

III. Discussion.

A. Physical Care.

On appeal, Brad contends the district court erred in awarding joint physical care because neither he nor Diane requested it. In assessing his argument, we find a brief historical examination of the relevant legislation beneficial. In 1997, the Iowa legislature defined the term "joint physical care" for the first time, but it did not explain its substantive application. 1997 Iowa Acts ch. 175, § 199 (codified at Iowa Code § 598.1(4) (1999)); *see also In re Marriage of Hansen*, 733 N.W.2d 683, 691 (Iowa 2007). In 2004, the Iowa legislature amended Iowa Code section 598.41(5) to read, in part, "If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent." 2004 Iowa Acts ch. 1169, § 1 (now codified at Iowa Code § 598.41(5)(a) (2013)); *see also Hansen*, 733 N.W.2d at 691–92.

Our supreme court has noted that we do not require the parties to "use magic words to convey a desire for 'joint physical care.' Nor are we interested in creating a trap for the unwary with respect to something so paramount." *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007). However, our statute makes clear that the district court may consider joint physical care *upon the request of either party*. *See* Iowa Code § 598.41(5)(a) (2011)); *see also Fennelly*, 737 N.W.2d at 102 (finding the court is not required to specifically explain why joint physical care is not in the children's best interest where father, the only party to request it, abandoned his request for joint physical care during trial). The legislature could have provided that the district court may consider

joint physical care whenever the best interest of the children so required, but it did not do so. *See* Iowa Code § 598.41(5)(a).

We acknowledge the parties to this action were never married. However, in determining custody and visitation terms where the mother has not been awarded sole custody, "section 598.41 shall apply to the determination, as applicable." Iowa Code § 600B.40. Moreover, in determining physical care for a child, our first and governing consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(*o*). Our analysis is the same whether the parents have been married, or remain unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1998). Our objective is to place the child in an environment likely to promote a healthy physical, mental, and social maturity. *Hansen*, 733 N.W.2d at 695. Accordingly, we conclude that before awarding physical care of a child born to parents who have never been married, a request for joint physical care, in some form, should be made by one or both of the parties.

In this case, because neither party requested joint physical care, we find the district court erred in awarding it. Thus, in our de novo review we must determine which caregiver should be awarded physical care. *See* Iowa Code § 598.41(1), (5). As noted, in determining which caregiver should be awarded physical care, our principle consideration is the best interest of the child. *See* Iowa R. App. P. 6.904(3)(o); *Hansen*, 733 N.W.2d at 695. We use the factors enumerated in Iowa Code section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), to determine which of the two parents is most likely to provide an environment that brings the child to health, both physically

and mentally, and to social maturity. *See Hansen*, 733 N.W.2d at 695–96. In making our determination, gender is irrelevant and neither parent has a "greater burden than the other in attempting to gain custody." *In re Marriage of Bowen,* 219 N.W.2d 683, 689 (Iowa 1974).

Because of the strengths of each party and the few facts to distinguish the parenting abilities of each parent, this is a difficult decision. As the district court stated, "Both parties love the child and both parties are committed to providing the child the care and environment that will bring him to a healthy physical, mental, emotional, and social maturity. Both parties are suitable parents and are both capable of providing for the child's daily needs and care." With that in mind, we must award physical care of NBG to one of the parents.

Iowa Code section 598.41(5)(b) requires the parent awarded physical care to "support the other parent's relationship with the child." In this case, there is undisputed testimony that, after Brad filed the petition to reopen the record, Diane was angry with him and refused to let him talk to NBG while he was in her physical care. Brad also presented evidence of a text message from Diane during the same time period which stated: "Don't bother calling or texting to talk to [NBG] because I'm not going to have him call you." This discord lasted a couple of weeks until Diane purchased NBG his own cell phone for communication with his father. Although at the time of the rehearing Brad and NBG were again communicating daily, and Brad testified that the communication between him and Diane had "gotten better" and they were once again able to

communicate regarding their son, this short-term issue weighs against awarding Diane physical custody of NBG. *See* Iowa Code § 598.41(5)(b).

At the time of the rehearing, NBG was exhibiting some behavioral issues at the preschool he was attending. Undisputed testimony shows Brad talked to the classroom teachers regarding the issue and they agreed to chart NBG's behavior both at school and at home in order to incentivize good behavior. While she was aware of problems NBG was having in the classroom, Diane categorized the issues as "just a phase" and chose not to chart NBG's behavior while in her physical care. When NBG's behavior worsened, it was Brad who suggested taking him to a play therapist and who followed through by getting the advice of professionals. We recognize there are different parenting styles, but in this case, we believe Brad's response to NBG's behavioral issues demonstrates a strong commitment to his son's development.

At trial Diane testified to the strong bond between NBG and his half-brother. Although there is a presumption that siblings, including half-siblings, should not be separated, that rule is not ironclad. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). Diane's older son was seventeen and a senior in high school at the time of trial. Diane testified he planned to attend college somewhere outside of the area after graduation. We also note the district court's concern regarding the older child, "[m]any of [the older child's] Facebook postings are troubling, and even the possibility that [the older child] uses similar language or expresses a similar attitude in the child's presence

should be a concern to Diane." While we recognize the important role NBG's brother plays in his life, this factor does not tip the scale in Diane's favor.

Brad has also made efforts to co-parent with Diane, but Diane's attitude is Brad can do what he wants to do at his house and she has the same right at her house. We agree parents are not going to parent their child exactly the same in their respective separate homes. However, our supreme court has noted the benefits of parents who are "operating from the same page" in child rearing practices. *Hansen*, 733 N.W.2d at 699. Brad may have been slightly over-enthusiastic in his efforts to co-parent, but we believe his efforts are important to our decision.

There was also evidence Diane may move her residence to live with her current boyfriend in Sloan. Although Diane denied she currently intended to move, she did inform Brad of this intention while the case was pending. Although this is not a significant concern, Diane's boyfriend did not testify and with few facts to distinguish these parents, it becomes a factor.

Although Brad is a somewhat overly enthusiastic first-time parent, he has more than shared the child's care with Diane to the date of the trial. He has shown a willingness to provide the child's care when it was not his scheduled time to do so. He has made efforts to co-parent the child with Diane in the best interests of the child and has a stable residence. For a brief period of time, Diane declined Brad the opportunity to telephone or text NBG. We conclude Brad should be awarded sole physical care of NBG.

B. School.

Even though we award Brad physical care of NBG, we see no reason to disturb the district court's finding NBG should attend the Sioux City Community school district. Iowa law distinguishes custody from physical care. Physical care is "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." Iowa Code § 598.1(7). On the other hand, custody concerns the legal rights and responsibilities toward the child, including decisions "affecting the child's legal, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.1(3); Iowa Code § 598.41(5)(b). Both parents still share joint legal custody of NBG.

Although Brad believes Akron-Westfield is a better choice for NBG, we believe the district court correctly determined attending Sioux City Community School District is in the child's best interest. As the court noted, this will eliminate a thirty-minute bus ride both to and from school for NBG. Also, the school's geographic proximity to both parents' homes and jobs makes it more accessible for each parent if NBG gets sick or has school-day activities which they can attend.

We acknowledge the minority's contention that the physical caretaker, Brad, is entitled to make the ultimate decision regarding the child's school. However, neither party appealed from the award of joint legal custody. As legal custodians of NGB, both Brad and Diane are entitled to certain rights and responsibilities that "include, but are not limited to, decision making affecting the

child's legal status, medical care, education, extracurricular activities and religious instruction." Iowa Code § 598.1(5). As joint legal custodians, each parent is entitled to "equal participation" in the decision. Iowa Code § 598.1(3). Moreover, Brad did not request sole custody, which would vest the sole decision making in him. *See In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996) (where the parties are unable to agree to fundamental decisions, the court may vest decision making in one parent by awarding sole custody).

Our supreme court has ventured into a dissolution dispute involving the rights and responsibilities of legal custodians concerning a child's "legal status" resolving a dispute over a child's legal name. *In re Marriage of Gulsvig,* 498 N.W.2d 725, 729 (Iowa 1993). Our supreme court has also resolved a dispute between joint legal custodians in regard to a child's medical care and records in an action initiated by a petition for injunctive relief. *Harder v. Anderson,* 764 N.W.2d 534, 538 (Iowa 2009). In *Harder,* the court stated, "When joint legal custodians have a genuine disagreement concerning a course of treatment affecting a child's medical care, the court must step in as an objective arbiter, and decide the dispute by considering what is in the best interest of the child." *Id.* Most litigants in dissolution proceedings do not want the court to micromanage their lives, nor does any judicial officer wish to invade such parental decision-making issues. Nevertheless, if the parents have reached impasse, the final arbiter is the court, not the physical caretaker. To conclude otherwise would result in the abdication of the other joint legal custodian's right to "equal

participation" in such decisions. We acknowledge, however, the physical caretaker's residence clearly impacts school alternatives and may compel the ultimate decision. Here, we affirm the district court's order in its role as the of the school issue.

C. Appellate Attorney Fees.

Both Brad and Diane seek an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of the parties seeking an award, the ability of the other party to pay, and the relative merits of the appeal. *Id*. In a custody proceeding between parents who have never married, the court may award the prevailing party reasonable attorney fees. Iowa Code § 600B.26. Taking into consideration these relevant factors, we decline to award either party appellate attorney fees.

D. Conclusion.

We modify the district court decision awarding joint physical care and conclude awarding Brad sole physical care is in the child's best interest. Iowa Code section 598.41(5)(b) requires the parent awarded physical care to support the other caregiver's relationship with the child. We expect Brad to comply with this obligation and to foster NBG's relationship with his mother through liberal visitation and mutual respect.

We affirm the district court's order but modify to award Brad sole physical care. We direct the district court to award Diane liberal visitation. We remand to

the district court for it to set forth an appropriate visitation schedule and order child support accordingly.

AFFIRMED AS MODIFIED AND REMANDED.

Doyle, P.J., concurs; Mullins, J., dissents in part.

MULLINS, J. (dissenting in part)

The district court, having concluded joint legal custody and joint physical care were appropriate, and that the parties were at an impasse concerning a choice of school for their child, correctly addressed the issue and made a decision that I would not disturb if we were to affirm the joint physical care decision. However, once we decided joint physical care was not appropriate and awarded physical care to Brad, then I respectfully submit that both the factual assumptions and the dynamics of decision making that were considered by the district court have changed. Accordingly, I concur with the majority opinion in all respects except for the decision to affirm the school selection made by the district court.

With Brad as the physical caretaker, the parents will no longer share equally in physical care time. This changes the factual assumptions of the child's physical residential location from what had been contemplated by the district court when it decided the school issue. Perhaps more importantly, the dynamics of decision making and the relative duties of the parties are also impacted by the change in the physical care arrangement. Each joint legal custodian, regardless of physical care arrangements, has rights and responsibilities to equal participation in decisions affecting legal status, medical care, education, extracurricular activities, and religious instruction. Iowa Code § 598.41(5)(b). As physical caretaker, Brad will have the responsibility to communicate with Diane and make available such information as is necessary to reach a decision. *See In re Marriage of Fortelka,* 425 N.W.2d 671, 673 (Iowa Ct. App. 1988). They will

each have the responsibility to participate in the process of making decisions for the benefit of their child, and Brad will be required to "support [Diane's] relationship with the child." Iowa Code § 598.41(5)(b). In the end, however, Brad has the "right and responsibility to . . . provide for the routine care of the child." *Id.* § 598.1(7). The question presented in this case is: In the event of an impasse in decision making between the physical caretaker and the other parent, each of whom is a joint legal custodian, who should make decisions concerning legal status, medical care, education, extracurricular activities, and religious instruction? Put another way: Where and how do the rights and responsibilities of the physical caretaker to provide routine care intersect with the joint rights and responsibilities of joint legal custodians?

"Routine care" has not yet been defined in Iowa law. In the case of *In re Marriage of Zabecki*, 389 N.W.2d 396 (Iowa 1986), the parties had joint legal custody, and the mother was originally awarded physical care. The father later filed a modification action seeking sole custody based on several allegations, including the mother's unilateral decision to enroll the child in a public school rather than the parochial school the child attended at the time of the dissolution decree. *Zabecki*, 389 N.W.2d at 397. The change of schools and the withdrawal of the child from competitive swimming were decisions made by the mother without consulting the father. *Id.* at 398–99. Our supreme court approved of the trial court "admonishing [the mother] for this failure to take [the father's] wishes into consideration, and in warning her against a recurrence." *Id*. at 399.

> The legislature obviously intended that joint custody be a framework for equal participation, with equal rights and

> responsibilities in the parenting of a child. The parent who does not have physical care of the child is not to be reduced to the role of a "favorite, visiting relative." *[In re Marriage of] Bolin,* 336 N.W.2d [441,] 447 [(Iowa 1983)] (quoting *In re Marriage of Castle,* 312 N.W.2d 147, 150 (Iowa Ct. App. 1981) (Johnson, J., concurring specially)). When Christine excludes David from major decisions affecting Konrad, she is frustrating the purpose of joint custody. If this conduct continues, her uncooperative attitude may serve as a basis for concluding that circumstances have substantially changed and thus warrant a modification. *Cf. Spotts v. Spotts,* 197 N.W.2d 370, 372 (Iowa 1972) (The mother's conduct in depriving children of their right to see their father was a serious reflection on her capacity to maintain custody. A continuation of the same behavior would furnish a basis for modification).

Id.

I respectfully submit the role of the court should be limited, as directed in *Zabecki,* to determining whether the parties have properly discharged their respective responsibilities in the decision-making and information-sharing process based on the legal status awarded to them by the court pursuant to legislated guidelines and judicial interpretations. The role of the court is to determine the legal status and measure performance against that status and, if necessary, modify that status or provide some other appropriate remedy. The court should not normally, however, substitute its own judgment for parental decisions concerning which school the child should attend, which doctor the child should see, which extracurricular activities are appropriate for the child, or what religious instruction the child should receive. More specifically, I find nothing to suggest the legislature intended a court should decide whether Jimmy should play football or be in the marching band, whether Andrea should get braces, whether Amanda should be examined by a dermatologist instead of the family practitioner, whether Jonathan should get religious instruction at the Catholic

Church or the Methodist Church, and so on. Notwithstanding that those are matters encompassed within the list of decision making in which joint legal custodians have the rights and responsibilities to equal participation, they are matters most parents would agree are among the decisions parents make while providing for the routine care of a child. Those decisions should be made by the parties after equal participation in the decision-making process, and in the event of impasse, subject to the rights and responsibilities of the physical caretaker to "provide for the routine care of the child," as tempered by the requirements of section 598.41(5)(b).

In this case, when the district court decided the school issue it did so in light of the facts and circumstances of its determination that the parties should have joint physical care, the child would live approximately half the time with each parent, and the parents (joint physical caretakers) were at an impasse on school selection. Our ruling awarding Brad physical care changes the primary residence of the child and grants to Brad as physical caretaker the right and responsibility to provide for routine care. *Compare* Iowa Code § 598.1(4) *with* § 598.1(7). The facts and assumptions made by the district court are no longer valid, and neither is the court's encroachment on parental rights and responsibilities.

There is another reason we should avoid the temptation to allow the school decision for the child to remain as ordered by the district court. If the court-ordered directive remains, then absent a mutual agreement by the parties, any future change in school venue will require a modification proceeding in court,

with the attendant expense and delays in obtaining a decision. Again, I assert that when the court designates a physical caretaker, managing the life of a child should be entrusted to the person so designated, subject to the rights to equal participation provided in section 598.41(5)(b), but not subject to micromanagement by the courts.

In light of our decision to grant Brad physical care, I would vacate the school decision made by the district court. In all other respects, I concur in the majority opinion.