IN THE COURT OF APPEALS OF IOWA

No. 3-623 / 13-0205
Filed August 21, 2013

**IN RE THE MARRIAGE OF AARON ROHDY
AND MICHELLE B. ROHDY**

**Upon the Petition of
AARON ROHDY,**
Appellee/Cross-Appellant,

**And Concerning
MICHELLE B. ROHDY,**
Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Lee (North) County, John G. Linn, Judge.

A mother appeals and a father cross-appeals from the physical custody and visitation provisions of the decree dissolving their marriage. **AFFIRMED ON APPEAL AND CROSS-APPEAL.**

Robert Engler of Swanson, Engler, Gordon, Benne & Clark, L.L.L.P., Burlington, for appellant.

Gregory Johnson of Johnson & Skewes, Fort Madison, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

A mother appeals and a father cross-appeals from the physical care and visitation provisions of the decree dissolving their marriage. The mother contends the court erred in awarding physical care of the parties' three children to the father. The father contends the mother's summer visitation should be reduced and the court erred in ordering weekly visitation at the maternal grandmother's home. We affirm on appeal and cross appeal.

Aaron and Michelle married in 2002. They have three children, born in 2003, 2004, and 2009. Throughout their marriage, Michelle served in the United States Navy and Aaron stayed home with the children.[1] Until her deployment to Iraq in 2010, the family lived wherever Michelle was stationed, including Hawaii, Australia, and South Carolina.[2] Upon Michelle's deployment in 2010, Aaron and the children moved to southeast Iowa, where all the grandparents and many other relatives live. During her tour in Iraq, Michelle contacted Aaron to say she was having second thoughts about their marriage. After her return from Iraq in 2011, Michelle was stationed in California, and she contacted Aaron to say she wanted to save the marriage. Michelle was to be stationed in the State of Washington, and Aaron made plans to move the family to Washington. The family vacationed together in California for three weeks, and then they all returned to southeast Iowa. There, Aaron discovered Michelle was planning to file for divorce after he moved to Washington. Aaron and the children remained in Iowa, and Michelle departed for her assignment in Washington.

[1] Aaron worked some after the two older children were in school.
[2] Michelle was stationed across the border in Georgia.

Aaron petitioned to dissolve the marriage in July 2011. The parties entered into a consent order on temporary matters in November, continuing the children in Aaron's physical care during the pendency of the dissolution. Following a contested trial in July 2012, the court issued its decree in September. The decree provided for joint legal custody, considered and rejected joint physical care, awarded physical care to Aaron, and set out Michelle's visitation schedule. Michelle appeals; Aaron cross-appeals.

Our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012). We examine the entire record and adjudicate the parties' rights anew on the issues properly presented. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50-51 (Iowa 1999). Although we give weight to the factual findings of the trial court, especially concerning the credibility of witnesses, those findings are not binding on us. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009).

Physical Care. On appeal, Michelle contends the court erred in awarding Aaron physical care. In determining a physical care arrangement, we seek to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We consider statutory factors as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *See* Iowa Code § 598.41(3) (2011); *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). Our first and governing consideration is the best interests of the children. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984).

Michelle first argues the court erred because it based its decision solely on an erroneous conclusion Aaron was the "past primary caregiver," and it ignored other significant factors. The court first considered joint physical care but rejected it as impossible because of the distance between the parents, with Aaron in southeast Iowa and Michelle stationed in the State of Washington. *See* Iowa Code § 598.41(5). The court then carefully considered positive and negative factors and characteristics for placing the children with each parent. Although the court stated "the overriding factor" in its consideration was who was the "past primary caregiver," the court considered factors listed in section 598.41(3), including paragraphs (a), (c), (d), (e), and (h). The court also considered factors set forth in *Winter*, 223 N.W.2d 166-67, including one through eight, and eleven.

We find the court's placement of physical care of the children with Aaron is in their best interests because Aaron can minister more effectively to their present and future needs, the children's placement with Aaron in southeast Iowa provides the most family support, and the placement ordered is the least disruptive to their mental and emotional growth. We conclude the trial court made the best choice in the difficult circumstances it faced and affirm on this issue.

Michelle also contends the court erred in considering her period of active deployment as a significant factor in awarding physical care to Aaron, citing to Iowa Code sections 598.41C and .41D. Section 598.41C applies to a modification of child custody or physical care, not the original custody and physical care determination. It does not apply in this case. Section 598.41D

concerns temporary assignment of the visitation rights of a parent on active military duty to another family member and also provides procedural protections so the active duty parent can attend or participate in hearings. It does not apply in this case.

Visitation. On cross-appeal, Aaron challenges the visitation provisions of the decree. Particularly because of the geographic distance between the parents, the court awarded Michelle visitation all summer, commencing seven days after summer break begins and ending ten days before school resumes in the fall. Aaron contends this is not in the children's best interests because Michelle does not have enough vacation to be available to the children the entire summer, so they would be in daycare during part of the summer instead of at home with family and friends. Aaron requests the summer visitation be reduced to match the vacation time available to Michelle.

The court also provided Michelle and Aaron would alternate Thanksgiving, Christmas, and Easter breaks, and the children would "regularly spend time" at Michelle's mother's home so Michelle and the children could communicate by Skype. After Michelle filed a motion to amend or enlarge seeking more specificity in the time the children could be at her mother's home, the court enlarged the decree to provide for the children to be at their maternal grandmother's home "every Friday from 4:00 p.m. to Saturday at 4:00 p.m." for Skype. Aaron challenges this provision as "nothing short of court-ordered grandparent visitation."

The trial court sought to provide the children with the "maximum continuing physical and emotional contact with both parents." *See* Iowa Code

§ 598.41(1). Typical visitation on alternating weekends is not feasible in this case and would subject the children to unnecessary stress and travel time in addition to increasing the transportation costs. Michelle's visitation for the entire summer takes advantage of the best block of time for the children to spend the maximum amount of time with her. We will not speculate on the amount of vacation time Michelle has available or what arrangements she might make for the children's care during the summer if she has to be at work. We do not see any difference between the possibility Michelle might have to work during part of the time the children are with her and the time Aaron has to work while the children are with him during most of the year. We affirm the summer visitation provision of the decree.

The weekly time the children spend at their maternal grandmother's home to Skype with Michelle seems to us to be a creative approach by the court to provide for regular, ongoing, emotional contact between the children and Michelle when physical contact is not feasible. The court did not order grandparent visitation, but provided the children with the opportunity to be alone with their mother on a weekly basis. We affirm the weekly Skype visitation provisions of the decree.

We conclude the physical care and visitation provisions of the decree serve the best interests of the children and affirm on appeal and cross-appeal.

Costs are taxed equally between the parties.

AFFIRMED ON APPEAL AND CROSS-APPEAL.