**IN THE COURT OF APPEALS OF IOWA**

No. 6-852 / 06-0760
Filed December 28, 2006

**IN RE THE MARRIAGE OF SHAWN CROSSER AND KELLY CROSSER**

**Upon the Petition of**
**SHAWN CROSSER,**
Petitioner-Appellant,

**And Concerning**
**KELLY CROSSER,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Hardin County, Carl D. Baker, Judge.

Father appeals from the physical care provision of the decree dissolving the parties' marriage. **AFFIRMED**.

Barry S. Kaplan and Melissa A. Nine of Kaplan & Frese, L.L.P., Marshalltown, for appellant.

William T. Talbot of Newbrough, Johnston, Brewer, Maddux & Howell, L.L.P., Ames, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**MILLER, J.**

Shawn Crosser appeals from the physical care provision of the decree dissolving his marriage to Kelly Crosser, which placed the children's physical care with Kelly. Shawn asserts the district court erred by failing to award the parties joint physical care or, alternatively, by placing the children's physical care with Kelly. We affirm the district court.

**I. Background Facts and Proceedings.**

Shawn and Kelly married in 1992. The parties have three children, two of whom are minors: Riley, born in 1993, and Shannen, born in 1996. Both children are generally healthy, although Riley has been diagnosed with Attention Deficient Hyperactivity Disorder (ADHD). Shawn filed a petition for the dissolution of the parties' marriage in June 2005. A dissolution decree was filed in April 2006, following a March 2006 hearing.

At the time of hearing Shawn was thirty-nine years old and Kelly was thirty-six years old. Both parties were in good health. Each had a high school education, and was gainfully employed.

Shawn worked for Target Distribution Center, earning $14.39 an hour. In 2005 Shawn's yearly income was $26,268. Prior to taking this position Shawn worked for a private hog confinement operation. Kelly had been employed in various capacities during the course of the marriage, but primarily provided home-based daycare services. At the time of hearing Kelly was employed by AGWSR School District as a daycare provider, for thirty hours per week at a rate of six dollars per hour. With a yearly income of approximately $10,000 Kelly admitted she was underemployed, but contended it was difficult to find suitable

employment in the local, small town area. For this reason, Kelly expressed an intent to move to a nearby area with better job opportunities.

Each party was an active and involved parent, to the extent their respective schedules allowed. Shawn became a more attentive and involved parent after the parties' 2004 separation. It was Kelly, however, who served as the children's primary caregiver during the majority of the marriage, while Shawn served as the family's primary income provider.

Prior to trial the parties stipulated to the disposition of nearly all items of property, including the marital residence. The parties agreed that Shawn would receive the residence, and pay Kelly $15,000 for her share of the home's equity. The main issue to be decided by the district court was that of the children's physical care. Each party had requested the children's sole physical care in his or her respective pleading, but in his pretrial report Shawn also requested the court consider awarding the parties joint physical care.

Following hearing, the court awarded the parties joint legal custody of the children, and placed the children's physical care with Kelly. The court noted that Shawn was "clearly angry with Kelly because of her relationship with" another man, and that "after observing Shawn's demeanor at trial, his attitude toward Kelly is one which is not conducive to joint physical care." Noting that Kelly had been the children's primary caretaker, and concluding that she would do a better job of supporting the children's relationship with the noncustodial parent, the court determined Riley and Shannen's interests were best served by placing their physical care with Kelly.

Shawn appeals. He contends the record does not contain a reason to rebut the statutory presumption of joint physical care. Alternatively, he contends that if the presumption in favor of joint physical care is rebutted, then the children's interests are best served by placing their physical care with him.

**II. Scope and Standard of Review.**

Our scope of review is de novo. Iowa R. App. P. 6.4; *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Although not bound by the district court's fact findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*).

**III. Physical Care.**

We begin by correcting a basic fallacy in Shawn's argument. Contrary to his contention, Iowa does not have a statutory presumption in favor of joint physical care. Shawn points to the following language of Iowa Code section 598.41(5) (2005) in support of his assertion that such a presumption exists:

> 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. . . . If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

As we have repeatedly stated, this language is no more than a proclamation by the legislature that joint physical care, once strongly disfavored, is now a viable option, provided it is in the children's best interests and the parents are able to cooperate and communicate with one another. *See In re Marriage of Ellis*, 705 N.W.2d 96, 101 (Iowa Ct. App. 2005); *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Section 598.41(5) does not,

however, make joint physical care the preferred or presumptive care arrangement. *See Ellis*, 705 N.W.2d at 101-02.[1]

We also reject Shawn's contention that the district court failed to provide a factual basis for declining to award joint physical care. The court stated that joint physical care was not an option in light of Shawn's anger, suspicion, and resentment toward Kelly. We likewise conclude joint physical care is not in the children's best interests. In addition to the contentious nature of the parties' relationship, it is clear that Kelly intends to move from the immediate area. The areas Kelly is considering relocating to, while close enough to facilitate visitation with the non-custodial parent, are sufficiently distant to make a joint physical care arrangement unworkable.

Having concluded that joint physical care is not a viable option under the facts of this case, we turn to the question of which parent should be granted physical care. In answering this question, our overriding consideration is the children's best interests. Iowa R. App. P. 6.14(6)(*o*); *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). The goal of the court is to select the environment most likely to cultivate physically, mentally, and socially healthy children. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We consider a number of factors, including the children's needs and characteristics, the parents' abilities to meet those needs, the nature of each proposed home environment, and the effect of continuing or disrupting the children's current status. *See* Iowa Code § 598.41; *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). In

[1] Shawn's reliance on the unpublished opinion of *In re Marriage of Little*, No. 04-1555 (Iowa Ct. App. April 13, 2005), is misplaced. The language cited to, stating that there is now a preference for joint physical care, is a recitation of the district court's conclusion and not a holding of this court.

addition, while it is not the singular factor in determining which placement would best serve the children's interests, we give significant consideration to placing the children with the primary caregiver. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

Applying the foregoing standards to the facts of this case, we agree with the district court's decision to place the children's physical care with Kelly. Both Shawn and Kelly are capable and loving parents who are able to meet the children's needs. We have no doubt the children would thrive in the care of either party. We are thus faced with the unenviable task of choosing between two good parents. In such circumstances, even small factors will tip the balance, and the district court's fact findings and credibility assessments become particularly important, given the court's opportunity to observe the parties.

Here, the record indicates that Kelly was the children's primary caregiver. It also supports the district court's determinations that Shawn's unresolved anger and resentment toward Kelly will undermine his ability to support her relationship with the children, and that Kelly will be better able to support Shawn's relationship with the children. After considering the totality of circumstances in this case, we agree with the district court's decision to place the children's physical care with Kelly.

**VI. Attorney Fees.**

Kelly requests an award of appellate attorney fees. Such an award rests in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal.

*Id*. Upon consideration of the foregoing factors, we award Kelly $1000 in appellate attorney fees. Costs of this appeal are assessed to Shawn.

**V. Conclusion.**

We have considered all of Shawn's contentions, whether or not specifically discussed. We agree with the district court's resolution of all disputed issues, including its decision to place the children's physical care with Kelly. The district court's decree is accordingly affirmed.

**AFFIRMED.**