IN THE COURT OF APPEALS OF IOWA

No. 2-467 / 11-1695
Filed June 27, 2012

IN RE THE MARRIAGE OF ASHLEY E. MOYER AND DANIEL R. MOYER

Upon the Petition of

ASHLEY E. MOYER,
Petitioner-Appellee,

vs.

DANIEL R. MOYER,
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

A father appeals from the child custody, visitation, and support provisions of a dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

DeShawne L. Bird-Sell of Sell Law, P.L.C., Glenwood, for appellant.

Mandy L. Whiddon of Primmer Law, Council Bluffs, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

A young father and college student appeals the district court's decision to grant physical care of his son to his ex-wife based on her proximity to extended family members. In addition to the child custody arrangement, Daniel (Dan) Moyer challenges the visitation and support provisions of the decree dissolving his marriage to Ashley Moyer. He contends he has been their son's primary caregiver. In the event that we affirm the custody provisions, he requests additional visitation. Dan also disputes the court's imputing of income for support purposes when his sole income is from student loans.

We agree with the district court that granting Ashley physical care is in the child's best interest. But we modify the visitation schedule to provide Dan additional contact with his son during school breaks. We also modify the decree to require travel expenses be shared during summer and school-break visitations. Finally, we find a substantial injustice would occur if Dan's child support obligation was calculated on his actual earnings. Because Dan is capable of working part-time, we affirm the portion of the decree ordering him to pay child support of $195.13 per month.

I. Background Facts and Proceedings.

Dan and Ashley were married in March 2008. They have one child, Gabriel, who was born in July 2006. When Ashley was pregnant, the parties moved in with Dan's parents. Dan and Ashley were able to live there without paying rent or other expenses after Gabriel's birth and while married.

From our de novo review of the record, we find that despite being young parents, both Dan and Ashley have been industrious and earnest in their responsibilities. During the marriage, Dan worked and attended school to earn his associate degree in mathematics. Ashley did not work outside the home for a year after Gabriel's birth so that she could care for him. She has attended culinary school and is two classes short of earning her degree. Ashley has held several jobs in the food service industry, frequently working as a bartender.

When the parties separated in February 2010, Ashley moved out of Dan's parents' home. Gabriel lived with Ashley, but Ashley relied on Dan to care for their son when she worked night shifts. Ashley filed for divorce in June 2010.

Ashley's family belongs to the Catholic Church and it is important to her that Gabriel be raised in that faith. To that end, the parents had Gabriel baptized by a Catholic priest shortly after he was born. In the fall of 2010, the parents clashed over Ashley's decision to enroll Gabriel in the St. Albert preschool. Although Ashley said she told Dan of her intentions, Dan claims he never agreed that Gabriel should attend that preschool.

In September 2010, Ashley moved for a temporary hearing on child custody, stating the parties had been unable to concur on a regular schedule. The district court held a hearing to resolve the custody issue as well as the preschool dispute. In October 2010, the court ordered the parents to alternate custody on a weekly basis. The order noted the parties' agreement to enroll Gabriel in preschool at the YMCA beginning November 1, 2010.

In August 2011, Dan moved to Laramie, Wyoming to pursue a degree in petroleum engineering at the University of Wyoming. He expects to graduate in 2014. Dan attends classes during the day. He testified that he will consider working while in school if offered an internship in the petroleum engineering field, but intends to cover his expenses with student loans. He received approximately $6000 in student loan money for living expenses in 2011, and was sharing a two-bedroom apartment with his girlfriend and her child.

In August 2011, Ashley was working approximately twenty hours per week at a bar and grill, but planned to start a new job at Verizon. She shared an apartment with her best friend and her friend's two children in Council Bluffs.

The court heard the dissolution case on August 19, 2011. The only issues were Gabriel's custody and support. The court entered the decree dissolving the marriage on August 23, 2011. The decree granted physical care to Ashley with Dan receiving visitation every other weekend from 9:00 a.m. Saturday until 7:00 p.m. Sunday when he is in Iowa. Dan received six weeks of summer visitation and visitation for one-half of Gabriel's winter break from school. Finally, the court ordered Dan to pay $195.13 per month in child support and to provide medical insurance for Gabriel.

On September 6, 2011, Dan filed a combined motion for new trial, expanded findings, and interpretation. He alleged the court erred in its fact finding and, given his status as a full-time student, should not have imputed income to him or required him to provide Gabriel with medical insurance. He also sought additional visitation, including holiday visitation, and asserted each

party should be required to provide transportation to visitations equally. The district court overruled and denied the motions on October 3, 2011. Dan brings this appeal.

II. Scope and Standard of Review.

We review de novo decisions on child custody. *In re Marriage of Hynick*, 727 N.W.2d 575, 577 (Iowa 2007). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). Despite our de novo review, we give strong consideration to the trial court's fact findings, especially with regard to witness credibility. *Hynick*, 727 N.W.2d at 577.

III. Physical Care.

Dan first contends the district court erred in granting Ashley physical care of Gabriel. In seeking a physical care award, he argues: (1) he is the more stable parent, (2) he has been the primary caregiver, (3) Gabriel's proximity to his grandparents should not be the key factor in deciding custody, and (4) Ashley shows a lack of regard for his role as parent.

Iowa law distinguishes custody from physical care; while child custody concerns a parent's legal privileges and obligations for his or her offspring, physical care is "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." *In re Marriage of Fennelly*, 737 N.W.2d 97, 100-01 (Iowa 2007) (quoting Iowa Code section 598.1(7) (2005)). The child's best interest is the overriding consideration in deciding physical care. *Id.* at 101. We look to the factors set forth in Iowa Code section

598.41(3) (2009) and those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974) when deciding the preferable care assignment. *Fennelly*, 737 N.W.2d at 101. If the court determines joint physical care is not appropriate, it must choose one parent to be the primary caretaker and award the other parent visitation rights. *Id.*

A. Stability.

In *Winters*, our supreme court said physical care should be determined by examining, among other factors, "[t]he characteristics of each parent, including age, character, stability, mental and physical health." 223 N.W.2d at 166. Dan first argues he should be granted physical care of Gabriel because he is the more stable parent. In support of his argument, Dan contends he has maintained more long-standing housing and employment and points to his academic achievements.

The record shows that in February 2010, Ashley moved out of the basement she shared with Dan at his parents' home. From that point until the August 2011 trial, Ashley lived at two different residences for approximately six months each before moving into her current apartment in Council Bluffs. She shares that apartment with her best friend and her friend's two young daughters. Ashley testified that she moved to residences she could afford as she worked two jobs to meet her financial obligations. At trial she testified that she had no plan to move from her current apartment or the Council Bluffs area.

While the parties were separated, Dan completed his associate degree in mathematics, earning a 3.763 grade point average. During this time, he

continued to live rent-free in his parents' home. Dan has only lived independently two times; once for a period of approximately six months and again when he moved to the University of Wyoming in Laramie—which is about an eight-hour drive from Council Bluffs. Daniel is supporting himself with student loans.

We find nothing in the record regarding Ashley's employment or living situation that impedes her ability to care for their son. We agree with the district court's assessment that Ashley offers the more stable environment for Gabriel because she remains in the vicinity of the child's "family support group."

B. Primary Caregiver.

Dan also claims he has been Gabriel's primary caregiver. One of the factors the court is to consider in determining physical care is "[t]he effect on the child of continuing or disrupting an existing custodial status." *Winters*, 223 N.W.2d at 166. Iowa Code section 598.41(3)(d) directs us to consider whether both parents have actively cared for the child before and since the separation. While greater primary care experience is "one of the many factors the court considers," it does not ensure an award of physical care. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996).

Ashley testified, and Dan agreed, that she was Gabriel's primary caretaker in his first two years. She took a year away from the workforce to care for him. During the parties' separation, Ashley left Gabriel in Dan's care overnight when she worked late shifts. The temporary court order, entered in October 2010, granted the parties temporary joint physical care on an alternating weekly basis.

We find both parties are capable of caring for the child and shared in the caregiving responsibilities equally at the time of trial.

C. Physical proximity to the grandparents.

Dan argues the district court relied too heavily on Gabriel's proximity to his grandparents in Iowa in determining physical care. He claims both parties will be leaving the Council Bluffs area, which neutralizes the factor of exposure to extended family. On that basis, he argues the decision should be made based on the quality of care each parent is capable of providing on his or her own.

The record shows that Ashley had a romantic relationship with a man who was serving in the armed forces. He had three years left in his commitment. Ashley testified that sometime in the future, she may move to be with him. But she told the court she had no plan to move for "a long time" and it was her intent at the time of trial to remain in Council Bluffs.

In contrast, Dan has already moved to Wyoming, a significant distance from not only Ashley, but from his son's maternal and paternal grandparents, aunts, uncles, and extended family. The parties relied on their families extensively during their marriage and the early years of Gabriel's life. The record shows Gabriel enjoys close ties to both families. Although colleges as close as three hours away offer degrees in petroleum engineering, Dan chose to move eight hours away from family to an area where he had no connection. Furthermore, Dan testified it was likely he would have to relocate again following his graduation from the University of Wyoming because jobs in his field would be most available in Texas, Louisiana, Pennsylvania, and California.

While Dan should not be faulted for pursuing his education and career goals, we agree with the district court that the distance and separation from the extended family tips the scales in favor of granting Ashley physical care of the child. *See In re Marriage of Welbes*, 327 N.W.2d 756, 758 (Iowa 1982) (recognizing that where both parents are capable of caring for the child, the fact one parent will allow extended contact with the grandparents rather than placing the child in the care of strangers was in the child's best interests); *Lovett v. Lovett*, 164 N.W.2d 793, 803 (Iowa 1969) (considering the father's decision to keep the children in the same community to attend the same school and church with the same daycare provider in making the determination the children's best interests were served by granting the father physical care); *In re Marriage of Donly*, 528 N.W.2d 663, 665 (Iowa Ct. App. 1995) (recognizing that granting the father physical care would allow the child to maintain close geographic proximity to both parents' extended families).

Ashley plans to remain in Council Bluffs where Gabriel will have contact with his extended family, including his paternal grandparents. In addition, the decree noted: "Any move of Gabriel from his family support group or the Council Bluffs area will be deemed a material change in circumstances." We do not believe that the district court placed too much emphasis on proximity to grandparents in assigning physical care to Ashley.

D. Support of the other parent's relationship with the child.

Finally, Dan contends Ashley's actions show a disregard for his rights as a parent. Whether each parent can support the other's relationship with the child is

a factor to consider in making a physical care determination. Iowa Code § 598.41(3)(e).

At trial, Dan testified Ashley enrolled Gabriel at St. Albert without his consent. Ashley testified she "did talk to him about it, but it was not a big conversation." The other preschool they discussed did not have any openings. Ashley enrolled Gabriel at St. Albert without talking to Dan about it again. But the parties eventually agreed to place Gabriel at the YMCA preschool before the temporary custody hearing, resolving the matter without court assistance. Dan also testified Ashley did not inform him that she signed Gabriel up for soccer. Ashley disputed this, testifying she informed Dan when she enrolled him in his first season, but not the following season.

Although Ashley could have been more thorough in her communication with Dan about Gabriel's preschool and extracurricular activities, we find from the record as a whole that she supports Dan's relationship with Gabriel and the parents have been able to work together. For instance, Ashley and Dan agreed that Dan would care for Gabriel overnight when she worked late shifts. To their credit, neither parent criticized the other's parenting skills. Any minor communication glitches between the parents do not warrant granting Dan physical care when considering all of the factors articulated in *Winters* and section 598.41(3).

We find granting Ashley physical care of Gabriel is in his best interest. Although both parties are capable parents, Dan's decision to enroll in an education program eight hours away from Gabriel's family, and the only

community he has known, tips the balance in favor of Ashley. We affirm the portion of the decree granting her physical care.

IV. Visitation.

When establishing visitation rights, our governing consideration is again the child's best interest. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation is in a child's best interest. *Id.* Iowa Code section 598.41(1) directs courts to award visitation rights that "will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child."

Dan contends the visitation schedule in the decree fails to maximize contact with both parents. He requests his visitation rights be enlarged to include "Thanksgiving breaks, Spring Breaks and additional time when he is in the State of Iowa." He also asks that the decree provide for "telephonic and electronic communication with the minor child." Finally, Dan complains that the court placed the onus of travel on him.

The portion of the decree relating to visitation states Dan is to have visitation with Gabriel "including but not limited to" every other weekend when Dan is in the Council Bluffs area. It also provides for six weeks of summer visitation, with Dan receiving visitation "the last two weeks of June, the last two weeks of July, and the first two weeks of August of each year." Finally, Dan is to

have visitation "commencing on Christmas Day at seven o'clock" for "the remainder of the minor child's school vacation term." The decree then provides:

> The visitation schedule set forth above provides only for the minimum visitation; the parties may extend visitation and it is encouraged that they do so in an effort to encourage a strong relationship with each parent. Moreover, the parties should be flexible in visitation and willing to substitute times more appropriate to their schedules. The party exercising visitation must give a minimum of 48 hours' notice of any deviation from the above minimum visitation schedule. All costs of transportation shall be borne by the party exercising visitation.

Given Gabriel's young age and the eight-hour travel time between Dan's home in Laramie, Wyoming and Council Bluffs, we find the visitation schedule set forth in the decree is reasonable. *See In re Marriage of Bartlett*, 427 N.W.2d 876, 877-78 (Iowa 1988) (finding the visitation schedule allowing the mother, who lived in Florida, four weeks of summer visitation and one week every other Christmas was reasonable given the child's ages). But to provide maximum contact with both parents, we modify the schedule to include visitation during Thanksgiving and spring break as follows: Dan shall receive visitation with Gabriel from 10 a.m. on Thanksgiving until 6 p.m. the following day in even-numbered years and from 6 p.m. Friday until 6 p.m. Sunday in odd-numbered years. With regard to spring break, Dan shall also receive visitation with Gabriel from 10 a.m. on the first Saturday of spring break until 6 p.m. Wednesday in odd-numbered years, and from 6 p.m. Wednesday until 6 p.m. the following Sunday in even-numbered years.

Again, the decree encourages the parties to be flexible in varying from the written visitation schedule. We reiterate this sentiment. Although we decline

to modify the decree to include a specific provision for telephonic and electronic communication, such communication falls within the purview of the liberal visitation encouraged in the decree.

We also agree it would be equitable for Ashley to share in the travel expenses for Dan's visitation during the summer and during Gabriel's school breaks. She is not required to pay expenses for weekend visitation or other extra visitation. We modify the decree to provide the parties will share in transportation expenses for summer visitation and visitation that occurs during breaks. *See In re Marriage of Wahlert*, 400 N.W.2d 557, 561 (Iowa 1987) (finding it equitable for the parties to share in the transportation costs for visitation, even though the custodial parent removed the children from the state).

V. Child Support.

Finally, Dan disputes the amount of child support he is required to pay. He argues the court erroneously imputed income to him as a full-time student.

In applying the child support guidelines, the court must first determine each parent's current monthly income from the most reliable evidence provided. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa Ct. App. 1996). The court must carefully consider all of the circumstances relating to their income. *Id.* If a parent voluntarily reduces his or her income or decides not to work, the court may consider earning capacity rather than actual earnings when applying the child support guidelines. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). Before imputing income to a parent, the court must determine that "if actual earnings were used, substantial injustice would occur or adjustments

would be necessary to provide for the needs of the child and to do justice between the parties." *Id.* In assessing whether to use the earning capacity of a parent, we examine the employment history, present earnings, and reasons for failing to work a regular work week. *Id.*

The district court calculated the child support obligation by imputing to Ashley a net monthly income of $1131.57 and imputing to Dan a new monthly income of $592.83. These figures were provided by Dan in a child support worksheet introduced into evidence at trial to show the amount of child support Ashley should be required to pay if he was granted physical care. The incomes were based on Ashley working forty hours per week at minimum wage and Dan working twenty hours per week at minimum wage.

We find the figures provided in Dan's child support worksheet are an appropriate basis for calculating Dan's obligation. We do not suggest that Dan decided to return to school with the intent to deprive Gabriel of support. In fact, in the long-run, Dan's education will likely help provide for his son's financial needs. Dan testified he was taking sixteen credit hours each semester and would likely need to study no less than thirty-two hours each week to keep up. He also testified he would work during the school year if offered an internship that was "just right." While Dan has taken on an ambitious schedule, that does not relieve him from the obligation to financially support his child. Most tellingly, when the child support worksheet was introduced at trial, Dan testified it reflected how much he would be able to work while attending school.

The evidence shows Dan has the ability to work while in school, but voluntarily decided to take out student loans to pay expenses, receiving approximately $6000 in the fall of 2011 for this purpose. Spread over the year, the loans would provide $500 per month. We affirm the portion of the decree requiring Dan to pay $195.13 in child support.

Costs on appeal are taxed to Dan.

AFFIRMED AS MODIFIED.