IN THE COURT OF APPEALS OF IOWA

No. 3-071 / 12-1226
Filed March 13, 2013

**IN RE THE MARRIAGE OF JEREMY WEST
AND LAURIE E. WEST**

**Upon the Petition of
JEREMY WEST,**
Petitioner-Appellant,

**And Concerning
LAURIE E. WEST,**
Respondent-Appellee.

Appeal from the Iowa District Court for Page County, J.C. Irvin, Judge.

A father appeals the district court's order regarding custody and child support. **AFFIRMED.**

Te'ya T. O'Bannon, Council Bluffs, for appellant.

Laurie E. West, Atlantic, appellee pro se.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Jeremy West appeals the district court's order granting his former wife, Laurie West, physical care of their three children. He claims this was not in the best interests of the children and the district court erred in its application of the factors from *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007). He also argues Laurie's desire to move is an attempt to sever his relationship with the children. Finally, he contests the court's computation of child support, asserting Laurie voluntarily lowered her income. Laurie did not file a brief on appeal. Because the factors weigh against joint physical care and the child support determination did not result in an injustice, we affirm the district court's determinations.

I. Background Facts and Proceedings

Jeremy and Laurie were married on March 31, 1995, and have three children, ages seventeen, fourteen, and eight at the time of trial. After their separation in July, 2011, Jeremy and Laurie moved from Shenandoah, Iowa, to separate apartments in the same apartment complex in Bellevue, Nebraska. To accomplish the move, Jeremy agreed to pay Laurie $700 a month in support so they could attempt a "fifty/fifty" split of custody. A petition for dissolution was filed on September 13, 2011. A hearing on temporary matters was held and the parties agreed to share physical care equally, with care of the children being exchanged weekly. Since the temporary hearing and pursuant to that order, Jeremy only pays Laurie $231.73 per month.

The dissolution trial was held on April 25, 2012, in which Jeremy, Laurie, and their oldest child testified. The district court granted Laurie physical care of

the children subject to reasonable and liberal rights of visitation in Jeremy. Child support was readjusted to $1114.99 per month according to the child support guidelines. A "Motion for Expanded Findings, Reconsideration and New Trial" was filed alleging many of the same claims now before us on appeal. An order was filed correcting Jeremy's address and rejecting the other claims, holding "while the court agrees with [Jeremy] that joint physical custody had been somewhat satisfactory in the past, [Laurie's] anticipated move from the State of Nebraska to a location at least fifty miles away, made joint physical custody no longer a viable option." Jeremy appeals.

II. Standard of Review

Our review of dissolution decrees is de novo. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). While we are not bound by the district court's factual findings, we do "give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying." *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998).

III. Joint Physical Care

On appeal, Jeremy argues the district court should have granted the parties joint physical care of the children. He does so by arguing they had "effectively co-parented" the children for the preceding nine months, and the district court made its determination without setting out specific findings of fact and conclusions of law.

In determining whether joint physical care is appropriate, our primary consideration is the best interests of the children. *See Hansen*, 733 N.W.2d at

695 ("Any consideration of joint physical care . . . must still be based on Iowa's traditional and statutorily required child custody standard—the best interest of the child."). Moreover, in making a physical care determination it is our intention to place children in the environment that is "most likely to bring them to health, both physically and mentally, and to social maturity." *Id.*

Our supreme court has articulated several factors which courts are to consider when determining if joint physical care is in the best interests of the child. First, where there are two suitable parents, consideration is given as to the stability and continuity of care giving, which "tend[s] to favor a spouse who, prior to divorce, was primarily responsible for physical care." *Id.* at 696. A second factor is the ability of the parents to communicate and show mutual respect. *Id.* at 698. The third factor is the degree of conflict between the parents, because joint physical care requires "substantial and regular interaction between divorced parents on a myriad of issues." *Id.* The court has also noted where one party objects to joint physical care, the likelihood of its success is reduced. *Id.* A fourth factor is the degree to which the parties agree about their approach to daily matters concerning the children. *Id.* at 699. While these four factors are significant to determining the appropriateness of joint physical care, they are not exclusive, and we must consider "the total setting presented by each unique case." *Id.*

In this case, it is evident both parents love their children very much. However, we agree with the district court's decision Laurie should be granted physical care of the children. Laurie has historically been the primary caregiver of the children. According to Jeremy's testimony, after the temporary hearing

provided for joint care alternating weeks, the children were only with Jeremy "every other weekend, a few hours on Wednesday nights, and Sunday nights." When the children were with Jeremy, they were often at Jeremy's paramour's house rather than Jeremy's apartment.

Laurie does not want joint physical care. The oldest son testified he would rather stay with Laurie, and Jeremy testified he has a "rough" relationship with the eldest child. Laurie does not want to stay in Bellevue, and has hopes of moving back to a smaller town in Iowa, such as Oakland. The district court specifically found this move, "while making visitation a bit more burdensome, was not designed to deprive [Jeremy] of contact with his children." Moreover, we recognize that Laurie's objection to joint physical care could make it less successful than granting one parent physical care. *See id.* at 696.

Finally, although Laurie was granted physical care, she testified she wanted Jeremy to have "liberal visitation" and "[h]e could see the kids whenever he wants," including midweek visitation. To that end, the court granted Jeremy liberal visitation rights, including every Wednesday night and alternating weekends during the school year, two consecutive weeks in the summer, and holidays as agreed upon in their mediation agreement. A continuity of care giving by Laurie, paired with her historical role as the children's primary caregiver, and liberal visitation with Jeremy, will provide the children with a stable environment that will contribute to their ability to become mentally, physically, and socially mature adults. *See id.* at 695. We therefore affirm the district court's granting of physical care to Laurie.

IV. Relocation

Next, Jeremy claims the district court erred in determining joint physical care should be terminated due to a potential relocation by Laurie as no evidence was presented the move was in the best interests of the children and the move would be contrary to their stability. Jeremy relies on *In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983), a case in which relocation and termination of a joint physical care arrangement was appropriate, even when the arrangement was successful, because there was "no hint in [the] record that [the mother's] move [was] motivated by a desire to defeat [the father's] visitation rights or undermine his relationship with the children."

Frederici is distinguishable because it is a modification of a care arrangement, not an original decree. However, using those factors, upon our de novo review of the record, we agree with the district court Laurie's initial move to Bellevue was at the enticement of Jeremy—which included a monthly monetary allotment—to see if the joint physical care would be successful. When the joint care arrangement did not work, as the children were shifting back and forth and their daily routines were destabilized, it is not unreasonable for Laurie to make an appropriate change. It was her desire to return to a smaller community. She wanted the children to be in smaller schools and live in a neighborhood more conducive to playing outside rather than being "cooped up" in her current apartment complex. Laurie also testified as to the financial struggles she has had living in Bellevue and a move would provide her financial security. Moreover, she is not proposing to move exceedingly far away, further undermining Jeremy's accusation that her move was a purposeful attempt to

strain the relationships between himself and the children. Jeremy's argument is without merit.

V. Laurie's Income

Finally, Jeremy argues Laurie intentionally lowered her income when she left her previous employment, resulting in a higher child support award. He claims this caused a substantial injustice to him and her previous full-time salary should be imputed to her for calculation of child support. If a parent voluntarily reduces income or decides not to work, the court may consider earning capacity rather than actual earnings. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). However, before using earning capacity the court must "make a finding that, if actual earnings were used, substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). In making this determination, the court examines the employment history, present earnings, and reasons for the current employment. *Nelson*, 570 N.W.2d at 106.

Laurie took a voluntary layoff at her job and at the time of trial had been looking for work for about four of five months while also working on her associate's degree. She testified she took the voluntary layoff because she wanted to go back to school and the drive between her place of employment and Bellevue was too much. The district court found Laurie's move to Bellevue was a product of Jeremy's enticement by promises of financial security, and the move eventually resulted in Laurie's income being substantially reduced. We agree. Jeremy is in school continuing his education yet he faults Laurie for doing the

same. Laurie has attempted to find part-time work to accommodate her schooling. There is no substantial injustice to warrant using her earning capacity rather than her actual earnings and we affirm the district court.

VI. Conclusion

The factors supporting joint physical care militate against such an arrangement here and continuity and stability for the daily routines of the children is better found with Laurie. We affirm the district court's determination she should have physical care of the children subject to Jeremy's liberal visitation. Moreover, based on the facts in the record, Laurie's desire to relocate is not to purposefully sever Jeremy's relationship with the children. Finally, using Laurie's current income does not do a substantial injustice to Jeremy and the district court's decision should be affirmed.

AFFIRMED.