IN THE COURT OF APPEALS OF IOWA

No. 3-300 / 12-1188
Filed May 30, 2013

IN RE THE MARRIAGE OF JUSTIN CERWICK AND MACHELLE CERWICK

Upon the Petition of
JUSTIN CERWICK,
Petitioner-Appellant,

And Concerning
MACHELLE CERWICK,
Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Thomas J. Bice, Judge.

Justin Cerwick appeals from a divorce decree awarding joint physical care of three children. **AFFIRMED AS MODIFIED AND REMANDED.**

Dan T. McGrevey, Fort Dodge, for appellant.

Machelle Cerwick, Fort Dodge, appellee pro se.

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

MULLINS, J.

Justin Cerwick appeals from a divorce decree awarding joint physical care of three children to him and his former wife, Machelle Cerwick. Justin argues the issue of joint physical care was not properly before the district court because neither party requested it. He further contends that even if the issue of joint physical care were properly before the court, the court erred in awarding joint physical care and should have awarded him physical care. We affirm the divorce decree as modified and remand for further proceedings.

I. Background Facts and Proceedings

We are called upon to determine whether the district court erred in granting Justin and Machelle joint physical care of their three children—J.C. (born in 2005), N.C. (born in 2007), and S.C. (born in 2010)—upon their eventual divorce. At the time of their divorce in 2012, Justin was thirty years old and Machelle was twenty-eight years old.

When Justin and Machelle met, both were high school graduates and in good health. Justin and Machelle worked together at the same company and were soon engaged to be married. Approximately eight months after the engagement Machelle learned she was pregnant with her first child, J.C. Around the same time she learned of her pregnancy, both Machelle and Justin were laid off. Machelle subsequently obtained a job at a local hospital while Justin began work at a facility manufacturing gypsum board.

After their second child was born in 2007, Machelle returned to school to pursue an associate's degree in radiology technology. While she was in school,

Justin supported the family financially and Machelle served as the children's primary caregiver. Machelle graduated in 2010. Although Machelle was unable to obtain a job in her desired field, she eventually secured employment at an animal food production company. Machelle worked from 3:00 p.m. to 11:00 p.m. for twelve days and then had two days off.

In 2010, Justin was fired from his job. He and Machelle agreed that he would return to school to pursue an associate's degree as a diesel mechanic. While he was in school, Justin was not employed and served as the children's primary caregiver.

At some point the couple's relationship began to deteriorate. Machelle asserted that they fought all the time and it was unhealthy for the children. While there was no evidence of physical abuse, Justin did punch a hole in the wall of their family home.

In early 2011, the parties separated. Machelle left the marital home; Justin remained in the martial home with the children. Initially, Machelle lived with her father in his home. She then moved into a two-bedroom apartment of her own.

After marital counseling failed, Justin filed for divorce in April 2011. Machelle recommended alternating care of the children on a daily basis during the week and switching care every other weekend. This arrangement was unsuccessful and led to police intervention on several occasions. Justin moved for physical care. Machelle responded with a motion for temporary joint physical care, which Justin resisted.

In June 2011, the district court held a hearing on Machelle's motion for temporary joint physical care. The district court found that "[w]hile both parties are capable of caring for the children, current circumstances render Machelle's proposed shared care arrangement undesirable. The children would be constantly changing homes and schedules, often daily. Moreover, Machelle's living accommodations militate against having children for extended periods." The court then placed temporary physical care of the children with Justin.

In August 2011, the court awarded Justin temporary support in the amount of $900.00 per month. The same day the court ordered temporary support Justin learned Machelle quit her job. After quitting her job Machelle enrolled in a pre-med program at a local community college. Machelle subsequently expressed her desire to finish a two-year pre-med program, transfer to a four-year university, and then attend medical school in pursuit of becoming a doctor. After enrolling in school, Machelle moved to modify child support and visitation.

In September 2011, the district court held a hearing on Machelle's motion to modify child support and visitation. The district court found

> [Machelle's] decision to quit a $38,000 per year job during the pendency of this action to return to school to pursue a course of study that is not reasonably calculated to increase her employability in the foreseeable future, where the parties have three young children and a negative net worth, and Justin earns less than $25,000 per year, to be selfish and irresponsible.

The court also found that "communication and cooperation between the parties appears to have further deteriorated since the June hearing, essentially precluding shared care." The court then expanded visitation slightly, reduced child support to $450 per month, and otherwise overruled Machelle's motion.

In February 2012, the district court held a trial on the dissolution of marriage petition. The court found

> [T]he case . . . was highly contentions and filled with acrimony and incrimination. Little evidence was received that was not intended to cast a negative light on the opposing party and virtually no evidence was presented that would assist this court in finding a working resolution of the gritty issues presented. The parties were focused on "attacking" and "tearing down" one another in the presentation of their respective cases.

Both parties requested physical care. Neither party requested joint physical care. Machelle did, however, submit three different child support worksheets—one if the court were to award physical care to her, one if the court were to award physical care to Justin, and one if the court were to award joint physical care. The court awarded Justin and Machelle joint physical care, divided martial debts and property, and ordered minimal child support. Justin then filed a motion to amend and enlarge the district court's findings to address perceived inequities in tax exemptions and child support determinations. The court then reduced child support obligations and divided tax exemptions between the parties.

Justin appeals the court's joint physical care order.

II. Standard & Scope of Review

We review cases tried in equity de novo. *See In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). We give deference to the district court's findings, especially those involving the credibility of witnesses. *Id.*

In this case, Machelle failed to file an appellee brief. While the appellant is not entitled to a reversal as a matter of right when the appellee fails to file a brief, we "handle the matter in a manner most consonant with justice and [our] own convenience." *Bown v. Kaplan*, 237 N.W.2d 799, 801 (Iowa 1976) (internal

citation and quotation marks omitted). We will confine our analysis to the appellant's objections to the trial court's ruling and will not search the record for an alternative theory to uphold its decision. *See State ex re. Buechler v. Vinsand*, 318 N.W.2d 208, 209 (Iowa 1982).

III. Analysis

Justin contends the district court erred in awarding joint physical care because neither he nor Machelle requested joint physical care. To assess Justin's argument, we find a brief historical examination of relevant legislative action helpful. In 1997, the Iowa legislature defined the term "joint physical care" for the first time but did not explain its substantive application. 1997 Iowa Acts ch. 175, § 199 (codified at Iowa Code § 598.1(4) (1999)); *see also Hansen*, 733 N.W.2d at 691. Then, in 2004, the 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.

We do not require the parties to use magic words to request joint physical care. *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007). Nor are our courts "interested in creating a trap for the unwary with respect to something so paramount." *Id.* Our statute makes clear, however, that the district court may consider joint physical care *upon the request of either party*. *See* Iowa Code § 598.41(5)(a) (2011); *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 the father abandoned his request for joint physical care). The legislature could have provided that the district court may consider joint physical care whenever the best interest of the children so required—rather than upon the request of either parent. *See* Iowa Code § 598.41(5)(a). It did not do so. *See id.*

In this case, neither party requested joint physical care. Both parties essentially conceded joint physical care was not appropriate. The record is replete with evidence supporting the district court's finding that this case was "highly contentious and filled with acrimony"—including several unfounded child abuse allegations and police intervention. Thus, we find the issue of joint physical care not properly before the district court and not in the children's best interest. *See* Iowa Code § 598.41(5)(a); *Fennelly*, 737 N.W.2d at 102; *In re Marriage of Hynick*, 727 N.W.2d 575, 580 (Iowa 2007) (finding the parties' lack of mutual respect and inability to communicate made joint physical care inappropriate).

As we find the district court erred in ordering joint physical care, we must determine which caregiver should be awarded physical care. *See* Iowa Code § 598.41(1), (5). To determine which caregiver should be awarded physical care, our principle consideration is the best interest of the children. *See* Iowa R. App. P. 6.904(3)(o); *Hansen*, 733 N.W.2d at 695. The factors enumerated in Iowa Code section 598.41(3) and in *Hansen* guide our best interest analysis. *See Hansen*, 733 N.W.2d at 698 (holding that although Iowa Code section 598.41(3) does not directly apply to physical care decisions, "the factors listed [in this code section] as well as other facts and circumstances are relevant in determining

whether joint physical care is in the best interest of the child"). Moreover, "the factors of continuity, stability, and approximation are entitled to considerable weight." *Id.* at 700. Our goal in making a physical care determination is to place the child in the environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

The transition from the parties' separation to divorce has been highly contentious—particularly with respect to the issue of physical care. Throughout much of the marriage Justin and Machelle shared parental responsibility in caring for the young children. In attempting to share physical care after separation, each party lobbed criminal allegations of physical abuse against the other and contacted the Department of Human Services and the local police on several occasions. Justin alleges that Machelle's parenting style is irresponsible. He argues she improperly clothed the children and is responsible for the children's frequent tardiness and absence from school. Machelle, on the other hand, attacks Justin's parental style as overly controlling and physically and verbally abusive.

Justin has been the primary caregiver since the parties separated in February 2011. The children have enjoyed relative stability and responsible care under his supervision. The principles of continuity, stability, and approximation favor placing physical care with Justin. *See Hansen*, 733 N.W.2d at 700. Upon our de novo review, we find Justin's home environment most likely to bring the

children to physical, mental, and social maturity. *See Courtade*, 560 N.W.2d at 38.

As a result we modify the district court decision awarding joint physical care and find awarding Justin physical care is in the children'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 children. We expect Justin to comply with this obligation and foster the children's relationship with their mother through liberal visitation and mutual respect. Justin's physical care shall not affect Machelle's rights and responsibilities as a joint legal custodian of the child. *See* Iowa Code § 598.41(5)(b).

IV. Conclusion

We find the issue of joint physical care was not properly before the district court as neither party requested such an arrangement under section 598.41(5)(a). Given Justin's status as the primary caregiver since the parties separated, we find that the concepts of continuity, stability, and approximation favor placing physical care with Justin as the environment most likely to foster the children's physical, mental, and social maturity. Thus, we affirm the district court's divorce decree but modify to award Justin physical care. We direct the district court to award Machelle liberal visitation and remand to set forth an appropriate visitation schedule, and to order child support accordingly. Costs on appeal are assessed to Machelle.

AFFIRMED AS MODIFIED AND REMANDED.