IN THE COURT OF APPEALS OF IOWA

No. 3-375 / 12-1575
Filed June 26, 2013

Upon the Petition of

LEE CLINE,
Petitioner-Appellee,

And Concerning

BONNIE SWANSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Adair County, John D. Lloyd, Judge.

The mother of a three-year-old daughter appeals the order determining child custody, visitation, and support. **AFFIRMED.**

Michael J. Miller and Jeffrey R. Edgar of Patterson Law Firm, L.L.P., Des Moines, for appellant.

Carmen Eichmann of Eichmann Law Offices, Des Moines, for appellee.

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

TABOR, J.

Lee Cline and Bonnie Swanson are the parents of Caroline, who is three years old. After the unmarried parties separated, Lee initiated an action to establish paternity, custody, visitation, and child support of Caroline. The district court granted the parties joint legal custody of their daughter and ordered them to share physical care on an alternating weekly basis. The court further decided Lee would assume physical care of Caroline when she starts kindergarten in 2015.

On appeal, Bonnie asks us to reverse the order granting Lee physical care of Caroline when she begins school. Bonnie requests physical care be placed with her instead and seeks a corresponding adjustment of the child support award. Bonnie also contends the district court abused its discretion in denying her an attorney fee award. Finally, Lee asks for appellate attorney fees.

Although both parties provide excellent care for their daughter, the evidence shows Lee is the more stable parent. Accordingly, we affirm the district court's order granting him physical care beginning in August 2015, and the corresponding child support award. Given the expense Lee incurred in procuring the child custody evaluation, we find the court acted within its discretion in turning down Bonnie's request for trial attorney fees. We also decline to award Lee his appellate attorney fees.

I. Background Facts and Proceedings

Lee and Bonnie met through eHarmony, an on-line dating service, in January 2009. In March 2009, Bonnie discovered she was pregnant. Their

daughter was born in October 2009. A few weeks before Caroline was born, Bonnie moved into Lee's home in Greenfield.

Lee has worked for Windstar Communications since January 2008. His typical schedule is Monday through Friday, though he is also required to work one Saturday per month. In exchange for working that Saturday, Lee receives one day off during his regular work week.

At the time of Caroline's birth Bonnie was working as a nanny for the Stineman family. She took six weeks of maternity leave before returning to work. The Stinemans encouraged Bonnie to bring Caroline with her to work, which she did until the baby was ten months old.

In August 2010, the Stinemans replaced Bonnie's services with those of a relative. John Stineman offered Bonnie a job at his business, Strategic Elements, located in Des Moines. Caroline attended daycare in Des Moines, approximately fifty miles away from Lee's home in Greenfield. Because it was nearer to her work, Bonnie transported Caroline to and from daycare. Bonnie also took Caroline to most of her medical appointments because her providers were also based in Des Moines.

In May 2011, after her employment with Strategic Elements ended, Bonnie went to work for Agriland FS in Winterset. The parties found a daycare just north of Winterset. Again, because Bonnie worked nearest to the daycare, she dropped off and picked up Caroline. Bonnie quit her job in July 2011 and began working part-time for a law firm in October 2011.

After Caroline's birth Lee and Bonnie continued a romantic relationship and eventually became engaged in July 2010. But their relationship ended one year later. In August 2011, Bonnie moved out of Lee's home and into her parents' home in Algona, approximately 143 miles from Greenfield. Bonnie started dating Jeremy Haugen in September 2011, and they have since become engaged. Jeremy lives in Garner.

Following their breakup, the parties' interactions grew contentious. Lee recorded his telephone conversations with Bonnie and kept a record of their exchanges. Bonnie called law enforcement to Lee's home when she was moving out to settle a dispute over what belongings were hers. Bonnie did not allow Lee to have contact with Caroline in the month after the couple's split.

On August 2, 2011, Lee filed a petition to establish Caroline's paternity, custody, visitation, and child support. Lee also applied for a custody evaluation, which Bonnie resisted due to the cost. The court granted the application and appointed Dr. Sheila Pottebaum as the evaluator. The court ordered Lee to pay the costs associated with the evaluation.

On October 24, 2011, the district court entered a temporary order setting forth a custody and visitation schedule. The court ordered the parties to share physical care of Caroline while the action was pending, with Lee and Bonnie alternating Caroline's care on a weekly basis. When Caroline is in Bonnie's care, Bonnie's mother provides daycare during working hours. When Caroline is in Lee's care, she attends an in-home daycare.

In March 2012, Dr. Pottebaum completed her custody evaluation. After observing both Bonnie and Lee with Caroline, the evaluator concluded each parent possessed "a plethora of positive skills" and both were "exceptional in their ability to demonstrate warmth and affection for their daughter." While Dr. Pottebaum characterized Bonnie and Lee as "excellent parents," she noted their discord "holds the potential to interfere with what could be a positive co-parenting relationship unless interventions are set in place to offset the current negativity." Dr. Pottebaum decided given the equality of their parenting skills and Caroline's bond with both parents, the determining factor in her physical care recommendation was "the predictability and stability of each parent's living situation." She recommended Lee be granted physical care when Caroline begins school in 2015, provided the parties are not living in close enough proximity to each other to allow a shared care arrangement to continue.

The court held a trial in June 2012. Each parent aired various complaints about the other. Lee believes Bonnie is overprotective of Caroline, while Bonnie believes Lee does not attend to Caroline's health-related issues as carefully as he should. Each blames the other for poor communication. Dr. Pottebaum testified about the child custody evaluation and reiterated her recommendation Lee be granted physical care of Caroline when she begins school. A number of Lee's long-time friends and family members testified regarding his loyalty and trustworthiness as a person. John Stineman testified regarding Bonnie's skill as a caregiver while employed as his nanny. Bonnie's mother and fiancé also testified on her behalf.

On August 2, 2012, the district court entered its order addressing child custody and child support. The court found Lee to be the more stable of the parents and expressed concerns about Bonnie's willingness to deprive Lee of access to Caroline by moving to Algona, and her refusal to allow Lee contact with Caroline following her move. Finally, the court found that while "neither [party] is blameless" in causing the discord between them, Bonnie has demonstrated an unwarranted "negative attitude towards [Lee]'s parenting and a desire to micro-manage his time with the child." The court concluded Bonnie was less willing and able to support Lee's relationship with Caroline.

The court ordered Lee and Bonnie to continue the arrangement set forth in the temporary order, with the parties alternating Caroline's care on a weekly basis. The order provides when Caroline begins kindergarten in 2015, Lee will assume physical care. At that point, Bonnie must pay Lee $314.96 per month in child support.

II. Scope and Standard of Review

Issues ancillary to a paternity determination are tried in equity. Iowa Code § 600B.40 (2011). We review equitable actions de novo. Iowa R. App. P. 6.907. When we consider the credibility of witnesses in equity actions, we give weight to the findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Analysis

The parties agree shared care is in Caroline's best interests during her preschool years. The fighting issue is which parent should be granted physical

care once Caroline starts school.[1] On appeal, Bonnie contends the district court was wrong in finding the physical-care balance tipped toward Lee. Bonnie asserts she has historically been Caroline's primary caretaker. She also argues Lee has been the source of their communication problems. Bonnie asks us to modify the grant of physical care and adjust the child support accordingly. She also disputes the district court's denial of trial attorney fees.

A. Physical care

Iowa law distinguishes custody from physical care. *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Child custody concerns parents' legal privileges and obligations for their offspring. *See id.* at 100-01. Physical care is "'the right and responsibility to maintain a home for the minor child and provide for the routine care of the child.'" *Id.* at 101 (quoting Iowa Code section 598.1(7)). The child's best interest is the overriding consideration in deciding physical care. *Id*.[2]

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[1] Neither party challenges the court's ability to make a physical care determination based on this future event. But we note the same concerns exist here as appear in cases where courts have ordered an automatic, prospective modification of custody arrangements: namely, the court's inability to predict the family's future. *See In re Marriage of Thielges*, 623 N.W.2d 232, 237 (Iowa Ct. App. 2001) (noting its strong disapproval of custody provisions that predetermine what circumstances will warrant a future modification because such provisions seem to erroneously provide that one event alone will mandate a change of care). There is no way of divining what physical care arrangement will be in the child's best interests at the time of the triggering event—in this case, Caroline starting school in a little over two years—or what the nature of the relationships will be between the parents and the child at that time. "The advent of school, while certainly a formidable milestone, is only one factor in a long list which must be considered if a change in custody is contemplated at that time." *See Knutsen v. Cegalis*, 989 A.2d 1010, 1014 (Vt. 2009). Other changes, apart from the child beginning school, may occur by that time which could impact the best-interests determination.

[2] Our analysis is the same whether the parents were married or remained unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988); *see also* Iowa Code § 600B.40.

Our objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *McKee v. Dicus*, 785 N.W.2d 733, 737 (Iowa Ct. App. 2010). We look to the factors in Iowa Code section 598.41(3) and in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), when deciding the better care assignment. *See McKee*, 785 N.W.2d at 737. We may give some factors greater weight than others. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). The particular facts of each case determine the weight ultimately assigned each factor. *Id*. If we decide joint physical care is not appropriate, we must choose one parent to be the primary caretaker and award the other parent visitation rights. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007).

Bonnie's first argument concerns the history of care giving in their family. She points out she took Caroline with her to work for the first ten months, transported Caroline to doctor's appointments, and was up with the baby at night. Greater primary care experience is one of many factors we consider in determining physical care. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). This consideration assures children maximum continuity in their lives. *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). But being the child's primary caretaker does not guarantee a grant of physical care. *Kunkel*, 555 N.W.2d at 253. We strive to find the care arrangement which

> will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . ., and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.

Iowa Code § 598.41(1). Under section 598.41(3), we mull whether each parent has actively cared for the child before and since the separation.

The record backs up Bonnie's claim she was Caroline's primary caretaker in the child's first years of life. While Lee was an active parent during the couple's romantic relationship, his role was diminished by the amount of travel required by Bonnie's position at Strategic Elements and Caroline's placement in a Des Moines daycare. But once the parties separated and the court entered a temporary order, Lee and Bonnie contributed equally to the child's care. We recognize Bonnie's valuable experience as a nanny, but find evidence in the record underscoring the capability of both parents to provide excellent care for their daughter.

Both parents will continue sharing their daughter's routine care for the next two plus years until she begins school when—given the current distance between their homes—a primary caretaker must be designated. Bonnie's role as primary caretaker for Caroline's first two years does not trump Lee's equal participation for the next three years. Placing Caroline in Lee's home when she enters kindergarten will not have a detrimental effect on Caroline's continuity of care.

Bonnie also blames Lee for their trouble communicating. She argues by recording their telephone calls Lee has focused more on "building a case" against her than on effective conversations. Accordingly, Bonnie claims she is the parent better able to support a relationship between Caroline and the non-custodial parent.

We do consider the parents' ability to effectively communicate with each other regarding the child's needs when making the physical care determination. Iowa Code § 598.41(3)(c). We also consider which parent can better foster the other parent's relationship with the child. *Id.* § 598.41(3)(e). Attempts to alienate the child from the former partner adversely reflect on a parent's custodial abilities. *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa Ct. App. 1985).

Our review of the record reveals both parents are capable of providing excellent care for their daughter. Unfortunately, they have allowed the contention of their breakup to spill over into their joint parenting. As Dr. Pottebaum noted, this contentiousness could harm Caroline if not addressed. But both Bonnie and Lee recognize the other is invested in Caroline's well-being. Because both parties have contributed to the discord, we do not embrace Bonnie's position that Lee, as primary custodian, would be less able to promote her relationship with Caroline.

As recognized by both the evaluator and the district court, both Lee and Bonnie offer quality physical care for Caroline. This wealth of parenting skill and attention is fortunate for the child, but leaves the physical care determination less clear cut. Like the district court, we see stability as the tie-breaker. Lee has shown more constancy in his work and living arrangements than Bonnie has demonstrated. And on this basis we affirm. Bonnie has changed not only jobs, but careers. She has moved frequently, including a relocation that places Caroline a significant distance away from her father. Because of the frequent changes in her life, her support system does not seem as well developed as

Lee's. He has held the same job in the same location since 2008 and maintains bonds with friends he has known since childhood.

In an ideal world the parties would reside close enough to continue their shared physical care arrangement into Caroline's school years. But barring a substantial change in circumstances, we agree with the district court's determination that Lee should be granted physical care of Caroline in 2015 when she begins kindergarten.

B. Child support.

Because we decline to modify the physical care provisions, we likewise decline Bonnie's request to alter the child support provisions of the order.

C. Trial attorney fees.

Bonnie asked the district court for attorney fees in conjunction with this action. *See* Iowa Code § 600B.25(1) (allowing reasonable attorney fees for prevailing party). The district court declined, finding although the parties have disparate incomes, Lee paid for the custody evaluation. On this basis, it ordered the parties to pay for their own attorneys.

An award of trial attorney fees rests in the trial court's sound discretion; we will not disturb that decision in the absence of an abuse of discretion. *Markey v. Carney*, 705 N.W.2d 13, 25 (Iowa 2005) (considering parties' respective abilities to pay). Here, Lee has a superior ability to pay, but advanced $4320 for Dr. Pottebaum's services. Given the cost of the evaluation, we find the district court acted within its discretion to deny Bonnie's request for attorney fees.

D. Appellate attorney fees

Finally, Lee requests appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but is discretionary. *Id.* at 26. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision on appeal. *Id.* After considering these factors, we decline to award Lee appellate attorney fees. Costs are taxed equally between the parties.

AFFIRMED.