IN THE COURT OF APPEALS OF IOWA

No. 3-486 / 12-2192
Filed June 26, 2013

IN RE THE MARRIAGE OF MOLLY J. CLARK AND DARIEN E. CLARK

Upon the Petition of
MOLLY J. CLARK,
Petitioner-Appellee,

And Concerning
DARIEN E. CLARK,
Respondent-Appellant.

Appeal from the Iowa District Court for Winnebago County, James M. Drew, Judge.

A father appeals the district court's ruling granting physical care of the parties' minor children to the mother. **AFFIRMED.**

Philip L. Garland, Garner, for appellant.

Sarah A. Reindl, Mason City, for appellee.

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

MULLINS, J.

Darien Clark appeals the physical care provisions of a decree dissolving his marriage to Molly Clark. Darien argues the district court erred in granting physical care of the parties' minor children to Molly. For the reasons stated below, we affirm the decision of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Darien and Molly Clark were married in April 2004. To this union two children were born: Cecilia in 2006 and Abraham in 2008. The parties separated in May 2010. From the time Abraham was born until the separation, Molly stayed at home to care for the children, while Darien worked full time during the week and occasionally on weekends. After their separation Darien and Molly arranged a schedule for parenting time. This schedule gave both parents substantial parenting time, but the children were under Molly's care a majority of the time. Molly's time with the children occurred both at the daycare where she worked at that time and at home.

Molly filed a petition for dissolution of marriage on July 19, 2011. Around this time, the parties began to disagree about a proper parenting schedule. Molly restricted Darien's visitation with the children, and there was a period of over one week in which Darien had no contact with the children at all. In August 2011, the district court approved the parties' stipulation that Darien have parenting time on alternate weekends and on one or two evenings during the week. In November 2011, after a hearing on the issue of temporary custody pending trial, the district

court ordered the parties to share parenting time on a roughly equal basis as they had done prior to the filing of the petition.

In the spring of 2012, Molly moved from Forest City, where both parties had previously resided, to Clear Lake as she was unable to secure subsidized housing in Forest City. A dispute arose in August 2012 over where Cecilia would be enrolled in school. After a hearing the district court ruled Cecilia would attend school in Forest City until a final custody determination was made. Since moving to Clear Lake, Molly has been employed at a coffee shop for thirty-five to forty hours per week, with a flexible schedule that is accommodating of her childcare responsibilities. Darien continues to work full time as a fleet manager for a drive-away company in Forest City.

After trial, the district court granted the parties joint legal custody of Cecilia and Abraham. The court found, and the parties do not dispute, joint physical care is not an appropriate arrangement. Instead, the district court's decree awarded physical care of both children to Molly and ordered Darien to pay child support accordingly. Darien now appeals from that ruling.

II. SCOPE AND STANDARD OF REVIEW.

Our review of marriage dissolution decrees is de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). Because of its ability to see and hear witnesses first hand, we give weight to the factual findings of the district court, especially its assessment of the credibility of witnesses, but we are not bound by those findings. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value as we must base

our decision on the particular circumstances of the case before us. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002).

III. PHYSICAL CARE.

Where child custody and physical care are at issue in marriage dissolution cases, the primary consideration is the best interest of the child. Iowa R. App. P. 6.904(3)(o); *Will*, 489 N.W.2d at 397. The court must consider joint physical care if requested by any party, and it must make specific findings of fact and conclusions of law that joint physical care is not in the child's best interest. Iowa Code § 598.41(5)(a) (2011); *In re Marriage of Hansen*, 733 N.W.2d 683, 692 (Iowa 2007). If the court determines joint physical care is not appropriate, it "must choose a primary caretaker who is solely responsible for decisions concerning the child's routine care." *Hansen*, 733 N.W.2d at 691.

The physical care determination should place the children in an environment likely to foster their mental and physical health and social maturity. *Id.* at 695. We look to the factors listed in Iowa Code section 598.41(3), as well as those announced in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), when deciding which parent is to be the primary caretaker. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). Also relevant to this decision are the factors of continuity, stability, and approximation. *Hansen*, 733 N.W.2d at 700. Not all factors are given equal consideration, and the weight of each factor depends on the specific facts and circumstances of each case. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998).

On appeal, Darien contends the district court erroneously granted physical care of Cecilia and Abraham to Molly. In deciding to award physical care to Molly, the district court relied on the fact that Molly has been the children's primary caregiver and Molly has a more accommodating work schedule. Darien argues (1) the district court placed undue emphasis on Molly's role as the primary caretaker of the children, (2) Molly unjustifiably denied him visitation for a time during their separation, and (3) Molly has failed to communicate with him about important issues in the children's lives. Molly claims her training and experience in child rearing and education, both professionally and with regard to the parties' own children, render her the more suitable caregiver.[1]

A. Approximation.

A central, but non-dispositive, factor in the physical care determination is an approximation of predissolution parent-child relationships. *See Hansen*, 733 N.W.2d at 697 (noting that the concepts of stability and continuity have been refined as a principle of approximation, which holds "the caregiving of parents in the post-divorce world should be in rough proportion to that which predated the dissolution"); *see also Winter*, 223 N.W.2d at 166 (urging consideration of the "effect on the child of continuing or disrupting an existing custodial status").

1 Molly also alleges Darien has made unwelcome, sexually aggressive advances toward her; Darien has engaged in inappropriate behavior; Darien has broken an agreement not to leave their children alone with Darien's parents due to concerns about past conduct by Darien's father; and Darien uses religious doctrine to manipulate the children's behavior in a way that Molly finds detrimental. Because we find, upon our de novo review, Molly should be granted physical care regardless of the veracity of these allegations, we do not incorporate them into our resolution of this matter.

Darien contends the district court's ruling placed unjustified emphasis on Molly's role as the primary caretaker for the children.

During the nearly two years between Abraham's birth and the parties' separation, Molly stayed home to care for both children. In this same period, Darien worked full time, including some weekends, to provide financial support for the family. Both parents had substantial parenting time with the children after the separation, but Molly still provided a majority of their care. Molly's parenting time, moreover, occurred both at home and while she was working at the children's daycare. The record as a whole reveals that both before and after the parties' separation, Molly successfully provided a substantial majority of the children's care. An award of physical care to Molly would best approximate this predissolution caregiving arrangement.

To be sure, greater primary care experience alone does not guarantee an award of physical care. *See In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). Moreover, Darien is not without considerable experience in caring for the children. We have noted, however, that the primary caretaker role is crucial in childhood development, and we give careful consideration to permitting a child to remain with the parent who has been his or her primary caretaker. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). In this case, because "successful caregiving by one spouse in the past is a strong predictor that future care of the children will be of the same quality," *Hansen*, 733 N.W.2d at 697, the principles of continuity, stability, and approximation favor granting physical care to Molly.

The district court's reliance on Molly's role as the children's primary caregiver is further buttressed by her formal training and experience in childcare matters. Molly has considerable experience in providing care to children in a professional setting. As part of her employment at a childcare facility, she has completed numerous instructional programs on topics such as health and safety precautions, child behavioral development, and other issues relating to child rearing and education. Molly testified she has applied this training not only at work but also in caring for her own children. "The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child" is a factor germane to the physical care determination. *Winter*, 223 N.W.2d at 166. Molly's considerable childcare education—and her experience applying that education to the care of her own children and others—further supports an award to her of physical care.

Finally, Molly's work schedule remains considerably more flexible than Darien's, and she has the ability to request time off on both weekdays and weekends in the event a child is ill or other family matters arise. This flexibility allows Molly to better approximate the predissolution parenting arrangement and adds continuity and stability to the parent-child relationship.

B. Denial of Contact.

In determining a physical care arrangement, a court "shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause." Iowa Code § 598.41(1)(c); *Will*, 489 N.W.2d at 399. Darien claims that after the petition was filed in July 2011, Molly

denied him visitation with the children for nine days. After that time, Darien resumed periodic visitation, and approximately five weeks later, the children began making overnight visits. Upon the district court's order in November 2011, the parties resumed their prior arrangement of sharing parenting time on a nearly equal basis.

Without deciding whether this denial of visitation was made with just cause, we find that the relatively short period in which Molly did not allow Darien visitation—or allowed only limited visitation—does not justify placing the children in Darien's physical care. Molly's role as the children's primary caregiver, her substantial training and experience, and her flexible work schedule, noted above, operate to diminish the significance of this factor. *Cf. In re Marriage of Daniels*, 568 N.W.2d 51, 56 (Iowa Ct. App. 1997) (finding that the weight of other relevant factors can reduce the import of a denial of visitation, even if unjustified); *see also Williams*, 589 N.W.2d at 761 ("Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case."). Thus, while the visitation restrictions, if unjustified, are not irrelevant to the physical care determination in this case, they are not of a sufficient magnitude to outweigh other factors favoring Molly as the primary physical caregiver.

C. Communication.

A significant factor in the physical care determination is the ability of each parent to communicate effectively with the other about the needs of their children. *See* Iowa Code § 598.41(3)(c). Darien argues Molly has failed to

communicate with him regarding several important events in the children's lives. Specifically, he claims Molly took Cecilia to counseling with only one-day's notice to him, she moved to Clear Lake with only one-day's notice, and she unilaterally decided to enroll Cecilia in another school district. Molly contends she had discussed counseling for Cecilia with Darien prior to taking her, Darien knew about her intended move to Clear Lake, and he was aware Cecilia had already attended prekindergarten classes in the Clear Lake school district. She also points to several instances in which Darien made decisions about the children's care without consulting her.

Assuming arguendo that Darien's claims about Molly's lack of communication are true, we do not find those instances sufficient to defeat an award of physical care to Molly. While these were certainly significant events in the children's lives, there is evidence of at least some degree of communication about these decisions; Darien's primary complaint seems to be a lack of adequate notice. Other than these claimed instances, the record demonstrates the parties' ability to communicate openly and effectively with one another about raising their children. For more than two years between their separation and the district court's decree, both Molly and Darien were able to work together and communicate regarding a shared parenting schedule, with only a brief instance of disagreement. In addition, Molly has experience using a "communication" or "parenting" notebook regarding the care of children to facilitate communication between different caregivers, and she testified as to her willingness to use such a notebook to communicate with Darien about the care of their children.

The relatively isolated instances of miscommunication between the parties regarding the care of their children, even if Molly were at fault in those instances, do not mandate placing the children in Darien's physical care. We think it clear from the record that Molly and Darien both possess the ability and willingness to communicate with one another about the needs of their children, and for the most part, they have done so throughout the period of their separation. Accordingly, this factor does not tip the balance in favor of either parent for the purposes of determining an award of physical care.

As we agree with the district court that physical care of the children should be placed with Molly, we affirm the district court's decree.

IV. ATTORNEY FEES.

Molly asks this court to award her $2000 in appellate attorney fees. An award of appellate attorney fees rests within the discretion of this court. *In re Marriage of McDermott*, 827 N.W.2d 671, 687 (Iowa 2013). In exercising this discretion, 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 of the trial court on appeal." *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). The relative merits of the appeal are also a factor. *McDermott*, 827 N.W.2d at 687. Any award of fees must be fair and reasonable. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Here, the record reveals Darien has the superior ability to pay. Molly was obligated to defend the decision of the district court, but Darien's appeal was not

devoid of merit. Accordingly, we find an award to Molly of $1200 for appellate attorney fees to be fair and reasonable.

AFFIRMED.