IN THE COURT OF APPEALS OF IOWA

No. 6-991 / 06-1093
Filed January 31, 2007

STEPHANIE A. FOGELMAN,
Petitioner-Appellee,

vs.

BRADLEY G. ANDERSEN,
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Jeffrey L. Larson, Judge.

Bradley G. Andersen appeals from a district court order that placed physical care of the parties' son with Stephanie A. Fogelman. **AFFIRMED.**

Michael J. Winter, Council Bluffs, for appellant.

Norman L. Springer Jr. of McGinn, McGinn, Jennings & Springer, Council Bluffs, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Bradley G. Andersen appeals from a district court order that placed physical care of the parties' son with Stephanie A. Fogelman. He contends the court erred by failing to award the parties joint physical care. We affirm the district court.

I. Background Facts and Proceedings

Bradley met Stephanie in May or June of 2003. Stephanie became pregnant, and the couple began residing together in October 2004. The parties have never been married to each other. Their only child, Gavin James Andersen, was born in January 2005. Stephanie and Gavin moved out of the home they shared with Bradley in July 2005.

In October 2005 Stephanie filed a petition to establish custody, visitation, and child support. The following month the court granted the parties joint temporary physical care of Gavin. The district court heard the child custody action in May 2006. At the time of trial, Bradley was unemployed and Stephanie was a full-time student at Iowa Western Community College.

On June 1 the court granted the parties joint legal custody and placed physical care of Gavin with Stephanie. The court also established a liberal visitation schedule for Bradley and ordered him to pay child support. Bradley filed a motion pursuant to Iowa Rule of Civil Procedure 1.904 requesting that the court modify or amend its decree. The court ruled on Bradley's motion on June 13, 2006. It modified its ruling to provide that Bradley would have overnight visitation each week from 6 p.m. on Wednesday until 6 p.m. on Thursday.

Bradley now appeals. He contends the court should have awarded joint physical care, and argues he and Stephanie should exchange physical care of Gavin on a weekly basis.

II. Scope and Standard of Review

We review a district court's ruling on child custody de novo. Iowa R. App. P. 6.4; *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa Ct. App. 1998). Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*).

III. Physical Care

The issue of joint physical care is addressed in the following language of Iowa Code section 598.41(5) (Supp. 2005):

> 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. If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

As we have stated before, this language is no more than a proclamation by the legislature that joint physical care, once strongly disfavored, is a viable option, provided it is in the children's best interests and the parents are able to cooperate and communicate with one another. *In re Marriage of Ellis*, 705 N.W.2d 96, 99 (Iowa Ct. App. 2005).

When we address the issue of physical care, our primary consideration is the best interests of the child. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). When we consider which physical care arrangement is in the

child's best interests, we consider the factors set forth in Iowa Code section 598.41(3), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).[1] The criteria for determining custody are the same regardless of whether the parents have never been married or have dissolved their marriage. *Hodson v. Moore*, 464 N.W.2d 699, 700 (Iowa Ct. App. 1990).

The critical issue is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). Our primary objective is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). We must also consider the

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[1] We consider the following factors from *Winter*, 223 N.W.2d at 166-67 when making physical care determinations:

1. The characteristics of each child, including age, maturity, mental and physical health.
2. The emotional, social, moral, material, and educational needs of the child.
3. The characteristics of each parent, including age, character, stability, mental and physical health.
4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
5. The interpersonal relationship between the child and each parent.
6. The interpersonal relationship between the child and its siblings.
7. The effect on the child of continuing or disrupting an existing custodial status.
8. The nature of each proposed environment, including its stability and wholesomeness.
9. The preference of the child, if the child is of sufficient age and maturity.
10. The report and recommendation of the attorney for the child or other independent investigator.
11. Available alternatives.
12. Any other relevant matter the evidence in a particular case may disclose.

willingness of each party to allow the child access to the other party. *Id.* With the foregoing principles in mind, we now address the district court's decision.

The district court gave serious consideration to Bradley's request for joint physical care, but concluded joint physical care would not be workable in this case. The court noted the parties "have clearly demonstrated by their past and current actions that they are not able to cooperate and communicate with each other in a reasonable and positive manner."

Upon our de novo review of the record, we find no reason to disagree with the district court's decision. The record reflects the parties have experienced conflict and disagreement regarding a variety of issues pertaining to their son. Bradley and Stephanie have been unable to agree on issues relating to Gavin's medical care, his food and nutrition, and how their son should be clothed. They have differences of opinion regarding their son's daily routine. The parents have also experienced some conflict regarding the amount of contact Gavin should have with his grandparents. Finally, the record reveals the parties have not been able to exchange care of their son without conflict. On the evening prior to their custody hearing, a physical exchange of care resulted in a physical confrontation, and the police were called.

Neither Bradley nor Stephanie is a perfect parent. However, they are both loving parents who are able to meet their son's needs. Nevertheless, like the district court, we conclude a joint physical care arrangement is not in Gavin's best interests in view of his parents' difficulties in cooperating and communicating

with one another.[2] In reaching this conclusion, we recognize the court had the parties before it, was able to observe their demeanor, and was in a better position to evaluate them as caregivers than we are. *See In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). Because we agree with the district court's decision, we affirm.

AFFIRMED.

[2] The record supports the conclusion that the parties' difficulty in communicating is exacerbated by the lack of respect Bradley has shown for Stephanie in his comments to her and his communication with others.