

IN THE COURT OF APPEALS OF IOWA

No. 8-728 / 08-0378
Filed December 31, 2008

CHANTELLE S. JOHNSON,
Petitioner-Appellant,

vs.

JOSEPH A. DEJOODE,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Honorable D.J. Stovall, Judge.

Chantelle Johnson appeals from the district court's custody order granting Joseph DeJoode physical care of their son. **AFFIRMED.**

Jeffrey Kelso of Howe, Cunningham & Lowe, Urbandale, for appellant.

Karen Taylor of Taylor Law Offices, Des Moines, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

VOGEL, P.J.

Chantelle Johnson appeals from the district court's custody order granting Joseph DeJoode physical care of their son, Drake. As the primary caregiver, she contends the order is not supported by the record and is not in the best interests of the child. We affirm.

I. Background Facts and Proceedings

Chantelle and Joseph began dating in 1997 and living together in 1998, in the home of Joseph's parents. Drake was born in April 1999, and Chantelle stayed home with him for the first two years of his life. The parties separated in November 2002. In December 2002, Chantelle married Jeffrey Johnson and Drake resided with them. In August 2006, Chantelle, Jeffrey, and Drake moved to Florida without informing Joseph. No formal order relating to custody, visitation, or child support of Drake was established until October 23, 2006. A temporary order then granted Chantelle and Joseph joint legal custody, with Chantelle having physical care and Joseph visitation and a child support obligation.

In the summer of 2007, Joseph was denied his visitation with Drake, which had been previously arranged in a mediation agreement. Consequently, on August 1, 2007, he filed an application for an order setting further hearing on temporary matters, asking the court to clarify his visitation rights from the current date until the scheduled trial date in January 2008. On August 27, a hearing on temporary matters was held with only Joseph and his attorney appearing; Chantelle later claimed she did not receive notice of the hearing. On August 28, and in an amended order, the district court changed temporary physical care of

Drake from Chantelle to Joseph. Both parties maintained joint legal custody. Joseph then went to Florida, and with the temporary order in hand, retrieved Drake from Chantelle and brought him back to Iowa.

On January 9, 2008, after a trial concerning the paternity order establishing custody, visitation, and support, the court awarded joint legal custody to both parties, with Joseph having physical care of Drake, and granting Chantelle reasonable and liberal visitation. Chantelle appeals. She asserts that she has been Drake's primary caretaker since his birth, and the trial court failed to give that fact proper weight.

II. Standard of Review

We review child custody orders de novo. Iowa R. App. P. 6.4. However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) (stating that the best interests of the child remain the principal consideration in all placement decisions).

III. Physical Care

"Legal custody" carries with it certain rights and responsibilities, including, but not limited to, "decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.1(3), (5) (2007). When parties are awarded "joint legal custody," "both

parents have legal custodial rights and responsibilities toward the child” and “neither parent has legal custodial rights superior to those of the other parent.” *Id.* § 598.1(3). “Physical care means the right and responsibility to maintain a home for the minor child and provide for the routine care of the child.” *Id.* § 598.41(7). When joint physical care is not warranted, the court must choose one parent to be the primary caretaker, awarding the other parent visitation rights. See generally *id.* § 598.41(1)(a)(5). Under this arrangement, the parent with physical care has the responsibility to maintain a residence for the child and has the sole right to make decisions concerning the child’s routine care. See generally *id.* § 598.1(7).

In determining physical care of a child, the courts are guided by the factors enumerated in Iowa Code section 598.41(3), as well as other nonexclusive factors enumerated in *In re Marriage of Hansen*, 733 N.W.2d 683, 696-99 (Iowa 2007). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

In the present case, we agree with the district court’s finding that physical care with Joseph is in Drake’s best interests. The record supports the district court’s observation that both parents clearly love Drake and have the ability to provide for his physical needs. Chantelle currently lives in Florida with Jeffrey, her husband of more than five years. She works as a CNA, and Jeffrey drives a truck over the road. They have flexible hours which allows someone to be home

to care for Drake. Joseph lives in Iowa with his live-in girlfriend and her teenage daughter. He works as a mechanic with Midas, and she stays at home; therefore also allowing someone to be home to care for Drake. Evidence introduced at trial demonstrated that both Chantelle and Joseph have been actively involved in Drake's life, although Chantelle was clearly Drake's primary caregiver for most of his young life. In assessing who should be a child's physical caretaker, we consider whether one parent has historically been the primary caregiver, although this factor is not controlling. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003). This consideration is given due weight; however, the court must consider all relevant factors in determining which parent is better able to provide for the long-term best interests of the child. *In re Marriage of Kunkel*, 546 N.W.2d 634, 636 (Iowa Ct. App. 1996).

As an initial observation, we do not believe that at the temporary hearing in August 2007, the district court should have modified physical care when such modification was not requested in the petition. Chantelle claimed she did not receive notice of that hearing and a default order was then entered changing physical care of Drake from Chantelle to Joseph. This required Drake to be moved from Florida to Iowa when the trial date was scheduled for just over four months later. Even assuming Chantelle did receive notice of the hearing and chose to ignore it, nothing in the petition would have alerted her to the possibility of Joseph gaining temporary care of Drake, resulting in his move from Florida to Iowa. "The judgment may award any relief consistent with the petition and embraced in its issues, . . . it cannot exceed what is demanded." Iowa R. App. P. 1.976. That being said, "stability and continuity of caregiving are important

factors that must be considered in custody and care decisions.” *Hansen*, 733 N.W.2d at 696 . We agree that “preservation of the greatest amount of stability possible is a desirable goal.” *Id.* at 696-97. The district court acknowledged as much in its ruling following the January 9, 2008 trial, stating, “[t]he Court is reluctant to risk another disruption for this child at this time by moving him back to Chantelle’s care.”

We acknowledge the central role that Chantelle played as the pre-separation primary caregiver and consider this as an important factor weighing in her favor. *Id.* at 697. However, since September 2007 Drake has resided with Joseph in Iowa. He is connected to his school, friends, and relatives in Iowa, and thriving both in his surroundings and in Joseph’s care. He has a strong support system: his father, his paternal and maternal grandparents, as well as three half-siblings,¹ and other extended family.

In addition, the district court found Chantelle was less than credible in her testimony. In particular the court was troubled by her uprooting Drake from Iowa when she and Jeffrey moved to Florida in 2006. This was done without the knowledge of Joseph, even using deceit in gaining travel money from Joseph’s mother. In addition, Chantelle limited phone contact between Joseph and Drake after the move. This behavior does not bode well for open communication regarding Drake’s well-being or promote his best interests by ensuring his contact with both parents. See *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476 (Iowa 1993) (“If visitation rights of the noncustodial parent are jeopardized by

¹ Chantelle has ten-year-old twin boys who reside with their father in Iowa. Chantelle has visitation.

the conduct of the custodial parent, such acts could provide an adequate ground for a change of custody.”)

Our courts consistently point to the importance of communication between parents about their children’s welfare. *In re Marriage of Bolin*, 336 N.W.2d 441, 447 (Iowa 1983). On the other hand, the record does not indicate nor did the district court find that Joseph had “done anything of significant consequence since gaining physical custody to interfere with Chantelle’s contacts.” See *In re Marriage of Manson*, 503 N.W.2d 427, 429 (Iowa Ct. App. 1993) (expressing the importance of each parent supporting the other parent’s relationship with the child). In affirming the district court’s findings, we give considerable weight to the sound judgment of the trial judge who had the benefit of hearing and observing the parties and other witnesses firsthand. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). We conclude that the district court fashioned a physical care and visitation arrangement that is in Drake’s best interests and therefore affirm the district court.

We decline Chantelle’s request for appellate attorney fees. Costs on appeal assessed to Chantelle.

AFFIRMED.