IN THE COURT OF APPEALS OF IOWA

No. 9-736 / 08-1582
Filed December 30, 2009

IN RE THE MARRIAGE OF VICKI LIN REIGHARD
AND PAUL ALLEN REIGHARD

Upon the Petition of
VICKI LIN REIGHARD,
Petitioner-Appellant/Cross-Appellee,

And Concerning
PAUL ALLEN REIGHARD,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Washington County, Daniel F. Morrison, Judge.

Vicki Reighard appeals from a district court's decree and post decree rulings dissolving her marriage to Paul Reighard. **AFFIRMED AND REMANDED.**

Constance Stannard, Iowa City, for appellant.

Paul Reighard, Washington, pro se.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

VOGEL, P.J.

Vicki Reighard appeals from a district court's decree and post decree rulings dissolving her marriage to Paul Reighard. She contests the district court decision to order a "shared custody arrangement" of the three children, as well as a self-executing provision that the party who moves from the children's current school district would forfeit shared physical care temporarily until the court had the opportunity to determine what arrangement would be in the children's best interests. She also asserts the district court's method of calculating child support was not correct and the property division was inequitable. We affirm and remand.[1]

I. Background Facts and Proceedings

Paul and Vicki were married in 1991 and three children were born of the marriage, Mariah in 1995, McKenna in 1997, and Ryan in 1999. Paul and Vicki both worked outside the home, and their schedules allowed each to be a part of the children's daily routines. Vicki got the children up in the mornings and ready for school and Paul was able to be home when the school day was done, transport the children to their various after-school activities, and prepare supper for them. But for the communication problems between Paul and Vicki, this arrangement worked well, providing the children good care by each parent. Marital discord began increasing, and in March 2007, Vicki moved out of the family home. Shortly thereafter, both Paul and Vicki began relationships with other people. The district court specifically noted the "poor decisions made by

[1] Paul's pro se brief does not comply with the rules of appellate procedure.

each of the parties to move into relationships with others who also have children." Vicki filed a petition for dissolution on July 27, 2007.[2]

The parties attempted a shared care arrangement, but based on Paul and Vicki's inability to communicate, this arrangement was unsuccessful. On January 25, 2008, after consideration of the affidavits submitted, the district court entered an order for temporary custody and support. The order granted Vicki physical care of the children, "subject to the reasonable and liberal visitation privileges of [Paul], not less than after school every day until [Vicki] gets home from work, Wednesdays until 8:00 p.m., and every other weekend."

The matter went to trial in May 2008, and the district court ordered Vicki and Paul joint legal custody of the parties' three children and a "shared custody arrangement" for physical care. The shared care arrangement was set as:

> Vicki having physical custody of the children from August 20 of each year until the day after school recesses for the summer. Paul shall have physical custody of the children from the day after school recesses for the summer until August 20.

The district court also included a provision, stating "if either parent moves from the Washington School District, the remaining parent shall become the physical custodial parent until such time as the court has an opportunity to address what arrangement will be in the child's best interest."

On September 30, 2008, Paul filed an application for rule to show cause, claiming that Vicki moved from Washington to North Liberty, triggering a change

[2] Delays occurred prior to trial, as Vicki filed an application to enter a default judgment, and the court entered a default order on November 9, 2007. Paul then filed a motion to set aside default, which was sustained at a January 4, 2008 hearing.

of custody.[3] On October 2, 2008, Vicki filed a notice of appeal of the district court's decree and subsequent child support order. A hearing began on October 14, 2008 on Paul's motion to enlarge or amend judgment. Vicki requested a continuance, and until further contempt proceedings commenced, the court ordered the parties comply with the original dissolution decree, and Vicki was instructed to "immediately turn physical care of the children over to [Paul] subject to her visitation rights."[4] Vicki appeals.

II. Standard of Review

We review custody orders de novo. Iowa R. App. P. 6.907 (2009). However, the district court had the advantage of listening to and observing the parties and witnesses. *In re Marriage of Zabecki*, 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. 6.904(3)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(*o*).

III. Shared Custody

Vicki first asserts the court erred in awarding "a shared custody arrangement," awarding Vicki physical custody during the school year, and Paul physical custody during the summer.[5] She argues this is actually "divided

[3] Paul also filed a motion for new trial, motion to enlarge and amend judgment, but this was mooted by Vicki's filing of this appeal.
[4] Vicki filed a motion to stay the implementation of the court's custody order, but the motion was denied.
[5] Neither party challenges the granting of joint legal custody.

custody" and neither she nor Paul requested shared care. *See* Iowa Code § 598.41(5)(a) (2007) ("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."). Absent a request for shared care, Vicki asserts the court erred in making such a determination.

In child custody cases the first and governing consideration is the best interests of the children. Iowa Code § 598.41(3). Next, it is important to discuss the differences between joint legal custody and joint physical care. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). "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); *Hansen*, 733 N.W.2d at 690. When joint legal custody is awarded, "neither parent has legal custodial rights superior to those of the other parent." Iowa Code § 598.1(3); *Hansen*, 733 N.W.2d at 690. On the other hand, "physical care" involves the right and responsibility to maintain a home for the minor child and provide for routine care of the child. *Hansen*, 733 N.W.2d at 690. If joint physical care is awarded, "both parents have rights to and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, [and] providing routine care for the child . . . ." *Id.* at § 598.1(4).

Joint physical care anticipates that parents will have equal, or roughly equal, residential time with the child. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). Under joint physical care, the parties are equally responsible

for routine, daily decisions to be made regarding the children regardless of residential arrangements at the time. *In re Seay*, 746 N.W.2d 833, 835 (Iowa 2008). While joint physical care does require equal responsibility on routine, daily decision-making, it does not require that the residential arrangements be determined with mathematical precision. *Id.* at 835-36.

The district court awarded Vicki physical custody from August 20 of each year until the day after school recesses for the summer. Paul was awarded physical custody from the day after school recesses for the summer until August 20. The non-physical care parent was awarded minimum visitation of every other weekend from Friday at 5:00 p.m. until Sunday at 7:00 p.m. and every Wednesday from 5:00 p.m. until 7:00 p.m. The district court ordered the arrangement, stating that "In order to maximize the contact with each parent, the court finds that a shared custody arrangement is in the children's best interest." We agree with Vicki that this appears to be more of a divided care arrangement; the school year with Vicki and the summer with Paul. However, the inference from the district court's label of "shared custody arrangement" is that neither parent would have the advantage over the other for the decisions which normally fall to the physical care parent. The result is discussed below. We find the district court set a schedule which would provide the children the most stability and consistency. With an extensive pattern of providing shared care on a daily basis for the children, we affirm the district court's order of shared physical care.

IV. Automatic Change of Primary Care

Vicki next asserts the self-executing or triggering portion of the district court decree was both "unreasonable and unconstitutional."[6] The district court order stated "if either parent moves from the Washington School District, the remaining parent shall become the physical custodial parent *until such time as the court has an opportunity to address what arrangement will be in the child's best interest.*" (emphasis added). Late in September 2008, Vicki moved out of the Washington Community School District to North Liberty, Iowa, thus triggering the above provision of the decree. Although the children had already begun the school year in the Washington school district, Vicki enrolled them in the North Liberty school district. A hearing was held on October 14, 2008, on Paul's rule to show cause. The district court then ordered Vicki to "immediately turn physical care of the children over to [Paul]," as the paragraph in the decree triggering a change in physical care "is operative until or unless an appropriate court enters a stay order." Vicki sought a stay order, which was denied by our supreme court on October 31, 2008.

On appeal Vicki asserts such an automatic trigger is contrary to Iowa law, and the physical care parent has the right to determine where the children live. *See In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996); *In re Marriage of Frederici*, 338 N.W.2d 156, 159-60 (Iowa 1983). While we agree with this basic concept, we are mindful that Vicki did not have sole physical care

[6] As the constitutional claim was not raised before the district court, the issue was not preserved as we have no ruling to review. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002).

of the children, but shared care. As such, Paul had an equal right to determine where the children would attend school.

During the dissolution trial, the district court addressed the parents, stating,

> I have heard nothing but disappointing things about both of you. Your behavior's been childish, immature, certainly not up to the standards of a parent. This is the picture that's been painted of both of you. You both tell me that you want physical care, which means you care about your kids. You decide to split up, and the first thing both of you do is go grab other partners who have kids and you throw your kids into a mess when they're still trying to figure out what's going on with their own parents. Those are extremely poor judgment calls. I would doubt your kids have a clue as to how to have a stable, normal relationship. I think you two need to get off this, "He hit me," "She hit me," "I don't like what she does," "I don't like what he does."
>
> There is little if anything in this testimony about why either of you is a better parent than the other or why either of you is a decent parent.

Addressing the parties from the bench, the district court was not shy about its assessment of both Vicki and Paul's behaviors and how their actions impacted their children. The language of the decree, while shorter on details than the comments made from the bench, is nonetheless clear that the best interests of the children would be served with a shared care arrangement.

The court then added the proviso that if either parent moved from the school district where the children were enrolled, such a move would upset the current sharing of physical care responsibilities, such that the other parent would have physical care, "until such time as the court has an opportunity to address what arrangement will be in the children's best interest." We infer from this that the district court was protecting the children from further rash decisions by either parent which would again upset their daily lives. At a minimum, it secured the

children's daily routine and educational stability until another "arrangement" could be assessed by the court. It is clear the district court placed the interests of the children ahead of the desires of either parent. *Hansen*, 733 N.W.2d at 695 ("Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child."). We therefore affirm the district court.

V. Calculation of Child Support with Shared Care

Vicki asserts the district court erred in calculating child support. We need not address this issue as physical care of the children was changed to Paul. However, we remand to the district court to recalculate and set child support Vicki will pay to Paul based on the change of physical care of the children.

VI. Property Division

Vicki next asserts the district court should have ordered Paul pay her $5000 as an equalization payment, as she claims Paul was awarded $10,000 more in assets than she received. She also asserts she should have been awarded one-half of Paul's 401K plan through a Qualified Domestic Relations Order (QDRO). In dissolution-of-marriage cases, marital property is to be divided equitably. *Hansen*, 733 N.W.2d at 702. Equitable distribution depends upon the circumstances of each case. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). An equitable division is not necessarily an equal division. *In re Marriage of Anliker*, 694 N.W.2d 535, 542 (Iowa 2005). In its post trial ruling the district court found,

> "Given the debt division the court believes the personal property is divided equitably. Given the fact that Paul is responsible for the debts in this marriage, and has paid off over $6,000 in joint debt

> prior to trial, [ ], it is equitable that he retain his Modine 401K in the amount of $22,940. . . . In addition Vicki cashed in her retirement during the marriage and consumed the funds."

We have reviewed the record on appeal and find it is incomplete as to valuations, findings and net distribution of the major assets of the parties. Moreover, Vicki did not call the absence of such findings to the district court's attention. Accordingly, we are in no position to say that this property division was inequitable. We therefore affirm the district court's property division.

VII. Appellate Attorney Fees

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). Upon our review, we decline to award appellate attorney fees. Costs assessed to Vicki.

AFFIRMED AND REMANDED.