IN THE COURT OF APPEALS OF IOWA

No. 8-286 / 07-1587
Filed October 15, 2008

IN RE MARRIAGE OF RANDALL CHARLES KREAGER AND AMI DEEANN KREAGER

Upon the Petition of
RANDALL CHARLES KREAGER,
Petitioner-Appellee,

And Concerning
AMI DEEANN KREAGER,
Respondent-Appellant.

Appeal from the Iowa District Court for Dallas County, Paul R. Huscher, Judge.

Ami Kreager appeals the physical care provisions of the district court's decree dissolving her marriage to Randall Kreager. **AFFIRMED AS MODIFIED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

Matthew J. Hemphill and Randy V. Hefner of Hefner & Bergkamp, P.C., Adel, for appellee.

Heard by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

Ami Kreager appeals the physical care provisions of the district court's decree dissolving her marriage to Randall Kreager. She contends the court erred in not placing physical care of the parties' two minor children with her and instead granting Randall's request for joint physical care. Ami also seeks an award of appellate attorney fees. We affirm as modified.

I. BACKGROUND FACTS AND PROCEEDINGS.

Randall and Ami were married on November 2, 1996. They have two children, Dallas, born in October 1998, and Jordan, born in late July 2003 and adopted by the parties. The parties separated on December 2, 2006, when Ami left the marital residence with the children shortly after Randall threatened her with a broken, unloaded shotgun. Following this incident Ami filed a petition for relief from domestic abuse under Iowa Code section 236.3 (2005). Randall consented to a protective order requiring him to have no contact with Amy and giving her the marital home. The court also placed temporary custody of the children with Ami, awarded her child support of $500 per month, and set Randall's visitation rights, which included alternating weekends and one weekly three-hour visit during the week. Randall filed a petition for dissolution on December 19, 2006. On January 9, 2007, the district court entered an order on temporary matters. The order modified the protective order in the domestic abuse case to increase Randall's child support payments and to allow him to pick up and return the children for visitations.

Ami was thirty-five years of age at the time of the dissolution trial and had a degree in agricultural business. She is employed by the United States Department of Agriculture in Des Moines earning approximately $58,000 per year.[1] Randall was thirty-six at the time of trial and had a marketing degree. Since 1996 Randall primarily has worked as a farmer, farming some 750 acres and raising cattle, as well as helping his father farm. He also worked an assortment of part-time jobs to supplement his farming income. The court calculated Randall's gross annual income at $40,000. The parties agree they are both in good physical health.

The parties tried their dissolution action over two days in August 2007. The main disagreement between the parties at trial was physical care of the children. Randall requested joint physical care of the children, or in the alternative to have physical care placed with him, while Ami sought to have physical care of the children placed with her. On September 5, 2007, the district court entered a thorough and well reasoned written ruling dividing the assets and liabilities of the parties, awarding the parties joint legal custody and joint physical care of the children, and ordering Ami to pay Randall $166.18 per month for child support after offsetting each parties' child support obligations. The parties agreed that following the dissolution Ami would move out of the marital home and Randall, who had been living with his parents, would move back in. Ami was uncertain where she would live, but tentatively intended to move about ten miles

[1] Neither party challenges the district court's calculation of their incomes for child support purposes and thus we will assume these figures are correct for purposes of this appeal.

from the marital residence and testified that her move would not present any significant problems in exchanging the children.

In making its physical care determination the court found that although Randall's action of pointing the shotgun at Ami did constitute assault, there was not a history of domestic abuse between the parties. The court further found that both parents would be suitable custodians of the children, had demonstrated an ability to care for the needs of the children, would promote active contact with the other parent, and had demonstrated an ability to communicate with each other that would only improve after the strain of the dissolution proceedings was over. Although the court believed Randall and Ami had very different parenting styles, it found that neither was right or wrong and they would in fact complement each other. The court also found that although Ami had been the children's primary caregiver, Randall had assumed a substantially larger role within the last two years. Finally, the court determined that joint physical care would facilitate maximum ongoing contact between the children and both parents and that it was in the children's best interest.

After trial, the court gave both parties the opportunity to submit proposed custody and visitation plans to it for consideration. Only Randall provided a proposal to the court. The court found his proposal was reasonable and adopted it. It provides that the children will alternate residing with Randall or Ami every three to four months. The schedule was fashioned largely around Randall's farming schedule, giving Ami care of the children during planting and harvest seasons, Randall's busiest times of year.

On appeal, Ami claims the district court erred in failing to place physical care of the children with her, instead granting Randall's request for joint physical care. Ami requests an award of appellate attorney fees. Randall argues we should affirm the joint physical care ordered by the court, and argues in the alternative that if we determine joint physical care is not appropriate we should place physical care of the children with him. However, as Randall did not separately appeal or cross-appeal, we cannot and do not consider his argument that physical care of the children should be placed with him. *See In re Marriage of Novak*, 220 N.W.2d 592, 598 (Iowa 1974) ("Failure to bring a cross-appeal in the manner provided by the Rules of Civil Procedure precludes examination of this question upon appeal. Review is de novo . . . but it is such only on matters properly presented to this court.").

II. SCOPE AND STANDARDS OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but instead make such findings and conclusions as from our de novo review we find appropriate. *Lessenger v. Lessenger,* 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (Iowa 1968). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity

to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, except to provide a framework for analysis, and our decision must be based on the particular facts and circumstances before us. *Id*.

III. MERITS.

"Joint physical care" means an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child. Iowa Code § 598.1(4). The rights and responsibilities include, but are not limited to, shared parenting time with the child, maintaining homes for the child, and providing routine care for the child. *Id*. With joint physical care "neither parent has physical care rights superior to the other parent." *Id.* Iowa Code section 598.41(5)(a) (Supp. 2005) provides:

> 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.

Any consideration of joint physical care must still be based on Iowa's traditional and statutorily required child custody standard of the best interest of the child. *See* Iowa Code § 598.41(5)(a); *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

> Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child. The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity.

Hansen, 733 N.W.2d at 695 (citing *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995)).

With this consideration in mind, our supreme court recently devised a nonexclusive list of factors to be considered when determining whether a joint physical care arrangement is in the best interests of the children. *Id.* at 697-99.

> The factors are (1) "approximation"—what has been the historical care giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) "the degree to which the parents are in general agreement about their approach to daily matters."

In re Marriage of Berning, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (quoting *Hansen*, 745 N.W.2d at 697-99).

The district court stated it had carefully reviewed the record for significant factors against joint physical care and had not found them. It later found "from all the evidence in this case" that joint physical care was in the best interest of the children. After considering relevant factors as discussed below, for the following reasons we agree with the district court.

A. Approximation.

Ami argues the district court should have granted her physical care of the children because she was their primary caregiver for the majority of their lives. She contends that although Randall had taken a somewhat larger role in parenting the children in the last two years before the dissolution, namely getting them up and ready for school and day care in the mornings, during the previous

six years he did little to help with the children on a daily basis. She argues that she has always been and continues to be the children's primary caretaker, dealing with almost all of their day-to-day needs, including Dallas's schooling and all of Jordan's adoption details and medical issues.

The district court found, and we agree, that Ami has been the children's primary caregiver. However, it does appear from our review of the record that Randall not only had taken on a substantially larger role within the last two years since Dallas started school, but also that he was not as absent in caring for the children the previous six years as Ami contends. There was testimony by both a long time friend and neighbor of the parties and by one of their Bible study acquaintances from the church they formerly attended together that the parties shared general parenting responsibilities on a fairly equal basis. In addition, although Ami has been more involved in Dallas's schooling, Dallas's second grade teacher testified that Randall also attended parent-teacher conferences and that he was scheduled to participate in a class field trip until the trip was cancelled due to weather. Ami also points to the fact the children's new preschool teacher/day care provider testified she talks to Ami on a daily basis but had never met Randall. However, it appears this is because that particular teacher is gone before Randall arrives to pick up the children when he does so. Accordingly, although Ami's role as the children's primary caretaker is a factor to consider in this case, her role was not so predominant as to rule out joint physical care.

B. Communication and Conflict.

Ami points to several incidents that she claims demonstrate a lack of communication and a high degree of conflict between the parties, making joint physical care infeasible and not in the children's best interest. However, the district court did not find the problems alleged by Ami to be of substantial significance, and somewhat contrary to her assertions found,

> These children would find a stable, loving, home with either of these parents. Each is capable and willing to provide for their care and nurturing. Each parent is supportive of the children's relationship with the other, and the parties have demonstrated an ability to communicate with each other when necessary. The court expects that the parties' ability to communicate and reach agreements regarding the children will improve substantially after the strain of these proceedings has ended.

We agree with these findings of the district court and adopt them as our own. It is clear that toward the end of their marriage and while the dissolution case was pending the parties harbored some animosity toward each other, accompanied by some communication breakdown and interpersonal conflict. However, both parties testified at trial that they believed the other to be a good parent who loves their children. We, like the district court, believe that the parties' communication will rebound and any conflict will decrease now that the stress of the dissolution proceeding is over. Accordingly, after a thorough review of the record, we can find no reason to conclude any issues with the communication, mutual respect, or conflict between the parties will be a significant impediment to joint physical care.

Perhaps the biggest concern or conflict noted by Ami was the incident on December 2, 2006, when Randall pointed an unloaded, broken shotgun at her, pulled the trigger, and said "Bang." As noted above, this incident led to the issuance of a protective order by consent agreement. We agree with the district court that this incident showed "an incredible display of poor judgment" by Randall and that it did constitute an assault. However, both parties testified that it was an isolated incident, the children did not witness it, Randall has never been physically abusive toward Ami or the children, and the name calling and verbal abuse that had gone on in the past was engaged in by both parties. This was a single incident that occurred at the end of the parties' marriage at a time when their relationship was most strained. We agree with the district court that while this conduct by Randall and its effect on Ami is not be minimized, it does not demonstrate a history of domestic abuse such that it should be a factor militating against joint physical care.

C. Daily Matters of Care.

Ami claims the parties do not agree on the daily matters of child rearing and parenting techniques. The district court found, and we agree, that although the parties have different parenting styles, neither style is necessarily right or wrong and they in fact complement each other. The children would no doubt benefit from exposure to both parenting styles. Furthermore, the parties do seem to be on the same page on many day-to-day routine matters, such as the children's schooling, their extracurricular activities, the important role of extended

family and church in the children's lives, and the importance of promoting active contact with the other parent.

Accordingly, we conclude the district court did not err in ordering joint physical care of the children. The district court's findings and conclusions regarding the parties' ability to communicate, promote contact with the other parent, and reach agreements regarding the children are supported by the evidence. We agree with the court that this physical care arrangement is in the children's best interests as it allows them to have the maximum ongoing contact with both parents.

D. Unique Schedule.

Ami further contends that even if we conclude joint physical care is appropriate, as we have, the parenting schedule adopted by the court is not in the children's best interest. She argues the schedule would be too disruptive and harmful to the children because it does not approximate the parties' historical care giving arrangement.

The court here fashioned the joint physical care schedule largely around Randall's spring planting and fall harvest seasons in order to maximize both parties contact with the children. The court ordered Randall to have the children from December 26 to Friday of the third full week in March, and from the second Friday in July until the last Friday in September. Ami would then have the children the third Friday in March until the second Friday in July, and from the last Friday in September until the Wednesday preceding Thanksgiving. The parties would also alternate the approximately one month time period from the

Wednesday before Thanksgiving until December 26, with Randall having this month in odd-numbered years and Ami having it in even-numbered years so as to alternate the Thanksgiving and Christmas holidays. The party without physical care is also entitled to alternate weekend visitation plus one evening during the week following a non-visitation weekend.

Randall has farmed throughout the children's lives and thus his busy seasons, April through May and October through November, have always been the same. Therefore, the children are already somewhat used to Randall spending less time with them during these times of year. Thus, contrary to Ami's argument, the schedule set by the district court would not be totally "new" to them. The joint care schedule ordered by the court takes into account, and we believe in fact takes advantage of, Randall's farming-related work schedule. Randall will have the children during the times of year his occupation allows him a great deal of flexibility, and Ami will have the children during the times Randall's work schedule would not allow him much time with the children. Although the schedule may not be traditional, it is a relatively stable schedule and will provide the children the maximum amount of time with each of their two loving parents.[2]

Ami is also critical of the parenting schedule because, other than Thanksgiving and Christmas, it made no exceptions for holidays or the children's

[2] We note again that after trial the district court gave both parties the opportunity to present the court with physical care and visitation plans. Only Randall provided the court with a proposed schedule and it is the one the court adopted. Ami did not provide the court with a proposal, nor has she on appeal proposed any alternative joint care schedule that would be more acceptable to her.

birthdays. This would mean Ami would have the children every Memorial Day, 4th of July, and Dallas's birthday, while Randall would have them every New Year's Day, Labor Day, and Jordan's birthday. It would also result in Randall having the children for their entire December holiday break in odd-numbered years and every spring break. We agree, to a certain extent, with Ami's criticism of the schedule. Randall appears to agree some modification of the schedule to address Ami's concerns is proper. Accordingly, we modify the parenting schedule to provide that Ami shall have the children for one-half of the children's December holiday break in odd-numbered years and one-half of the children's spring break each year; Ami shall have the children on Dallas's birthday in odd-numbered years and on Jordan's birthday in even-numbered years; and Randall shall have the children on Dallas's birthday in even-numbered years and on Jordan's birthday in odd-numbered years.[3]

IV. APPELLATE ATTORNEY FEES.

Ami seeks an award of appellate attorney fees. Such an award is not a matter of right, but rather rests in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal. *Id.* Ami's income is larger than Randall's, and we have determined Ami's appeal has little merit. Accordingly, after considering the relevant factors, we decline to award Ami appellate attorney fees.

[3] The parties are of course free to alternate Memorial Days, 4ths of July, New Year's Days, and Labor Days, if they see fit to do so.

V. CONCLUSION.

Based on our de novo review of the record, and for the reasons set forth above, we agree with the district court's decision to place the children in the joint physical care of the parties. Under the specific facts and circumstances of the case at hand the physical care provisions of the decree, and the joint parenting schedule set forth by the district court as modified herein, are appropriate. Ami's request for appellate attorney fees is denied. Costs on appeal are taxed three-fourths to Ami and one-fourth to Randall.

AFFIRMED AS MODIFIED.