IN THE COURT OF APPEALS OF IOWA

No. 17-0481
Filed November 22, 2017

IN RE THE MARRIAGE OF KATRINA LOUISE THOMPSON AND TY NASHUA THOMPSON

Upon the Petition of
KATRINA LOUISE THOMPSON,
Petitioner-Appellee,

And Concerning
TY NASHUA THOMPSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Mahaska County, Joel D. Yates, Judge.

A father appeals the custody and visitation provisions of a decree of dissolution. **AFFIRMED AS MODIFIED.**

Earl B. Kavanaugh of Harrison & Dietz-Kilen, P.L.C., Des Moines, for appellant.

Steven E. Goodlow, Albia, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and McDonald, JJ.

MCDONALD, Judge.

Ty Thompson challenges the district court's determination that Katrina Thompson should receive physical care of the parties' children following their divorce. He maintains shared physical care is most appropriate and, if not, he should receive physical care of the children. He also argues, in the event the court determines Katrina should have physical care of the children, he should be awarded additional visitation. Both parties seek appellate attorney fees.

I.

Katrina and Ty Thompson met at the University of Iowa while both were students. Katrina graduated and commenced work. Ty left the university without graduating but did obtain two associates degrees at a community college. They married in 2002.

The couple spent their married life in Oskaloosa. During the marriage, Katrina worked full-time at several financial firms and part-time as a university instructor, and Ty worked part-time at UPS. In 2007, the couple had their first child, S.V.T. Due to their work schedules, Ty provided daytime care while Katrina provided evening care. In 2011, S.R.T. was born. Initially, Ty continued providing daytime care while Katrina worked. Katrina left the workforce in 2012 to be home with the children. At the time of the dissolution, she remained at home.

The parties purchased a 'fixer-upper' house and began extensive renovations. Around this time, the marriage became strained. Ty alleges Katrina took over the childcare duties and limited his parenting time. Katrina admitted she "didn't trust Ty with the girls" but did not provide reasons. Katrina filed for divorce in May 2015. Ty moved out the family residence but remained in Oskaloosa. Ty

and Katrina set an informal visitation schedule with no overnight visits for Ty. The informal visitation scheduled was changed following a hearing on temporary matters. The order on temporary matters granted Katrina physical care of the children with Ty to have visitation each Wednesday from 6:00 to 9:00 p.m. and every other weekend from 6:00 p.m. Friday to 6:00 p.m. Sunday. There were additional provisions for holidays and summer vacation.

The matter came on for trial. At trial, Katrina, Ty, and the guardian ad litem testified. The parties both testified they had a strained relationship but they could work together for the good of their children. The guardian ad litem in the case issued two reports recommending shared care despite the conflict between the parties. The guardian ad litem's testimony was consistent with the written reports. The district court gave the parties joint legal custody of the children, with Katrina to have physical care and Ty to have visitation. The decision to award Katrina physical care was based on the district court's finding that "approximation weighs heavily in Katrina's favor" and that the "communication between the parties is not good." The decree did not discuss the guardian ad litem's reports or testimony.

II.

Our review of dissolution cases is de novo. *In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). "Although our review is de novo, we afford deference to the district court for institutional and pragmatic reasons." *See Hensch v. Mysak*, ___ N.W.2d ___, ___, 2017 WL 4050671, at *1 (Iowa Ct. App. 2017). The court gives weight to the findings of the district court, particularly concerning credibility. *See McDermott*, 827 N.W.2d at 676. We will affirm the district court unless the district court failed to do substantial equity. *See In re Marriage of Mauer*,

874 N.W.2d 103, 106 (Iowa 2016). In our review, "[p]rior cases have little precedential value" as each case depends on the unique circumstances of the parties. *Mechiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002).

III.

We first address the physical care arrangement. "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." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). Iowa Code section 598.41(5)(a) (2015) provides the court may award joint physical care at the request of either parent and if it does not award 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." Iowa Code § 598.41(5)(a).

In making the determination whether joint physical care is appropriate, the *Hansen* court identified four non-exclusive factors to consider. *See Hansen*, 733 N.W.2d at 696. The first *Hansen* factor, approximation, addresses the "historic patterns of caregiving". *Id.* at 697. "[W]e believe that joint physical care is most likely to be in the best interest of the child where both parents have historically contributed to physical care in roughly the same proportion." *Id.* at 697–98. The second factor is the ability of the parents to communicate and show mutual respect. A lack of trust or a history of controlling or abusive behavior can be a significant barrier to co-parenting. *Id.* at 698. Third, the degree of conflict between the parents is a relevant consideration. *Id*. "Where the parties' marriage is stormy and has a history of charge and countercharge, the likelihood that joint physical

care will provide a workable arrangement diminishes." *Id.* Fourth and finally, "is the degree to which the parents are in general agreement about their approach to daily matters." *Id*. at 699. In addition to these considerations, the court must evaluate the unique circumstances of each case. *Id.*

On do novo review, in consideration of all the factors, we conclude a joint physical care arrangement is not in the best interest of the children. Approximation heavily favors awarding Katrina physical care of the children. When Katrina left the workforce in 2012, she assumed the role of primary caregiver. She has maintained this role since that time, which includes the most recent half of S.V.T.'s life and nearly all of S.R.T.'s life. This role has included taking the children to visits to the doctor, school conferences, and activities. This is the care arrangement Ty acquiesced to during the course of the marriage. This is the arrangement to which the children have grown accustomed. "While no post-divorce physical care arrangement will be identical to predissolution experience, preservation of the greatest amount of stability possible is a desirable goal. In contrast, imposing a new physical care arrangement on children that significantly contrasts from their past experience can be unsettling, cause serious emotional harm, and thus not be in the child's best interest." *See Hansen*, 733 N.W.2d at 696–97.

Because we have decided shared care is not in the best interest of the children, we must choose which caregiver is best suited to have physical care of the children. *Id.* at 700 (citing Iowa Code § 598.41(1)(a)). We consider which parent would support the other's relationship with the children as well as continuity, stability, and approximation. *Hansen*, 733 N.W.2d at 700. We also consider other factors, including the needs of the children, safety, geographic proximity, and the

children's wishes, among others. *See* Iowa Code § 598.41(3); *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974).

It is in the children's best interest to award Katrina physical care of the children. Remaining with Katrina would provide stability for the children as Katrina has been the primary caretaker since 2012. She has been responsible for the girls' appointments, education, and extracurricular activities. The children have become accustomed to her care. She has provided exemplary care for the children.

None of the foregoing is to suggest Ty is not an involved and capable father. After the parties' first child was born, Ty provided the majority of the caregiving for the child. Since the parties changed the caregiving pattern in 2012, Ty has remained active and involved with the children. There is no evidence Ty poses any risk of harm to the children. Katrina's concerns to the contrary are unfounded. Because of the strong relationship he has with the children, Ty requests additional visitation, arguing the district court's visitation schedule was illiberal.

We agree with Ty's contention the visitation schedule was illiberal and not in the best interest of the children. To set the appropriate amount of visitation, we consider what arrangement will "assure the child[ren] the opportunity for the maximum continuing physical and emotional contact with both parents" and "encourage parents to share the rights and responsibilities of raising the child[ren]." Iowa Code § 598.41(1)(a). Given the established routine of school-aged children, we decline to award additional weekday overnight visitation. In addition, trial testimony established Ty would be at work early in the morning and would be unable to get the children up and ready for school. Because Ty will not be able to exercise midweek visitation, additional visitation during the holidays and summers

is fair, appropriate, and in the best interests of the children. In particular, extended summer visitation would allow the children to spend more time with their father and the father's family without disruption to their school routine.

For the foregoing reasons, we modify the decretal visitation provisions. Ty shall have visitation as follows:

A. Every other weekend from Friday after school, or when school is not in session, from 12:00 p.m., to Monday morning when school begins or when school is not in session, 9:00 a.m. Ty is to provide the transportation at the beginning and end of each visit.

B. Every Wednesday from after school, or when school is not in session, 12:00 p.m., to 8:00 p.m. Ty is to provide the transportation at the beginning and end of each visit.

C. Summer visitation will be as follows. Ty is entitled to a total of six weeks of summer visitation, with those weeks divided into two-week intervals to be exercised non-consecutively. Ty is to provide written notice to Katrina on or before May 1 of each year. Katrina is entitled to one two-week period uninterrupted, with Katrina providing written notice to Ty on or before May 15 of each year.

D. Holidays and special occasion visitation will be as follows.

Holiday/Special Day	*Custodial Period*	*Even-Numbered Years*	*Odd-Numbered Years*
Easter Weekend	Good Friday @ 6 pm until Sunday at 6 pm	Ty	Katrina
Memorial Day Weekend	Fri @ 6 pm – Mon @ 6 pm	Katrina	Ty
Fourth of July	7/3 @ 6 pm – 7/5 @ 8 am, or thru weekend if on Fri, Sat, Sun, or Mon	Ty	Katrina
Labor Day Weekend	Fri @ 6 pm – Mon @ 6 pm	Katrina	Ty
Thanksgiving	Wednesday prior @ 6 pm until Sunday @ 6 pm	Ty	Katrina
Christmas vacation – 1st Half*; includes Dec 24th and Dec 25th	6 pm at start of X-mas vacation until half way thru break at 6 pm	Katrina	Ty
Christmas vacation – 2nd Half*; includes Dec 31st and Jan 1st	Half way thru break at 6 pm until the day before school starts at 6 pm	Ty	Katrina

Spring Break	6 pm Friday before Break until 6 pm Sunday after Break	Katrina	Ty
Mother's Day	9 am - 6 pm	Katrina	Katrina
Father's Day	9 am - 6 pm	Ty	Ty
Petitioner's Birthday**	9 am - 6 pm	Katrina	Katrina
Respondent's Birthday**	9 am - 6 pm	Ty	Ty
Child's Birthday	9 am – 6 pm	Katrina	Ty
*regular visitation terminates during Christmas vacation **not to interfere with school (Christmas Vacation and Spring Break dates are based on the school calendar of the school district in which child is or will be enrolled)			

E. In addition to the foregoing parenting time, the parties may extend or exercise such further and additional parenting time, as they may both mutually agree upon.

We address a final issue related to physical care and visitation. In support of his argument for joint physical care and physical care, Ty contends the district court's failure to discuss at all the testimony and reports of the guardian ad litem is reversible error. We disagree. The "legislature has granted to the court the responsibility to make an impartial and independent determination as to what is in the best interests of the child." *In re Marriage of Stephens*, 810 N.W.2d 523, 530–531 (Iowa Ct. App. 2012). This responsibility cannot be delegated to the guardian ad litem explicitly or implicitly. The district court was thus free to reject or accept the guardian ad litem's testimony and reports as it saw fit. The failure to explicitly discuss the testimony and reports does not mean the district court did not consider the reports in making its determination. In addition, recent statutory revisions disallow guardian ad litem testimony and disallow the filing of reports. *See* 2017 Iowa Acts ch.43, § 598.12(1)(a)(6) (providing "the guardian ad litem shall not testify, serve as a witness, or file a written report in the matter."). Finally, the

argument would not entitle Ty to any relief. On appeal, Ty is entitled to de novo review of all of the evidence, which this court has done.

Both parents seek appellate attorney fees. "An award of appellate attorney fees is not a matter of right but rests within our discretion." *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). "[W]e consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request is obligated to defend the trial court's decision on appeal." *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). After consideration of these factors, we decline to award appellate attorney fees to either party.

IV.

For these reasons, we affirm the district court's decree as modified and decline to award appellate attorney fees.

AFFIRMED AS MODIFIED.