IN THE COURT OF APPEALS OF IOWA

No. 0-139 / 09-1557
Filed May 12, 2010

IN RE THE MARRIAGE OF AMY N. PETERSON AND HAROLD OSCAR PETERSON

Upon the Petition of

AMY N. PETERSON,
Petitioner-Appellee,

And Concerning

HAROLD OSCAR PETERSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Jasper County, Darrell Goodhue, Judge.

Appeal from the child custody and attorney fee provisions of a decree of dissolution. **AFFIRMED AS MODIFIED AND REMANDED.**

Lynn C.H. Poschner and Eric Borseth of Borseth Law Office, Altoona, for appellant.

Lee M. Walker and Jane Odland of Walker, Billingsley & Bair, Newton, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Harold Peterson appeals from the October 8, 2009, decree dissolving his marriage to Amy Peterson. Harold contends he and Amy should have received joint physical care of their young son and that he should not have been ordered to pay Amy's attorney fees. We affirm as modified and remand.

SCOPE OF REVIEW. We review dissolution cases de novo. *In re Marriage of Cooper*, 769 N.W.2d 582, 585 (Iowa 2009). Although our review is de novo we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

BACKGROUND. Amy was born in 1981 and Harold in 1977. They met in September of 2004 while both of them were working for United Hands, a stage-hand company. The couple was married in 2005 and their son was born the same year.

Amy has two associate degrees received in 2002 and 2003 from Kirkwood Community College in Cedar Rapids and in 2008 was certified in dog grooming after taking a nine-week course at a Colorado facility. At the time of the hearing she owned Pet-A-Coat Grooming. It is located at Green Acres Boarding, which her parents own. She anticipated she would gross $14,000 in the calendar year 2009.

Harold has a high school education and has taken courses in a facility management program. He is employed as an operations manager for Global Spectrum, the company that manages the Iowa Events Center in Des Moines.

His annual salary in 2008 was $62,000. He says in season he works forty to forty-five hours a week. Harold lives and works in Des Moines while Amy lives and works in the Newton area.

PROCEEDINGS. The parties separated several times before Amy filed a petition for dissolution on August 18, 2008. She asked, among other things, that the parties' son be placed in her temporary and permanent custody. Harold answered the petition seeking conciliation counseling and if that was not successful, asking that the child be placed in the joint legal and physical care of both parents.

On September 30, 2008, a temporary order was entered providing the parties should share physical care of the child on a weekly basis, exchanging him each Wednesday evening at 7 p.m. Harold was ordered to pay Amy temporary child support of $328.03 a month. The order remained in place with no further court involvement in the time between when it was issued and the trial commenced on July 16, 2009.

At trial the parties appeared to have agreed that they should have joint legal custody. Amy sought primary physical care and Harold sought joint physical care. Harold introduced an exhibit entitled "Request for Relief," which set forth his request for a parenting schedule if the parties did not agree on one. It called for sharing care in alternating weeks and provided for an allocation of certain holidays. It asked that the child attend school in a Des Moines metro area school unless the parties agreed otherwise and provided that they should discuss and agree on that issue. It set forth Harold's request for allocation of

health care expenses, health insurance expenses, child support, and tax exemptions. It also included Harold's request for a provision in the decree that the parties would first try mediation before filing any request for court relief.

On July 20, 2009, the district court filed findings. The court determined that the parties should have joint legal custody, but denied Harold's request for joint physical care and determined Amy should be the primary physical care parent. The district court, in denying Harold's request for joint physical care, found: (1) no parenting plan was in place, (2) Amy was the primary caretaker when the parties lived together, (3) Harold's schedule is dependent on his mother providing babysitting services, (4) though Amy works and relies on her parents for child care, her place of employment is closer to her mother's home, making it more convenient for her to be involved with the child on a regular and consistent basis, (5) the distance between the parties and the impending school year are issues, (6) there is uncertainty as to the abilities of the parties to communicate and significant disagreements are developing relative to preschool, (7) Harold agreed to terminate his parental rights to a child who lived with him for a year, and (8) Harold has misused alcohol, and a third conviction for operating while intoxicated (OWI) would result in a prison sentence.

On July 27, 2008, Harold filed a motion seeking to enlarge and amend asking the district court to amend, among other things, to (1) find he was a substantial if not equal caregiver, (2) find he would move to Newton if it was decided the child would attend school in Newton, (3) omit from its consideration that he consented to the adoption of an older biological child and correct the

erroneous finding that the child lived with him for a year, and (4) find, contrary to the district court's findings, he did present a parenting plant in his "Request for Relief," which was admitted as an exhibit.

The district court ruled on the motion on September 9, 2009, and amended its findings to state that Amy was home full-time with the child for his first four months of his life, when she worked it was primarily part-time, she was only occasionally gone overnight, and Harold conceded she was the primary caretaker though 2006.[1] The court also noted that Amy had been absent from Iowa for nine weeks while attending dog grooming school in Colorado and, because Amy's parents and Harold's mother provided care for the child, Harold could not be considered the primary caretaker during that period. The court found no agreement had been made as to the school the child would attend, the parties live about thirty-six miles apart and in different school districts, and they have no history of resolving conflicts through mediation. The court also said it did not question that it was in Harold's older son's best interest that Harold agree to terminate his parental relationship with that child because Harold was then unstable, but the court questioned whether Harold had gained stability. The court also noted that Harold's mother gave him substantial assistance with the child at issue here.

A decree of dissolution was then filed on October 6, 2009, ordering that the parties have joint legal custody, Amy have primary physical care, Harold have set visitation time, and that he pay Amy $583.60 a month in child support.

[1] A review of the record reflects that Harold conceded only that she was the primary care parent from December 2005 to April 2006.

Harold was also ordered to pay $3500 towards Amy's attorney fees and the costs of the action.[2] Harold filed a notice of appeal on October 14, 2009.

JOINT PHYSICAL CARE. Harold contends the parties should have been awarded joint physical care in that it would provide stability and a continuity of care for the child.

"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) (2009). When joint legal custody is awarded, "neither parent has legal custodial rights superior to those of the other parent." *Id*. § 598.1(3). "Physical care" involves "the right and responsibility to maintain a home for the minor child and provide for routine care of the child." *Id*. § 598.1(7), 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*. § 598.1(4).

The court's objective in resolving a custody dispute is to place a child in the environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Although joint physical care was once strongly disfavored by the courts, the Iowa

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[2] The district found the parties' requests for relief as to property matter substantially mirrored each other and the only dispute was Amy's request for alimony and a portion of Harold's 401(k). The court resolved the issue of the 401(k) and disallowed Amy's claim for alimony, noting that marital assets had funded her dog grooming education and the marriage was of a short duration. This part of the district court's order is not challenged on appeal.

legislature has proclaimed it a viable disposition of a custody dispute. *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998). It provides an opportunity for a child to have substantial contact with both parents, which if the parents are committed to a working relationship, can be beneficial to the child. It also can frequently afford parents who both work outside the home the ability to minimize child care expenses by structuring their work schedule to work more hours when the other parent has the child and work less hours when they do.

During the time the temporary order was in place the parties here so structured their work time to achieve these benefits. Amy testified she worked longer hours in her dog grooming business the week her son was not in her care. Harold testified he worked longer hours when Amy had their son and decreased his work hours when he did. Physical care issues are not to be resolved upon perceived fairness to the parent but rest primarily on what is the better situation for the child. *See In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). The temporary care arrangement provided a good situation for the child here as both parents strengthened their bond with him. An award of joint physical care is appropriate where such action would be "in the best interests of the children and would preserve the relationship between each parent and the children." *Id.*

If the request is made for joint physical care, then a denial of the request by the court must include specific findings of fact and conclusions of law that awarding joint physical care is not in the best interest of the children. Iowa Code § 598.41(5)(a). The district court made such findings as are set forth above,

although some of the courts findings that have been and will be discussed in this opinion are not supported by the record.

Amy's father, her only witness besides herself, testified Amy is a good mother and that Harold is a good father. Harold's mother, his sister, who is a registered nurse, the adoptive mother of his older child, and a man he works with all gave positive testimony about Harold's relationship with his child and their observations that father and child have a good relationship and Harold is concerned about his child and attentive to his needs.

We find both parties to be good parents and involved in the child's care. Harold has been employed outside the home during the child's life and hopes to continue to be employed. Amy returned to employment after the child was about four months old. She did some scheduling for the job from home. She had periods when she did not have assignments and other periods when she had assignments that took her some distance from home and demanded that she remain away from home overnight. It is fair to say, as the district court found, that in the early years of the child's life Harold spent more hours away from the child than did Amy because he was employed full-time and provided most of the family's financial support, while Amy's employment was not as regular or lucrative. Since the parties' separation they have successfully shared care.

We find as did the district court, that Harold's mother and Amy's parents have been involved with the care of the child. Harold's mother has been more involved, and the parties both acknowledge that Harold's mother was their primary daycare provider prior to the parties' separation. She is retired. From

her testimony we perceive her to be a loving grandmother and an excellent care provider for the child. Since the parties' separation she has continued to provide the child care for Harold while he is working. Amy's father testified Amy's mother provided child care as Amy moved into their home when she and Harold separated. At the time of the trial Amy had only had her own living quarters for a month. Amy testified that because her parents are employed, she has hired someone to help care for the child when she works.

It is clear that this child has been cared for by his mother, his father, his maternal grandmother and his paternal grandmother. It is also clear that in the future, because both of his parents will be working outside the home, he will continue to receive care from these persons and others. Harold's mother will have more time to devote to the child than will Amy's mother. "In considering whether to award joint physical care where there are two suitable parents, stability and continuity of caregiving have traditionally been primary factors." *Hansen*, 733 N.W.2d at 696. Harold's mother will continue to care for the child while Harold works outside the home. Amy's mother, because she helps run a business, will not have as much time to devote to the child and Amy will be required to employ other child care providers. Stability and continuity are factors to consider in reaching a decision as to physical care. *See id.*

The holding in *Hansen* appears to indicate that if there is a primary care parent and that parent is opposed to joint physical care, then that parent should be the person to continue to have primary care. *See id.*, at 701. However there is not a primary care parent in every situation. Such as here where both parties

(1) have worked outside the home, (2) will continue to work outside the home, and (3) have shared substantial responsibility for the child, it is difficult to say one parent is the primary care parent or that the child will be provided with continuity of care by granting one parent primary physical care.

The child has, at this station of his life, had substantial involvement with both of his parents and his paternal grandmother. With a joint physical care arrangement it appears he would continue to have substantial contact with his paternal grandmother. The availability of a grandparent to assist with a child's care has been found to be a positive factor for a parent seeking custody. In *In re Marriage of Welbes*, 327 N.W.2d 756, 758 (Iowa 1982), the court, in granting custody to a father, considered the fact his parents were available to assist with childcare. In doing so the court said, "No matter which parent has custody, [the child] is foredoomed to get much of her care and early training from others. Since this is true, we believe the grandparents are to be preferred over the ministrations of strangers." In *In re Purscell*, 544 N.W.2d 466, 469 (Iowa Ct. App. 1995), we considered, in awarding a father custody, that he would have the help of his parents in caring for the child. *See also Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002).

In assessing a request for joint physical care we also look to the ability of the parents to work together. *See* Iowa Code § 598.41(3)(c). Amy testified she and Harold cannot communicate easily. Harold testified that they can. We do not find either opinion entirely credible, for it is in Harold's interest seeking joint physical care to say they communicate well and in Amy's interest in seeking

primary physical care to say they do not. They resolved most of their financial issues themselves. They exercised joint physical care with minimal disagreements and no court involvement for the ten months prior to the dissolution hearing. They changed cars when physical care was changed so that the safest vehicle was available to the parent who was transporting their son. They agreed on a number of medical decisions, reached agreement on the issue of immunizations, and developed an alternative medical treatment plan. They have agreed to make adjustments to the court-ordered care and agreed that while Harold was out of state for schooling they would change some days. Amy was willing to take on additional transportation. There was some tension when each party separately took the child to a pediatrician for a three-year checkup. Apparently they both wanted a pediatrician in the city where they lived. The child's health certainly was not compromised by two physicals, the latter of which provided a second opinion and could have, but did not, catch problems not identified in the first. Amy notified Harold when the child was injured at her work place and required several stitches under his chin. She said it was not serious, and he said she handled it appropriately.

During the temporary custody period both parties were able to modify their schedules at times during their week so they could spend more time with the child. Amy testified she tries to work additional hours the week she does not have her son so she has more time for him when he is with her. Harold testified he has some control of his schedule and sometimes is able to schedule himself

so that he has three or four days off the week he has his son and works additional hours when he does not.

We, as the district court, recognize the problem that could arise when the child is ready for school and needs to be in one school system. Harold testified at that point he would move to Newton if that was where Amy wanted the child to be.[3]

At the time of the hearing Harold was using his mother for child care. Amy, who had moved in with her parents when the parties separated then had her own apartment, was using her parents for child care less than earlier and had starting using another child-care provider.

We disagree with the district court that the fact Harold agreed to the adoption of his first child should be considered as relevant to the issue here. According to the testimony of the adoptive mother, Harold and her sister were in a relationship when the child was conceived and from the offset it had been the agreement of both parents that the child would be adopted. After the child was born the mother changed her mind and had some emotional issues and was

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[3] Harold was asked:

> Q. Now, one of the requirements for joint physical care is that you have to have physical proximity. You live in Des Moines. She lives in Newton. How do you expect to resolve that issue? A. If she is still decided on Newton, in a couple of years I'm willing to relocate.
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> Q. Why in a couple of years? A. Well, when he would be starting full-time school.
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> Q. So when [your son] starts school, you're willing to locate to where? A. Either Newton, or—you know, as we discuss and come up with an agreement.
>
> Q. So you're willing to put the—or impose that restriction on yourself, that you'll move to Newton if that's where she wants to be? A. Yeah. I'd like—or the proximity, you know. Colfax might be a good destination, but yes.

unable to care for the child. Harold was young and in a position where it would have been difficult for him to do so. The child was placed in an excellent home and Harold continues an uncle-like relationship with the child.

Harold's prior problem with alcohol causes some concern. Harold admitted he was foolish and that he did not exercise good judgment, but testified he has ceased drinking alcohol. The district court in addressing this issue stated, "Harold is able to retain full-time employment, indicating that alcohol abuse might not be a serious problem." We are inclined to agree with this finding.

Amy had some social problems while attending school in Colorado and she also had at least one affair, leaving Harold with the child while she stayed away overnight with one of his friends. Both parties have been immature in certain respects, but neither has allowed their activities to put their child at risk. We modify the decree to provide that the parties have joint physical care. We remand to the district court to set the care plan by providing that the parties exchange the child each week under the provisions that they followed during the temporary care period with such adjustments as the district court may make on remand. The district court shall further fix child support under the modified order.

ATTORNEY FEES. Harold contends he should not have been required to pay Amy's attorney fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). The district court ordered Harold to pay towards Amy's fees because he makes more money than she does. The district court did not abuse its discretion and we

affirm on this issue. We award no appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED AND REMANDED.

Doyle, J., concurs; Danilson, J., concurs in part and dissents in part.

DANILSON, J. (concurring in part and dissenting in part)

I respectfully concur in part and dissent in part to the majority opinion.

I dissent in respect to the modification of physical care. I would affirm the district court's ruling awarding Amy physical care of the parties' son. Amy and Harold reside thirty-six miles apart in different school districts. They have been unable to agree regarding which preschool their son should attend or which pediatrician should serve as their child's physician. As a result, the parties' child has two preschools and two pediatricians. In addition, Harold has been twice convicted of operating while intoxicated, and there is evidence that he has driven a vehicle with the child while his license was suspended. These facts give little confidence that any joint physical arrangement will meet with success or be in the child's best interests.