

IN THE COURT OF APPEALS OF IOWA

No. 0-318 / 09-1520
Filed July 14, 2010

IN RE THE MARRIAGE OF JEREMY LYNN MORRIS AND THERESA ANN MORRIS

Upon the Petition of

JEREMY LYNN MORRIS,
Petitioner-Appellee,

And Concerning

THERESA ANN MORRIS,
Respondent-Appellant.

Appeal from the Iowa District Court for Marion County, William H. Joy,
Judge.

Mother appeals the physical care provisions of a dissolution decree.

AFFIRMED.

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

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

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

The September 2009 dissolution decree entered for Jeremy and Theresa Morris provided they would have joint legal custody of J.J., their four-year-old son, and Jeremy would provide physical care. Theresa appeals and seeks physical care. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Jeremy and Theresa, now both in their late twenties, were married in September 2004, when Theresa's son, Dennis, was three-years-old. Dennis, now age eight, lived with Theresa and Jeremy during their marriage. Jeremy supported Dennis financially and introduced him as his son. Jeremy's two young daughters from a previous relationship, now ages six and nine, live with their mother and visit Jeremy every other weekend. When schedules do not permit the regularly-scheduled visitation, Jeremy makes arrangements for an alternate time. Jeremy pays child support for his daughters. During the summer, Jeremy's daughters stay with him every other week.

Jeremy works for his father at Morris Tree Service. Jeremy's work hours are typically from 7:30 a.m. to 5:00 p.m., but vary "due to the weather and slow seasons." Jeremy has a flexible work schedule and can get time off as needed for J.J. Jeremy's father has discussed transfer/sale of the business to Jeremy and his brother upon his retirement.

Theresa and Jeremy's marriage did not begin smoothly and after two months, Theresa, pregnant with J.J., left Iowa and took Dennis to Alabama where her father, stepmother, grandmother, and other paternal relatives reside.

Theresa testified, “as far as my connection with my father and my stepmother, they’re the most important in my life besides my children.” Two weeks later, Jeremy drove to Alabama and brought Dennis and Theresa back to Iowa. J.J. was born in February 2005.

Theresa was born in Iowa, but lived in Alabama from 1996, when she was thirteen, until she moved back to Iowa in 2004, at age twenty-four. Theresa testified she has “never considered Iowa my home.” Theresa’s mother and two sisters live in Iowa.

Jeremy, who has completed ninth grade, started drinking at age fourteen and has an extensive drug and alcohol history. A back injury and a surgery led to an abuse of prescription pain pills. During the time Jeremy was struggling with substance abuse he took medication for depression and attempted suicide at age sixteen and, five-years-ago, when then-pregnant Theresa left for Alabama.

Jeremy paid criminal fines for his conduct during the time he was abusing drugs and alcohol. In March 1999, he paid fines for trespass and theft. In October 2005, Jeremy paid a fine for an intoxication charge. In August 2004, one month before they married, Jeremy spanked Dennis causing bruises on his bottom. Jeremy attempted to deal with his substance abuse problems in 2004, but did not complete the program. In January 2006, Jeremy underwent a twenty-eight day hospitalization and has remained sober, including abstaining from medications, after this treatment. Theresa acknowledges Jeremy’s sobriety after treatment.

In November 2006, Jeremy was charged with domestic abuse assault and a no contact order was entered for Theresa. Jeremy completed a sixteen-week batterer's education program, pled guilty to assault with injury, and was fined. Jeremy believes the program helped him. The record supports Jeremy's assertion: "[S]ince November of 2006 there has not been a single incident of violence between Theresa and I. Though we have certainly argued, it has never gotten physical."

Theresa worked until August 2004, when sickness with her pregnancy with J.J. caused her to stop. Theresa returned to employment outside the home in April 2007, when she started working at her sister's bar. Theresa's work shift started at 3:00 p.m. and continued until midnight or 2:00 a.m., Tuesday through Saturday evenings. Some weeks Theresa did not work every weekday shift. Jeremy picked up the boys and took care of them while Theresa worked. Theresa quit "right before the Halloween party the bar had" because "Jeremy didn't like me working there."

On January 21, 2008, Theresa started attending a cosmetology school. This was basically full-time during the day, four days a week. Jeremy would pick up J.J. at day care at 5:30 p.m. and Theresa would arrive home at 6:00 p.m. Theresa testified Jeremy "did a lot of stuff with the kids," but she provided the primary day-to-day caretaking. Theresa acknowledged Jeremy is able to care for J.J. and took care of both Dennis and J.J. when she had a broken leg.

In February 2009, Jeremy, who was out of the home, petitioned for dissolution of marriage and sought joint legal and physical care of J.J. Initially,

the parties each cared for J.J. three and one-half days a week. Theresa then sought temporary physical care of J.J. and injunctive relief from Jeremy threatening/harming her or removing property from the home. After hearing, on March 27, the court ordered temporary physical care to Theresa with Jeremy having visitation every other weekend. Jeremy was ordered to pay temporary child support and to continue to stay out of the marital home. The attorneys were to agree upon a date Jeremy could return and remove his clothes and tools. Theresa asserts there were problems with the property transfer and Jeremy came over numerous times causing an ongoing problem.

Despite the court-ordered weekend visitation for Jeremy, Theresa moved back to Alabama with her sons. Theresa left the house in disarray when she left. Jeremy talked to J.J. on the telephone during his time in Alabama. Additionally, Theresa allowed J.J. to visit Jeremy from June 25 to July 26, 2009.

On July 17, 2009, Jeremy filed a motion for reconsideration of the temporary visitation order. Jeremy sought temporary physical care based on Theresa's unannounced move to Alabama. A hearing on Jeremy's motion was held on August 7, 2009, and temporary care was not changed.

Theresa did not bring J.J. when she returned to Iowa for the temporary care hearing even though that would have allowed Jeremy to exercise his court-ordered weekend visitation. Similarly, Theresa did not bring J.J. when she returned to Iowa for the August 19, 2009 dissolution hearing. Theresa testified, "[i]f Jeremy would have asked me to bring him, I would have brought him. . . . I guess he should have asked."

In Alabama, Theresa is living in a two-bedroom apartment on her father's acreage and working at a hair salon. In the future, she plans to buy her aunt's three-bedroom house, which already has a salon she could use for a business. Theresa currently works from nine to five while J.J. is in daycare/preschool and Dennis is in school. Theresa testified J.J. has adjusted to the move and has made new friends.

Both parties testified to harsh discipline administered to J.J. by the other party, but both are willing to have the non-physical-care parent have summer visitation commencing two weeks after school ends and continuing for the whole summer. Jeremy asserts J.J.'s home has been the Marion County area his entire life and living in Alabama will decrease the bond J.J. has with his half-sisters. Theresa asserts living in Iowa will decrease the bond J.J. has with Dennis, and she is closer to her paternal relatives than she is to her maternal relatives in Iowa.

Theresa testified that even if she had remained in Iowa, shared physical care would not have worked: "[J.J.] needs a stable home. He doesn't need a split-parent home, that he's living in one house one week and another house in another week."

At the end of the hearing, the court discussed the factors in Iowa Code section 598.41(3) (2009), and awarded joint legal custody with physical care to Jeremy and visitation as agreed by the parties:

Looking at those [factors], the Court wants to comment on a couple of them.

Whether each parent would be a suitable custodian for the child. [Jeremy] could find little criticism of [Theresa's] ability to be a suitable custodian for the child.

In contrast, quite a bit of our trial dealt with the potential problems that might exist if [Jeremy] were to be considered a suitable custodian.

One has to do with his drug and alcohol addiction, his past criminal record. In reviewing that testimony, it appears that [Jeremy] has made the best out of a bad start in his life, in that he has finally come to a realization of the problems He is sober now. He has been sober for some time. And although he knows that there's no guarantee that he will be sober forever, it appears that that has been an education to him that is going to benefit him and may benefit others in the future.

There's also concern about his discipline. Although it evidently never [rose] to the level that anyone thought a child could be endangered by it and [contacted DHS].

. . .

But overall, both parents seem to admit that the other would be a fit custodian of J.J. and the discipline that [Jeremy] is accused of using does not disqualify him as a suitable custodian for the child.

. . .

Whether both parents have actively cared for the child before and since the separation.

Certainly, both of the parents have cared for J.J. and it does appear the [Theresa] did most of the caring, but there were times when that fell to [Jeremy] to do.

[Section 598.41(3)](e) . . . whether each parent can support the other parent's relationship with the child.

The Court didn't hear any testimony from which it could determine [Jeremy] has tried to sabotage or adversely affect [Theresa's] relationship with J.J.

Unfortunately, the same can't be said about [Theresa]. [Theresa] apparently leaves the marital house quickly, leaves it in a mess. She moves with her child to the state of Alabama. She does that without any advance notice, or meaningful discussion with [Jeremy.] . . . This is while the dissolution proceedings are pending. This is when [Jeremy] has asked that the Court consider . . . joint legal custody, and shared physical custody.

. . .

[Theresa] by her unilateral action to leave, effectively defeats [Jeremy's] request for the Court to grant or consider shared physical custody of J.J.

And now she claims that to grant [Jeremy] primary physical custody of J.J. would be against J.J.'s long-term best interest

because that would require his separation from Dennis. Keep in mind; she is the one that made that situation exist. She is the one that took herself and Dennis and their child 900 miles away from [Jeremy].

[Theresa's] move has already separated J.J. from his father and it would appear . . . that would be against J.J.'s long-term best interest.

...

The reasons given by [Theresa] for this move are not convincing to the Court. Even if they are true, those concerns could have been addressed by [Theresa] simply moving outside the Knoxville area. She could have remained close enough to allow meaningful contact between J.J. and his father.

...

The Court believes [Theresa's] move was motivated more by her desire to defeat [Jeremy's] legal request for shared physical custody and to put 900 miles between him and his son.

. . . [Jeremy] admitted more readily than some people the frailty of his past and the problems that he has had. [Theresa] seemed more strident and more critical of [Jeremy] than the Court believes was really merited by the facts in this case.

[Theresa] should really not benefit from her plan.

This appeal followed.

II. Scope of Review.

As an equitable action, we review dissolution proceedings de novo. Iowa R. App. P. 6.907 (2009). We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 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 make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(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).

III. Merits.

The sole issue is whether Theresa or Jeremy should be awarded physical care. “Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*.” *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). Therefore, in determining physical care, our overriding consideration is J.J.’s best interests. See Iowa R. App. P. 6.904(3)(o). In assessing which physical care arrangement is in J.J.’s best interests, we utilize the factors in Iowa Code section 598.41(3), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate goal is to place J.J. in the environment most likely to bring him to healthy physical, mental, and social maturity. See *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

Theresa is correct in asserting we give consideration to placing children with the historical primary caregiver. See *In re Marriage of Decker*, 666 N.W.2d 175, 178-80 (Iowa Ct. App. 2003). However, “no one criterion is determinative” and our courts apply a multi-factored test. *Hansen*, 733 N.W.2d at 697. While Theresa was a caregiver before the separation, the “fact a parent was the primary caretaker prior to separation does not assure [she] will be the custodial parent.” *Decker*, 666 N.W.2d at 178.

The record is instructive on the issue of each parent’s ability to support J.J.’s relationship with the other parent. Theresa’s testimony and unilateral move

to Alabama are of concern when making such an analysis. Originally, the parties each took care of J.J. three and one-half days per week and Jeremy requested joint physical care. The ability of each parent to actively support the other parent's relationship with the child is an important factor in deciding physical care. Iowa Code § 598.41(3)(e); *In re Marriage of Manson*, 503 N.W.2d 427, 429 (Iowa Ct. App. 1993). “More importantly, the ability of each parent to do so is instrumental in the successful mental, emotional, and social development of the [child].” *Morris*, 503 N.W.2d at 429. This record reveals Jeremy is more willing and able to assist J.J. in developing a strong relationship with both parents than is Theresa.

Finally, in this type of case, where either party would be a suitable parent, the district court's evaluation of the parties is particularly helpful. See *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993) (“The trial court had the parties before it and was able to observe their demeanor and was in a better position than we are to evaluate them as custodians.”). Upon our de novo review, we accept the district court's determination, after its opportunity to observe the parties and evaluate the credibility of Theresa's stated motivation for her move to Alabama, that Jeremy should be awarded physical care.

Both Theresa and Jeremy request appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). We decline to award appellate attorney fees and tax costs one-half to each party.

AFFIRMED.