IN THE COURT OF APPEALS OF IOWA

No. 0-593 / 10-0393
Filed September 9, 2010

IN RE THE MARRIAGE OF SHAWNNA MARIE RIPPLE AND KYLE ROGER RIPPLE

Upon the Petition of
SHAWNNA MARIE RIPPLE,
Petitioner-Appellant,

And Concerning
KYLE ROGER RIPPLE,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Sean W. McPartland, Judge.

A mother appeals the physical care and visitation provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Mark D. Fisher of Nidey Wenzel Erdahl Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

Jacob R. Koller of Simmons, Perrine, Moyer, Bergman, P.L.C., Cedar Rapids, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

VAITHESWARAN, P.J.

Shawnna Ripple appeals the physical care and visitation provisions of a dissolution decree.

I. Background Facts and Proceedings

Shawnna and Kyle Ripple married in 2000. They have two children: a daughter, born in 2005, and a son, born in 2006.

Shawnna petitioned to dissolve the marriage. Under an agreed, temporary arrangement, she kept the children every Monday through Wednesday and every other weekend, and Kyle kept them the other days.

At trial, both parents sought physical care of the children. Shawnna alternately sought joint physical care. Following trial, the district court placed the children in Kyle's physical care. Shawnna appealed. She contends the district court should have ordered joint physical care.

II. Joint Physical Care

In denying Shawnna's request for joint physical care, the court stated:

> [T]he parties here have displayed significant difficulties in communication since the filing of the dissolution matter, with testimony and evidence substantiating differences in approaches to parenting, lack of cooperation and often hostile communication between the parties. Although some testimony indicated shared care might be preferable, the substantial and credible testimony and evidence indicated a continued shared-care arrangement would be difficult for the children and would place them in the middle of, if not make them the source of, conflict. . . . Given the way the divorce proceedings have proceeded and given the past conflict between the parties, the Court believes and finds that there is a high potential for conflict if the parties were to be awarded joint physical care. . . . [T]he Court concludes shared care simply is not in the best interest of [the children], and would expose and subject them to further acrimony.

Shawnna takes issue with these findings. She argues joint physical care was the most equitable option because she and Kyle (A) historically shared the care of the children; (B) "communicated effectively regarding the children" and did not allow their conflict, which "was not out of the ordinary for divorcing parents," to affect the children; and (C) agreed "on major issues concerning daily care."

A. History of Care

"[L]ong-term, successful, joint care is a significant factor in considering the viability of joint physical care after divorce." *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007). Shawnna asserts, "While there were times one parent took a more active role than the other, these periods alternated and the end result was a nearly equal division of care." On our de novo review, we disagree.

Most of the witnesses who testified at trial, including members of Shawnna's family, stated unequivocally that, during much of the marriage, Kyle was primarily responsible for the children's physical care. Shawnna's mother, who had frequent contact with the family, testified, "On a daily basis, Shawnna is not the caregiver. She just has chosen not to do that." She observed that Kyle was a constant presence in the children's lives and provided "hands-on care," including appropriate discipline. Shawnna's father likewise testified that in the latter years of the marriage, Kyle "got the kids ready, he got them in the car, he reprimanded them." Shawnna's sister testified that "if the children needed anything, [Kyle] would be the first to stand up and, you know, take care of them,

get what they wanted. . . . [H]e would discipline them. They'd listen more [to him]." Another sister testified:

> [Kyle] was the one that . . . ma[d]e sure the kids were always fed, the kids were taken care of at the table, the kids got their jammies on. He would be the one that would take them to the bathroom when they were potty-training four out of five times when we would be together. And he was the one that would make sure the meals were ready. . . . [H]e clearly demonstrated that he was the one that put [the children's] needs before his own.

A neighbor testified that Kyle "was always the one . . . getting things ready, doing things for [the children], making sure their needs were met or whatever they wanted." Another neighbor similarly testified that she considered Kyle to be the children's primary caregiver because "I see him with the kids. I see him outside doing things with the kids. I see him at church with the kids."

The district court found this testimony to be "credible and heartfelt." We defer to this credibility finding because the district court had "a firsthand opportunity to hear the evidence and view the witnesses." *See In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

Seemingly acknowledging the strong testimony in favor of Kyle, Shawnna falls back on the parents' temporary joint physical care arrangement. The district court considered this arrangement. The court found that while it "initially worked well," it "worked less well over time as the marriage and relationship . . . deteriorated." This finding is supported by the record.

Shawnna herself testified the shared parenting schedule broke down the summer before trial. She noted that, as a school teacher, she had the summer off, yet Kyle refused to let her have the children on the days he was charged with

their care. She testified that Kyle no longer supported her relationship with the children and stated there was a "breakdown of communication."

Kyle similarly testified that the temporary joint physical care arrangement was not successful. He noted:

> [T]he bouncing . . . is not the best. . . . Like when I get the kids back from out of her care, it takes me a day to get them to what I'm expecting of them to be, the manners, the listening, the hygiene, brushing their teeth day and night, [my daughter] combing her hair on a daily basis. It's been a struggle that way.

Based on this and other evidence, we conclude the temporary arrangement does not militate in favor of joint physical care.

B. Communication and Conflict

Shawnna maintains that, contrary to the district court's finding, she and Kyle communicated effectively about the children. Her own testimony belies this assertion. In addition to her statement that there was a breakdown in communication, she testified Kyle did not effectively use an online shared-parenting calendar she created, failed to keep her adequately informed of the children's whereabouts, and argued while exchanging the children.

Shawnna's testimony highlights the parents' communication difficulties and is also indicative of her opposition to joint physical care until late in the trial. This opposition, combined with Kyle's reservations about the temporary arrangement, suggests the parents were not committed to the level of communication required of a joint physical care arrangement. *See Hansen*, 733 N.W.2d at 699 (stating a "lack of mutual acceptance can be an indicator of instability in the relationship that may impair the successful exercise of joint

physical care"); *see also* Iowa Code § 598.41(3)(g) (2009) (directing court to consider whether one or both spouses agree or are opposed to joint custody).

We recognize some of the communication difficulties stemmed from the circumstances that led to the dissolution proceedings. *See In re Marriage of Ellis*, 705 N.W.2d 96, 103 (Iowa Ct. App. 2005) ("[W]hen a marriage is being dissolved we would find excellent communication and cooperation to be the exception and certain failures in cooperation and communication not to be surprising."), *overruled on other grounds by Hansen*, 733 N.W.2d at 692; *see also In re Marriage of Bolin*, 336 N.W.2d 441, 446 (Iowa 1983) ("Although cooperation and communication are essential in joint custody, tension between the parents is not alone sufficient to demonstrate it will not work."). However, those difficulties did not dissipate over time. Exchanges of the children were fraught with discord and were traumatic for the younger child in particular, who experienced developmental setbacks and insecurity. *See Hansen*, 733 N.W.2d at 699 ("Even a low level of conflict can have significant repercussions for children."). Accordingly, we disagree with Shawnna that the parents' conflict "was not out of the ordinary for divorcing parents."

C. Agreement on Daily Matters

Finally, Shawnna argues that joint physical care was appropriate because she and Kyle agreed on major issues concerning daily care. *Id.* As the district court found, there is no question that they did. However, Kyle's history as primary caretaker and the acknowledged communication difficulties override this factor. Because we conclude joint physical care is not in the best interests of the children, we turn to Shawnna's alternate argument regarding visitation.

III. Visitation

The district court ordered that unless otherwise agreed between the parties, Shawnna was to have visitation with the children every Wednesday from after school until 8:00 p.m., every other weekend from Friday after school until Sunday at 8:00 p.m., alternating birthdays and holidays, and two uninterrupted weeks of vacation during the summer. Shawnna argues the court should have ordered overnight midweek visitation, extended the alternating weekend visitation to Monday mornings, and given her at least six weeks of uninterrupted visitation during the summer. While we are not persuaded by Shawnna's request for an extension of midweek and weekend visitation, we agree that two weeks of summer visitation is inadequate.

Liberal visitation rights are generally in the best interests of the children. *See In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa Ct. App. 1991); *see also* Iowa Code § 598.41(1)(a) (stating insofar as is reasonable and in the best interest of the child, the court "shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents"). That is particularly true where there is a "healthy parent-child relationship" with the non-custodial parent. *Toedter*, 473 N.W.2d at 235.

All concerned agreed that Shawnna was an appropriate caregiver. Additionally, Shawnna testified that her schedule as a school teacher allowed her time off in the summers to care for the children. While she acknowledged that she placed the children in daycare for three days a week during the summer of

2008, she testified the graduate school classes that required the placement were not a factor in 2009.

We recognize the decree already affords Shawnna "the first opportunity to care for the children should they otherwise require child care for a period of more than four hours during their time with the children." However, that provision simply addresses daytime care. We believe Shawnna is entitled to additional overnight summer visitation. For that reason, we modify the decree to afford her a total of six weeks of summer visitation with the children, to be taken in two-week increments each summer month unless otherwise agreed, subject to the terms and conditions contained in the summer visitation provision of the decree.

IV. Appellate Attorney Fees

Kyle requests $7506 in appellate attorney fees. An award rests in our discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). As Shawnna prevailed on one of the issues raised and there is not a large discrepancy in the parties' incomes, we decline his request for appellate attorney fees.

Costs are taxed equally to each party.

AFFIRMED AS MODIFIED.