IN THE COURT OF APPEALS OF IOWA

No. 0-600 / 10-0587
Filed September 9, 2010

IN RE THE MARRIAGE OF CLINT R. HANER AND MELISSA A. HANER

Upon the Petition of
CLINT R. HANER,
Petitioner-Appellant,

And Concerning

MELISSA A. HANER,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Kathleen Kilnoski, Judge.

Petitioner appeals from the custodial determination made in the decree dissolving his marriage to respondent. **AFFIRMED.**

Chad D. Primmer of Primmer Law, Council Bluffs, for appellant.

Lloyd R. Bergantzel, Council Bluffs, for appellee

Considered by Sackett, C.J., Potterfield and Tabor, JJ.

SACKETT, C.J.

Clint R. Haner appeals from his March 8, 2010 decree dissolving his marriage to Melissa A. Haner and providing she be the primary custodian of the parties' two sons born in 1998 and 2002. Clint contends the children should have been placed in their parents' joint physical care. We agree with the district court's conclusion that the parties are both good parents but that communication problems between them render joint physical care unworkable. Melissa has not cross-appealed so we do not address her challenge to the economic provisions of the decree.

SCOPE OF REVIEW. Our standard of review in dissolution-of-marriage proceedings is de novo. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). In a de novo review we examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). 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. 6.904(3)(*g*) (2009); *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa Ct. App. 1998). We approach this issue from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992); *see also In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992).

Our focus is on what is in the interests of the children, not on the perceived fairness to the parents. *See In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). "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." *Id.* at 695-96. We also look at the factors specified in Iowa Code section 598.41(3) (2009).

BACKGROUND AND PROCEEDINGS. Clint and Melissa were married in March of 1999. Clint left the family home and filed a petition seeking dissolution of the marriage. The petition was filed on September 17, 2009. He sought custody of the children. Melissa answered asking she be granted primary physical custody of the children. A temporary custody order was entered providing the children move between their parents' households on a weekly basis.

The parties met with a mediator to mediate the issue of child custody and related issues. They agreed on certain issues including that the children should remain in the Logan school system and that they should have joint custody. The disagreement not resolved in mediation centered on Clint's position that the children should continue to alternate homes on a weekly basis while Melissa wanted to be the primary custodian. The matter came on for hearing in February of 2010 and the district court entered the decree a month later naming Melissa as the primary care parent and granting Clint liberal visitation and ordering him to pay child support.

SHARED CARE. Clint contends that the district court should have made permanent the shared care arrangement created in the temporary custody order. Under Iowa Code section 598.41(5)(a):

> [T]he court may award joint physical care . . . 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.

There is no presumption in favor of joint physical care. *See Hansen*, 733 N.W.2d at 692. Rather, the statute makes joint physical care an option if it is in the child's best interest. *See id.* An important question to be asked in deciding whether to award joint physical care is whether the parties can communicate effectively on the issues that arise daily in the routine care of a child. *See In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007).

The district court found, as do we, that both Melissa and Clint are capable parents and have close bonds with their sons. Clint admits that prior to the parties' separation and the temporary custody order, Melissa spent more time with their sons than he did though he had daily contact with them. Clint wished he could have spent more time with the children but he was the major wage earner in the family and his job was in Omaha, some thirty-six miles from where the parties lived. He testified he felt the need to work overtime to meet the family's financial needs.[1] This is not to say he was uninvolved with the children. He had participated in bedtime routines, he read to them, and engaged in outdoor activities with them, including fishing. He was frustrated that he was not always able to attend their sports activities because of his working schedule. Since the temporary custody order was entered, the children have moved between households with few problems and the arrangement does not appear to have been harmful to the children. These facts, together with the parents'

[1] He testified his hours were cut after the parties' separation because he did not need as much money as he did when the parties lived together.

agreement on basic child raising theories, support shared care as does the fact they live in close proximity to each other and agree on the school district the children should attend.

The district court, while finding as do we, that there were factors supporting a continuation of the shared custody arrangement, concluded that the post-separation relationship of the parties was so strained that a shared custody plan would not likely succeed. In arriving at this conclusion the court noted Clint, though quick to point out what he perceives are Melissa's parent flaws, failed to provide support to Melissa and the children until a support order was entered some three months after he left the parties' home, and the fact that Clint recorded a conversation[2] that Melissa was engaged in. The court then found that Melissa should have primary physical custody subject to Clint's liberal visitation.

Contrary to Clint's argument, the district court made adequate findings to support the denial of shared care. Clint also argues that the findings are not supported by the record. We agree to a limited extent. Clint explained when he left the home that he had expenses to obtain housing and that Melissa had access to a $20,000 401(k) account so he considered she had ample money to care for the children. Clint's criticisms of Melissa's relationship with the children and their desire to live with him should not necessarily defeat his claim for shared care. This is a close custody case where we defer to the trial court's credibility

[2] The record is far from clear as to what this entailed. Clint did leave a recorder in a place Melissa would be and played a recording of Melissa's voice for one of Melissa's witnesses.

assessments. *See id.* at 101. The trial court had the opportunity to observe the witnesses and concluded primary care should be with Melissa and Clint should have liberal visitation. We affirm on this issue.

PROPERTY DIVISION. The district court valued and divided certain property and ordered Melissa to pay Clint an equalization payment of $20,000. Melissa argues that the equalization payment should be reduced. Clint apparently believed Melissa would make this argument in his initial brief, and argued it was fair and equitable. Melissa did not cross-appeal from the district court order so we cannot now consider her request for modification of the equalization payment. *See In re Marriage of Sjulin*, 431 N.W.2d 775, 777 (Iowa 1988); *see also Sandler v. Sandler*, 258 Iowa 84, 86-87, 137 N.W.2d 591, 592 (1965).

APPELLATE ATTORNEY FEES AND COSTS. Clint requests $1000 in appellate attorney fees. Melissa requests $1750 in attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In evaluating the parties' requests for attorney fees on appeal, we consider both the needs of the party making the request and the ability of the other party to pay. *Id.* We conclude that a reasonable allowance should be made and hereby order that Clint pay $1000 of the attorney fees incurred by Melissa on appeal. Clint has higher earning than does Melissa and he was not successful on his challenge to the custody provisions of the district court's decree.

We do not believe Melissa should be responsible for Clint's attorney fees. However, Melissa challenges the property division despite having failed to file a notice of cross-appeal. As a result, a large part of the appendix includes testimony related to the property division. The cost of printing the appendix was $330.48. We believe that Melissa should be responsible for one-half of this cost which is $165.24 and we tax her with costs in this amount. The balance of the costs on appeal is taxed to Clint.

AFFIRMED.