

**IN THE COURT OF APPEALS OF IOWA**

No. 0-812 / 10-0732  
Filed February 9, 2011

**IN RE THE MARRIAGE OF CHRISTINA L. DETERMANN  
AND ROBERT L. DETERMANN**

**Upon the Petition of  
CHRISTINA L. DETERMANN,**  
Petitioner-Appellant,

**And Concerning  
ROBERT L. DETERMANN,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, Mark J. Smith,  
Judge.

Christina Determann appeals from the physical care provision of the  
parties' dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Maria K. Pauly and Edward N. Wehr of Wehr, Berger, Lane & Stevens,  
Davenport, for appellant.

Adam W. Blank of Pillers & Richmond, De Witt, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

**DANILSON, J.**

Christina Determann appeals the physical care provision of the parties' dissolution decree, in which the district court awarded joint physical care of the parties' two-year-old son. Considering, among other facts, Robert Determann's prior domestic abuse, his repeated violations of the protective order, and the confirmed report of child abuse naming Robert as the perpetrator, we conclude the child's interests are best served by awarding Christina primary physical care. We therefore modify the decision of the district court ordering joint physical care and order physical care of the child with Christina, and remand to the district court to award liberal visitation to Robert.

**I. Background Facts and Proceedings.**

Robert and Christina were married in December 2007. They had one child together in May 2008. Christina's two older children, ages two and nine, from different fathers, also lived with the family during the parties' marriage. The parties agreed that Christina would be a stay-at-home mother for the children. Robert was employed by Determann Industries as an equipment operator, where he worked from about 5:30 a.m. to 5:00 p.m. In October 2008, Robert stopped working for Determann Industries, the parties purchased a semi truck, and Robert became a truck driver for CNRD Trucking, L.L.C.<sup>1</sup>

The marriage was mostly stable until an incident in March 2009 at a fireman's fundraiser in Buffalo. Apparently Christina was not ready to leave

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<sup>1</sup> Robert testified at trial that he made \$45,000 per year as a truck driver. However, the district court found that Robert "was less than forthcoming about his income," and noted that the record showed Robert's gross income in 2009 to be \$63,200.

when Robert wanted to, and Robert grabbed Christina's arm in an attempt to force her to leave, leaving bruises on her arm. Another incident occurred in April 2009, when Robert became upset with Christina's oldest child, chased the child upstairs to his bedroom, and threw him onto his bed, causing him to strike the wall. Robert denied that he threw the child onto the bed, but admitted that he grabbed the child by the leg and turned him over. Robert then forced Christina to get out of the shower and yelled at her to discipline the child. The incident resulted in a confirmed but not registered child abuse report by the Iowa Department of Human Services. Based on this altercation, Christina gathered the children and their clothing, left the family's home in Camanche, and moved in with Christina's parents in Davenport. Christina soon rented an apartment in Davenport where she lived with the children.

As a result of these incidents, Christina filed a petition for relief from domestic abuse. The district court entered a temporary protective order on April 21, 2009, awarding Christina temporary custody of the parties' child and exclusive use and possession of the parties' 2006 Mercury Mountaineer. On May 13, 2009, after a hearing, the court entered a permanent protective order finding that Robert committed a domestic abuse assault against Christina. The order also granted Robert visitation Tuesdays from 3:00 p.m. to 8:00 p.m. and every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m., with the condition that Robert's mother transport the child to and from Christina's home.

Meanwhile, Christina also filed a petition for dissolution of marriage. In July 2009, the court entered an order setting temporary child support and medical support. In September 2009, Christina filed an application for rule to

show cause, requesting Robert be held in contempt of court for failing to make support payments. The court determined that as of October 2009, Robert had “a child support arrearage of \$2,587.50.” Robert had also stopped making payments on the Mercury Mountaineer Christina was driving and the vehicle was repossessed. Apparently Robert paid his child support arrearage sometime in October 2009, because the court approved the satisfaction and dismissed the rule to show cause on October 23, 2009. The court also ordered Robert to give Christina the 1996 Mercury Tracer that she owned prior to the marriage.

In the meantime, Christina was unable to make the payments on her apartment, because the rental amount was based on income, which included Robert’s child support that she was not receiving. In October 2009, Christina and the children moved in with Christina’s boyfriend, Cody Pittman, and his two young daughters from a prior marriage that lived with him every other weekend.

The relationship between the parties during these proceedings was tumultuous to say the least. Among other things, Robert was upset that Christina moved out of the family home and was involved in a new relationship. Christina blamed Robert for being controlling and abusive, and alleged that he had accessed Internet dating sites throughout their marriage and that women had called the family home for Robert day and night. After moving out of the family home, Christina began working as a bartender at the Pour House in Davenport. She only worked at the Pour House for “a few months,” however, because Robert made harassing phone calls to the Pour House while she was at work. In addition, she was having problems with the child’s visitation, because Robert’s

mother refused to drop the child off with a babysitter at Christina's house while Christina was at work.

Robert violated the protection order "at least four times." He and a friend appeared at Christina's apartment and sat in a vehicle in the parking lot; he seized the parties' Mercury Mountaineer Christina was ordered to use; he appeared at the family home during the court-appointed time Christina was to pick up her belongings; and he appeared with his mother during visitation exchanges. During these interactions, Robert was harassing and threatening to Christina. It is clear that Christina contributed to the vulgar exchanges, as did Robert's mother and Robert's sister. Unfortunately, the child was present for at least some of these interactions.

The dissolution trial was held over two days in February 2010. The court entered its decree in March 2010 and awarded the parties joint physical care of the child. In reaching its conclusion, the district court noted:

In reflecting on the issues stated above, the Court is still convinced that both parties genuinely love and care for the child. The child has the opportunity to be involved with both parents' extended families in that they both live in this area. In weighing the factors stated above, the Court finds that at this point in the child's life it is in his best interest to have maximum contact with both parents, despite their issues they have with each other. Even though the parties live approximately 40 minutes from each other, the Court finds that joint physical custody can be accomplished if the exchange is done on a weekly basis.

The district court set forth a physical care schedule, in which the parties alternated physical care every other week at 6:00 p.m. on Sunday, and each received two weeks of uninterrupted visitation in the summer. Christina filed a motion to amend or enlarge, requesting the court award her primary physical

care. After a hearing, the court confirmed its original physical care determination. Christina now appeals.

## **II. Scope and Standard of Review.**

Because this is an action in equity, our review is de novo. Iowa R. App. P. 6.907. We are not bound by the district court's findings of facts, but we give them deference because the district court has a firsthand opportunity to view the demeanor of the parents and evaluate them as custodians. Iowa R. App. P. 6.904(3)(g); *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004); see *In re Marriage of Witten*, 672 N.W.2d 768, 778 (Iowa 2003).

## **III. Physical Care.**

The sole issue on appeal involves the physical care provision of the parties' dissolution decree awarding the parties joint physical care of their two-year-old son. Christina contends the turmoil and level of conflict between the parties produces a "situation where joint physical care will not work," and states that as the child's "primary caretaker from birth," she should be awarded physical care. Christina alleges that the inability of the parties to communicate and cooperate is exacerbated by the nearly forty-mile distance between their residences, which "increases concerns how the parties will be able to make joint decisions that are necessary" in a joint physical care arrangement. In further support of her contention that she should receive physical care, Christina points to Robert's "anger issues"; his violations of the domestic abuse protective order; his controlling, abusive, and threatening behavior; and his overall failure to support her relationship with the child.

The primary consideration in any physical care determination is the best interests of the child. Iowa R. App. P. 6.904(3)(o). “[T]he courts must examine each case based on the unique facts and circumstances presented to arrive at the best decision.” *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007). The following nonexclusive factors are to be considered when determining whether a joint physical care arrangement is appropriate: (1) “approximation,” or what has historically been the care giving arrangement for the children between the parents; (2) the ability of the parents to “communicate and show mutual respect”; (3) the “degree of conflict” between the parents; and (4) the ability of the parents to be in “general agreement about their approach to daily matters.” *Id.* at 697-99; *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

If the court denies a 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 interests of the child.” Iowa Code § 598.41(5)(a) (2009). The court shall then determine placement according to which parent can minister more effectively to the children’s long-term best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). “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.” *Hansen*, 733 N.W.2d at 695; *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998) (“The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other.”).

In the instant case, we agree with the district court's findings that "both parties genuinely love and care for the child" and that a joint physical care arrangement would allow the child "the opportunity to be involved with both parents' extended families in that they both live in this area." However, in light of the above principles, and after a de novo review of the record, we conclude joint physical care is not in the best interests of the child under the facts presented here.

Christina has been the primary caregiver for the majority of the child's young life, and the record indicates the child is happy and well-developed. See *Hansen*, 733 N.W.2d 683, 700 (noting the concepts of continuity, stability, and approximation "cut strongly against joint physical care as a quality alternative least disruptive" to the child and most likely to promote the child's "long-term physical and emotional health" where the child is accustomed to primary care by a particular parent). Further, the child is bonded to his half-siblings who live with Christina, and there is no compelling reason to separate the children. See *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993) (acknowledging that half-siblings should be kept together whenever possible, and separated only for compelling reasons).

We further note that the parties have significant difficulties in communication. Robert and Christina live nearly forty miles away from each other. This distance compounds the need for them to communicate effectively about the child, something they have proven unable to do thus far. In fact, both parties have participated in vulgar and profane interactions, at times in the presence of the child. Efforts to involve Robert's family in visitation exchanges to

prevent the parties from interacting were not successful, as the record shows Robert's mother and sister also contributed in these arguments, as did Christina's boyfriend, Cody Pittman.

The degree of conflict between the parties further supports the determination that joint physical care is not appropriate in this case. There is substantial evidence in the record that Robert has anger issues, and is controlling and threatening toward Christina. Robert's behavior alienated Christina from friends and family, and ultimately caused her to fear for her safety. Similar to the facts in *Hansen*, the parties have "demonstrated considerable mutual distrust and a high level of conflict" throughout these proceedings, which included "allegations of sexual improprieties and domestic abuse." *Hansen*, 733 N.W.2d at 700. In May 2009, the court entered an order finding Robert committed a domestic abuse assault against Christina, and Robert acknowledges he has violated the protective order on several occasions. "Because domestic abuse reflects the ability of the parties to listen to one another and respect one another's opinions and feelings, the existence of domestic abuse is a significant factor in determining whether joint physical care is appropriate." See *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007).

In addition, the parties disagree on a number of parenting issues. See *In re Marriage of Burham*, 283 N.W.2d 269, 275 (Iowa 1979) (noting that an important factor in determining whether joint physical care is in the best interests of the child is the degree to which the parents are in general agreement about their approach to daily matters). Robert emphasizes the fact that Christina moved in with her new boyfriend, Cody Pittman, during these proceedings, is

indicative Christina “has not been very stable or wholesome.” Robert further points to two protective orders entered against Cody by his ex-wife. Robert also argues the home is not fit for the child because it is a three-bedroom residence that houses seven people, including five young children (Christina’s three children and Cody’s two children who live with him half of the time).

The court raised similar concerns in regard to Christina’s living arrangements, Cody’s past relationship, as well as Cody’s involvement in family arguments, and we share these concerns. However, we note Robert’s failure to timely pay his child support obligation and his accumulation of “a child support arrearage of \$2,587.50” placed Christina into financial straits. Robert should not, after the fact, be able to complain about her need to share a residence with another. In this regard, we find the court relied too heavily on Christina’s housing situation and the fact she is an unemployed mother of three children from three different fathers, without sufficient consideration of her actual parenting abilities.

There are also issues between the parties in regard to the child’s immunizations and nourishment. Robert alleged Christina failed to provide medical care to the child and the child was behind in his immunizations. Robert also pointed to evidence that the child was behind in developing language skills and was under-nourished. Although the record reflects the child’s immunizations were delayed because he was ill at the time he was scheduled to receive them, he is now current on the immunizations. The record also shows the child is healthy and well within the range of normal in terms of nourishment, growth, and development.

Both parties have had issue with the exchange of the child's nebulizer, which he uses occasionally to treat his breathing problems. It is clear the nebulizer is something the child needs and should be transported with him on visitations.

Where the parties have been unable to handle the day-to-day logistics of co-parenting in the temporary physical care arrangement while Christina had primary care, we believe there is a high potential for conflict in the future in a joint physical care arrangement, where even more communication and cooperation would be required. In particular, we are not confident Robert will comply with court orders when he has previously violated the protective order on four occasions, failed to timely pay his child support and discontinued making payments on the Mercury Mountaineer that Christina was granted possession and use by court order, and was "less than forthcoming" about his income.

The court recognized and attempted to address the problems in the parties' relationship in terms of a joint physical care arrangement in its ruling on Christina's motion to enlarge and amend:

[T]he Court found that both parties have conduct weaknesses and behavioral problems. However, they both appear to be well able to take care of [the child] when he is in their custody. Given the issues presented at trial for both parties, the Court determined that the issue of physical custody was close, and due to each parent's weaknesses, the Court found that joint physical custody was the most appropriate custodial arrangement at this time. The Court awarded joint physical custody on the premise that each parent would, hopefully, rise above their dislike of the other parent and put their child's interest ahead of their own. Since the child is almost two years of age, the parents' behavior between now and the time the child enrolls in kindergarten will indicate whether the joint physical custodial arrangement should continue, or if the parents' behavior issues continue, which parent has shown that they have placed the child's interest ahead of their own. These behavior

issues will be exemplified during custodial exchanges, conversations concerning medical care, conversations concerning the child's developmental changes and each parent's conversation with the child concerning the other parent's strengths as opposed to their weaknesses. If bad behavior on the part of either parent continues to prevail, the Court will place physical custody of the child with one parent. The parents are put on notice that should bad behavior continue to the child's detriment, they will jeopardize the chances that they will obtain physical custody of the child.

The very fact the court found it necessary to discuss these issues suggests the court did not have "a high degree of confidence in the ability of the parties to have a smooth, working relationship which is a prerequisite to a successful joint physical care arrangement." *Hansen*, 733 N.W.2d at 701. Having examined the entire record, we hold this is not a case where joint physical care is in the best interests of the child in light of the primary caregiving responsibilities of Christina, the communication and respect issues, the contentiousness of the marriage, and the lack of agreement on daily matters.

Neither parent has shown the maturity or responsibility their child deserves or to which they are capable. They both need to lay aside their personal animosities toward each other and center their attention on the child's best interests. Under the circumstances here, we acknowledge that the success of any physical care arrangement may be tenuous, but we believe the best interests of the child will be advanced by awarding physical care to Christina rather than to award joint physical care. The parties shall remain joint legal custodians with physical care of the child placed with Christina.

We further note that Robert has "an important role" to play in the child's life. *Id.* Christina testified that "100 percent [the child needs] his father in his life," and we expect her to support Robert's relationship with the child. We

remand for the court to establish liberal visitation for Robert and transportation arrangements.

#### **IV. Appellate Attorney Fees.**

Both parties seek an award of appellate attorney fees. We enjoy broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In exercising this discretion, we consider several factors: the financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* We award appellate attorney fees to Christina in the amount of \$1000.

Costs of this appeal are taxed to Robert.

**AFFIRMED AS MODIFIED AND REMANDED.**