IN THE COURT OF APPEALS OF IOWA

No. 0-880 / 10-0484
Filed February 9, 2011

IN RE THE MARRIAGE OF MONICA GALE TANNER AND ROBERT TRAVIS TANNER

Upon the Petition of

MONICA GALE TANNER,
Petitioner-Appellee,

And Concerning

ROBERT TRAVIS TANNER,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

A father appeals the provisions in the dissolution decree placing the parties' two children in the mother's physical care, regulating his visitation, and awarding attorney fees. **AFFIRMED AS MODIFIED.**

Robert Tanner, Johnston, appellant pro se.

Andrew Howie and Robert Hudson of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellee.

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

TABOR, J.

Robert Travis Tanner appeals the provisions in the dissolution decree placing the parties' two children in Monica Tanner's physical care, regulating his visitation, and awarding attorney fees. Because we conclude Monica historically has been the primary caregiver and will facilitate maximum continuing contact between the children and their father, we affirm the grant of physical care to her. We also affirm the provisions relating to the week-long visitation in Kansas City, telephone contact, regular weekend visitation, and the provision precluding Travis from exercising summer visitation the week before the children begin school. We modify the provision relating to the date by which Travis must inform Monica of his summer visitation schedule and the provision relating to the children's summer school and Bible school.

I. Background Facts and Proceedings

Monica and Travis married in September 1999 and have two daughters, Isabel, born in 2002, and Alexis, born in 2005. The parties met and initially lived in Kansas City. They moved to Johnston, Iowa, in March 2006, so Travis could accept a new job with MidAmerican Energy.

In November 2008, Monica filed a petition for dissolution of marriage. On December 9, 2008, both parties attended a mediation session where they reached a partial agreement. The agreement contemplated that Monica would move to Kansas City and have physical care of the children. It provided Travis a week-long visitation in Kansas City where he would pick the girls up from school or daycare on Monday, Tuesday, and Wednesday, and would return

them to Monica's by 7:00 p.m. each night. Beginning Thursday, Travis would have them in his care continuously until Saturday at 7:00 p.m. It also provided him weekend visitation one time per month, "on his open weekend." The district court's order on temporary matters adopted the mediation agreement and ordered visitation to occur as described in the parties' agreement. After the parties were unable to reach a final resolution of the custody and visitation issues through mediation, the district court held a trial on February 9, 2010.

After separating, the parties sold their residence and Travis moved to a two-bedroom apartment in Johnston, where he continues to reside. Neither he nor Monica have family in Iowa. In January 2009, Monica moved with the children to Kansas City, where both she and Travis grew up and where their extended families still live. Monica and the children temporarily stayed with her parents. In June, Monica began renting a three-bedroom townhome for her and the girls.

The parties dispute the reasons for Monica's return to Kansas City. Monica testified she moved because of the strong family support system there and because of uncertainty regarding her employment in Des Moines. Travis argued Monica moved for "selfish and vindictive" reasons and asserted she was not at risk of losing her job.

Monica works as a physical therapy assistant and has "regular" work hours from nine to five each day with flexibility in her work schedule that allows her to care for the children. She testified that during the history of their marriage she was the primary care provider for the children and explained that

it was difficult to cooperate in parenting duties with Travis even when they were married. She expressed concern that if the court placed the children in Travis's physical care, they would react with "extreme insecurity and confusion." Monica further testified that since moving to Kansas City, she and the children see her family several times a week and that she tries to allow the children contact with Travis's family. She expressed her belief that it is important for the children to have a meaningful relationship with their father. Monica indicated she has acted on this belief by allowing Travis extra visitation and permitting the children to go with Travis's family on different family occasions like weddings, birthday parties, and Sunday dinners, even when such occasions fell on her designated weekends with the children.

Travis currently resides in a two-bedroom apartment in Johnston, where the girls share a room when they are staying with him, and continues to work for MidAmerican Energy. His employment requires an unusual six-week rotation schedule, including several overnight shifts.[1] Travis testified that if the children were placed in his physical care, his overnight work schedule would require him to hire a nanny to spend nights with the children. He stated the nanny would "probably sleep in [his] bedroom or . . . on a blowup, an inflatable of some sort."

[1] The first two weeks of the rotation were "training weeks" and operated on a "traditional" work schedule. In the third week, Travis worked from Monday through Thursday from 6:00 p.m. until 6:00 a.m. the following morning. During the fourth week he worked Monday through Wednesday from 6:00 p.m. until the next morning at 6:00 a.m. He would have Thursday night off, but then returned to work on Friday and would work both Friday and Saturday from 6:00 p.m. until the next morning at 6:00 a.m. In the fifth week, Travis would not work Monday through Wednesday and would then work Thursday through Sunday from 6:00 a.m. until 6:00 p.m. He would have the sixth week off of work completely.

The parties' ability to communicate is clearly strained. At the time of trial, Travis had not given Monica his home telephone number and vowed only to communicate about the children through e-mail or the parties' attorneys. Monica testified that Travis calls every night to speak with the children and if they are not available he gets "hostile" and will call five to six times, leaving progressively angrier messages. She feels "more or less, harassed by his phone calls."

At the conclusion of the case, on February 10, 2010, the court dictated its findings into the record. On March 5, 2010, the court filed a dissolution decree, awarding Monica physical care of both children, subject to reasonable and liberal visitation for Travis. The court explained that "because of the distance between the parties, joint physical custody is not practical or workable." The court further explained that Monica lives in a location where both parties grew up and both parties have families, which provides the children with a support system. Additionally, the children have been established in Kansas City for more than a year, and Monica's work schedule better accommodates the children's schedules.

The visitation schedule provided Travis a week of visitation in Kansas City where he would pick them up from school or daycare on Monday and Tuesday and return them to Monica by 7:00 p.m. both evenings. Then, on Wednesday, he would pick the children up from school or daycare and keep them in his care until Saturday at 7:00 p.m. The decree further provided that on the "weekend after [Travis's] 40 hour training week [Travis] shall have the

children from 7:30 p.m. Friday to Sunday at 4:00 p.m.;" with the parties exchanging the children in Bethany, Missouri. With respect to summer visitation, the decree provided that Travis would have the children for six weeks during the summer and that he must communicate the dates he will exercise his visitation to Monica no later than March 1 of each year. It further provided that the summer visitation shall be "set to end no later than one (1) week prior to the commencement of school."

The decree also referenced the children's summer activities, stating as follows:

> [Monica] shall provide a schedule of proposed summer school and bible school prior to March 1st if possible. If [Travis] chooses to exercise his summer visitation prior to school being let out for the summer, during summer school or during bible school, [Travis] shall be obligated to assure that the children attend those activities. However, [Monica] shall attempt, as well as she may, to schedule the children's activities (including summer school and bible school) during times which will not interfere with [Travis's] visitation.

The decree also provided Travis "telephonic contact with the children two to three times per week." Finally, the district court ordered Travis to pay $10,000 of Monica's attorney fees.

Travis appeals the decree's provisions concerning physical care, visitation, and attorney fees.

II. Scope and Standard of Review

We review dissolution of marriage cases de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Although not bound by them, we "give weight to the findings of the district court, especially to the extent

credibility determinations are involved." *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). We are mindful that a district court "'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.'" *In re Marriage of Drury*, 475 N.W.2d 668, 670 (Iowa Ct. App. 1991) (citation omitted).

III. Analysis

A. Physical Care

Travis asks us to grant him primary physical care. He contends the district court erred in awarding Monica physical care because it did not give proper weight to "Monica's true nature and character" or her relocation to Kansas City. Monica asserts the court correctly placed physical care with her because she will foster a relationship between the children and their father; she is the historical care provider; Travis admitted she is a good parent; she has a flexible work schedule allowing her to be available for the children; and Travis has created difficult communication between the parents.

When making physical care determinations, a court seeks to place children in the environment most likely to advance their mental and physical health and social maturity. *Hansen*, 733 N.W.2d at 695. Our prime concern is the best interests of the children; "[p]hysical care issues are not to be resolved upon perceived fairness to the *spouses*." *Hansen*, 733 N.W.2d at 695; *see also* Iowa R. App. P. 6.904(3)(*o*). To determine the children's best interests, we weigh all relevant conditions affecting physical care. *In re Marriage of Thielges*, 623 N.W.2d 232, 237–38 (Iowa Ct. App. 2000). We recognize that our statutory

scheme allows for joint physical care if it is in the children's best interest and when the court declines to award such, it must "explain why joint physical care is not in the children's best interest." *In re Marriage of Breckenfelder*, 737 N.W.2d 97, 101–02 (Iowa 2007).

In the case before us, we agree with the district court's conclusion that, in light of the geographic distance between the two parties, joint physical care is "not practical or workable" and, therefore, is not in the children's best interest. We also agree with the decision to place the children in Monica's physical care for the reasons set forth below.

We understand Travis's frustration with the distance he now lives from the children as a result of their move to Kansas City. But we cannot conclude that Monica's relocation renders her an unsuitable caretaker. *See In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998) (placing greater weight on emotional aspects of stability than the physical setting or relocation of the child). Many valid motives may prompt a parent to relocate and we do not find Monica's move was counter to the children's best interests. *See Thielges*, 623 N.W.2d at 238 (providing several legitimate reasons that a parent may move, including relocating to the place where the parent grew up, to an area where the parent's relatives reside, and to get a "fresh start").

Contrary to Travis's contention, the record demonstrates the district court did measure both parties' character and credibility. The district court had ample opportunity to view each parent and to assess their demeanor and truthfulness. We give weight to the district court's credibility and attendant character

determination. *See Hansen*, 733 N.W.2d at 690. Travis's assertions that Monica has poor character, which renders her unfit to provide primary care for the children, are not supported by the record and are contradicted not only by Monica's actions, but also by Travis's own statements that Monica is a good mother to the children.

Despite her relocation to Kansas City, Monica has demonstrated the type of conduct we look for when determining who will best meet the children's needs as the physical care custodian. Monica recognizes the importance of the children having a good relationship with Travis and she testified she is glad they have spent more time with him since the parties separated. She has demonstrated she will facilitate maximum continuing contact between the children and their father by providing him additional visitation with the girls not required by the temporary order, and by fostering the children's relationship with Travis's extended family. In addition, the record reflects that Monica "has done a good job of keeping [Travis] informed about the children's health, education, and activities." This evidence reflects positively on Monica's character as a responsible custodial parent who will include Travis in the children's lives and supports placing the children in her physical care. *See* Iowa Code § 598.41(1)(a) (2009) (citing importance of fashioning arrangement that allows the children the "opportunity for the maximum continuing physical and emotional contact with both parents").

Moreover, Monica has been the primary caregiver for both children since their birth and has a work schedule that is "appropriate and workable for the two

young children," whereas Travis's work schedule would require him to hire a nanny to care for the children. These factors support the court's conclusion that placement with Monica is in the children's best interest. *Hansen*, 733 N.W.2d at 696 (stating "stability and continuity of caregiving are important factors that must be considered in custody and care decisions"); *In re Marriage of Decker*, 666 N.W.2d 175, 180 (Iowa Ct. App. 2003) (indicating one parent's "position as the children's primary care parent" weighs in favor of placing the children in that parent's care). In addition, the strong family support system in Kansas City weighs in favor of placing the children in her care. *See Dale v. Pearson*, 555 N.W.2d 243, 246 (Iowa Ct. App. 1996) (giving weight to the fact that the father "has the support of his family" in modification proceeding). The record demonstrates Monica's extended family assists her with the children and Monica has demonstrated she will foster the children's relationships with their paternal relatives.

We decline Travis's invitation to award physical care to him in hopes that such an award will compel Monica to return to Des Moines.[2] Awarding physical care to Travis as a mechanism to coerce Monica's behavior would not only require us to speculate about what one party might do in reaction to the care arrangement, but would sideline the best interest analysis. We are committed to placing the children with the parent and in the environment that is in their best interests based upon the information we have before us. Travis's proposal

[2] Travis testified he wanted physical care of the children because "[i]t would be in [his] children's best interest . . . because [he] strongly feel[s] that Monica would move back at that point and she would do what's right. And immediately upon return to Des Moines, [he] [would] give her joint physical custody of the children because that's the best thing for them."

that we place the children with him so Monica will feel compelled to move to Des Moines is not in the children's best interests.

In light of the foregoing, the district court correctly concluded that the children's best interests will be served by placing them in Monica's physical care.

B. Visitation

Travis challenges several visitation provisions. He argues: (1) his visitation week in Kansas City should run continuously from Monday after school through Sunday evening at 7:00 p.m.; (2) telephone contact with the children should be every night rather than two to three nights per week; (3) the "weekend visitation in Des Moines should occur, at minimum, once every five weeks with specific wording that states 'to take place on his open weekend;'" (4) he should "be allowed to have his summer visitation the week prior to school starting, if he so chooses;" (5) March 15 rather than March 1 should be the date by which he must communicate to Monica when he will exercise summer visitation; and (6) "[s]ummer school and Bible school references in the decree should be removed altogether and decided mutually between the parents, as the U.S. Constitution intended it to be."

When determining visitation rights, "the governing consideration is, as always, the best interest of the child[ren];" we recognize that liberal visitation rights are in children's best interests. *Drury*, 475 N.W.2d at 670. When determining the proper amount of visitation in a given case, we are guided by the principle that a court should order the amount of visitation that will ensure

the children the "opportunity for the maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1)(a).

Upon our de novo review of the record, we conclude the provision establishing Travis's week-long visitation in Kansas City strikes the proper balance and is in the children's best interests. By incorporating the requirement that Travis return the girls the first two nights, the court implicitly credited Monica's testimony that staying overnight at her home the first two nights of the week-long visitation creates stability for the girls, reduces their confusion and the disruption of spending those nights at their grandparent's home during the school week, and helps them to perform better academically. We recognize that Monica had previously allowed the children to stay with Travis beginning Monday nights. The parties changed this practice when Travis voluntarily relinquished these additional overnights in favor of rigidly following the temporary order. The children have become familiar with this routine, which allows them to sleep in their own, familiar beds during the school week, and Travis previously, voluntarily assented to this arrangement. The arrangement is in the children's best interests and we see no reason to disturb it.

We also decline to change the provision allowing the father telephone contact with the children two to three times per week. We agree that frequent telephone contact is important in maintaining the bond between the children and their father. But requiring telephone conversations every night is not in the children's best interests. Their schedules may make mandatory, nightly contact difficult to achieve and missing such telephone calls has created discord for this

family in the past. We believe this provision is appropriate and urge that it serve as a floor, not a ceiling—the parties may arrange a greater number of telephone calls as they see fit. Given Monica's prior conduct—allowing Travis more visitation than required in the temporary order—and her testimony at trial indicating she is willing to allow contact more often than provided in this decree, we are hopeful the parties will work together amicably to allow frequent communication between the children and their father.

We also decline to alter the provision relating to Travis's weekend visitation. To the extent he argues, "[i]t was never [the] court's intention to have that weekend visitation stripped away," we agree. The decree currently provides that his weekend visitation will occur "after his 40 hour training week." The evidence indicates he is not scheduled to work the weekend associated with his training week so Travis's requested change that it read "on his open weekend" does not appear to effect a change. To the extent he argues on appeal that the weekend visitation should occur every five weeks, it appears his argument is based on his previous five-week work rotation schedule. He testified his company is now on a six-week rotation schedule. Travis has not established why the change he suggests will advance the children's best interests or why the current arrangement fails to do so. In light of the change to Travis's six-week rotation schedule at work, and the absence of an argument on the points above, we decline to disturb this provision.

Likewise, we conclude the provision that precludes Travis from exercising his summer visitation the week before the children begin school is in

the children's best interests and we decline to disturb it. We agree with the district court's reasoning that "the children do need a time to settle down, prepare mentally, [and] prepare physically for school before school starts."

But, we concur with Travis's contention that his deadline for communicating the dates of his summer visitation should be March 15, and not March 1, as provided in the decree. The district court dictated into the record that Travis must notify Monica "by March 15 of each year as to when he will exercise [his] blocks of summer visitation." It provided further that Monica will then have until April 15 of each year "to inform Travis what two weeks of uninterrupted time during the summer she wants." The court explained its reason for selecting these dates as follows:

> [B]y March 15 of each year the parties should be able to determine when school gets out, when summer school is going to be held, when Bible school is going to be held, because those things aren't scheduled at the last minute. . . . People know by March 15 when those things are going to occur.

No reason appears for changing the date from March 15 to March 1. Because the court's findings of fact support its conclusion that March 15 was "late enough in the year that [Travis] should already be on notice as to when [the children's summer] activities are, so if he wants to avoid them, he can," we agree Travis should have until March 15 to communicate his summer visitation dates to Monica.

Travis's final challenge is to the following visitation provision:

> If the Respondent chooses to exercise his summer visitation . . . during summer school or during Bible school, the Respondent shall be obligated to assure that the children attend those activities. However, the Petitioner shall attempt, as well as she

> may, to schedule the children's activities (including summer and Bible school) during times which will not interfere with Respondent's visitation.

Travis asks us to strike this provision, contending the children's attendance at summer school or Bible school should be a joint decision of the parents. To the extent that this provision of the decree gives Monica rights superior to those of Travis in deciding whether the children should attend summer school or Bible school classes, we agree it should be deleted from the decree. Iowa Code section 598.1(3) imposes shared decision making on parents who have joint legal custody when it comes to these matters: "Rights and responsibilities of joint legal custody include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." The award of physical care to Monica does not affect Travis's right to participate in decisions affecting the children's education and religious instruction. *See* Iowa Code § 598.41(5)(b). Those decisions are appropriately left to the parents to decide. *See In re Marriage of Craig*, 462 N.W.2d 692, 694–95 (Iowa Ct. App. 1990) (stating "[w]e will not prescribe what type or form of religious instruction should be provided for the children, nor which parent shall be responsible for the religious instruction of the children"). In the absence of specific provisions in the dissolution decree, both parents have an obligation to discuss these matters and decide what summer activities are in the best interests of their children.

B. Attorney Fees

The district court ordered Travis to pay $10,000 of Monica's attorney fees. Travis appeals that award and argues each party should be responsible for their own legal fees. Monica contends the trial attorney fee award was warranted and equitable, pointing to the property division and the parties' respective incomes. Monica also asks us to award appellate attorney fees.

"Iowa trial courts have considerable discretion in awarding attorney fees." *Drury*, 475 N.W.2d at 671. Awards must be fair and reasonable, and they must be based on the parties' respective abilities to pay. *Id.* To overturn such an award, "the complaining party must show that the trial court abused its discretion." *Id.* Because Travis has a considerably higher income than Monica, we conclude the award of $10,000 in fees for Monica's trial attorney was within the court's discretion.

An award of appellate attorney fees is not a matter of right, but rests within this court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). In making our determination, we consider "the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend" the trial court's decision on appeal. *Id.* Based on the relative ability of the parties to pay and Monica's obligation to defend multiple provisions of the decree on appeal, we award her $2000 in appellate attorney fees. Costs are assessed to Travis.

AFFIRMED AS MODIFIED.