

IN THE COURT OF APPEALS OF IOWA

No. 1-025 / 10-0730
Filed March 7, 2011

STATE OF IOWA, ex rel. M.M.,
Plaintiff,

vs.

BRIAN K. BOVEE,
Defendant-Appellant,

vs.

TABITHA LYNN HOFF,
Third-Party Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Gordon C.
Abel, Judge.

Brian Bovee appeals from the district court's order granting physical care
of his and Tabitha Hoff's son to Tabitha. **AFFIRMED.**

Jill K. Harker of J.K. Harker, P.C., Omaha, for appellant.

Tabitha Hoff, Council Bluffs, appellee pro se.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

VOGEL, P.J.

Brian Bovee appeals from the district court's order granting physical care of his and Tabitha Hoff's son, M.M., to Tabitha.¹ As we agree with the district court's decision, we affirm.

M.M. was born in 2002 to Brian and Tabitha, who were never married. Brian's paternity was established in 2003, and he was ordered to pay child support. M.M. has lived with Tabitha his entire life, and Brian had little to no contact with M.M. until October 2006, after serving ten months in prison on a willful injury conviction. Following his release, Brian became a steady part of M.M.'s life, seeing him several times a week. Brian filed a petition to establish custody, visitation, and support in January 2009, seeking "joint legal and physical custody" of M.M. In April 2009, the court entered a temporary order awarding the parties joint legal custody of M.M., and alternating physical care on a weekly basis. Following a trial in September 2009, the parties were granted joint legal custody of the child, with Tabitha having physical care and Brian liberal visitation. Brian filed a motion for a new trial, which was denied. Brian appeals.

We review child custody and support orders de novo. Iowa R. App. P. 6.907; *McKee v. Dicus*, 785 N.W.2d 733, 736 (Iowa Ct. App. 2010). The legal analysis used in resolving a question concerning the custody of a child born out of wedlock is the same as that used if the child's parents had been married and a dissolution of their marriage resulted. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). We recognize that the district court was able to listen to and observe the parties and witnesses, lending credence to its findings. *In re Marriage of*

¹ Tabitha did not file a responsive brief on appeal.

Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). Our overriding consideration is the best interests of the child. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

Brian asserts the district court “abused its discretion” in granting Tabitha physical care of M.M. and such was not in M.M.’s best interest.² The district court found,

The court’s consideration of the record and its findings, including the lack of effective communication between the parents, Brian’s willingness to be disdainful of Tabitha and to take unilateral action, the court concludes the permanent award of joint physical care cannot serve [M.M.’s] best interests. The court concludes [M.M.’s] long term best interests would be met by awarding primary physical care to Tabitha in order to enhance and preserve [M.M.’s] sense of security, and to provide continuity and stability in his life. The court is convinced that between the parents, Tabitha has a superior willingness, and ability to promote [M.M.’s] contact and relationship with his non-custodial parent.

We defer to the credibility assessments made by the district court and conclude the district court’s factual findings were an accurate reflection of the record. Further, the district court’s ruling demonstrates it considered and weighed the appropriate factors in making a physical care determination. *In re Marriage of Hansen*, 733 N.W.2d 683, 697–99 (Iowa 2007) (explaining that when determining whether a joint physical care arrangement is in the best interests of the children, we consider (1) “approximation”—what has been the historical care-giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict

² Brian also argues the court gave no compelling reason to separate M.M. from his half-sibling, D.B., Brian’s son by a subsequent relationship, and of whom Brian has joint physical care. At the time of trial, both Tabitha and Brian were expecting another child with their current significant others. While the record indicated M.M. has an established relationship with D.B., he will have a half-sibling in the home of either parent. See *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996) (explaining that there is a preference for keeping siblings together).

between the parents; and (4) “the degree to which the parents are in general agreement about their approach to daily matters.”

We agree that based on Tabitha’s historical care-giving of M.M., and the lack of communication between the parties, joint physical care utilized during the pendency of this action, would not be in M.M.’s best interest as a permanent arrangement. See *Hansen*, 733 N.W.2d at 692 (stating that Iowa does not have a presumption in favor of joint physical care, it is simply a viable option, if it is in the child’s best interest); see *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996) (“In assessing who should serve as physical caretaker, we consider whether one parent has historically been the primary care giver, although this factor is not controlling.”).

We commend Brian for the many positive steps he has taken to improve his life, and recognize the maturity he has gained. Nonetheless, we agree with the district court that Tabitha “has a superior willingness, and ability to promote [M.M.’s] contact and relationship with his non-custodial parent.” The relationship Tabitha is able to support between M.M. and Brian, as well as the stability she has given M.M. since his birth, convinces us that the district court came to the correct physical care resolution. Therefore, upon our de novo review of the record, we agree it is in M.M.’s best interest that the responsibility for his physical care be placed with Tabitha, with liberal visitation awarded to Brian. We affirm the district court pursuant to Iowa Court Rules 21.29(1) (a), (b), (d), and (e).

AFFIRMED.