IN THE COURT OF APPEALS OF IOWA

No. 1-102 / 10-1361
Filed March 21, 2011

IN RE THE MARRIAGE OF
MARCUS E. RUSSELL
AND ANGEL M. RUSSELL

Upon the Petition of
MARCUS E. RUSSELL,
Petitioner-Appellant,

And Concerning
ANGEL M. RUSSELL,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, Nancy S. Tabor, Judge.

Marcus Russell appeals from the physical care and economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

David Pillers and Adam W. Blank of Pillers & Richmond, DeWitt, for appellant.

Maria K. Pauly of Wehr, Berger, Lane & Stevens, Davenport, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings.

Marcus and Angel Russell were married August 31, 2002. Marc filed a petition for dissolution on June 25, 2009. The parties have three children, ages seven, six, and four at the time of trial. Throughout the marriage, Marc worked for Union Tank Car. At the agreement of the parties, Angel stayed home to take care of the children. Angel occasionally worked part-time jobs during the marriage, but these jobs never lasted long. For the most part, Angel has been out of the workforce since her oldest child was born.

Angel testified that during their marriage, Marc was verbally and physically abusive to her. Marc admitted at trial that there had been "a lot of domestic violence" between him and Angel but explained there had not "been any findings of domestic abuse." Marc later testified he had never physically abused Angel. In 2004, Angel obtained a protective order against Marc after an incident that ended in Marc being arrested for domestic violence. Both the protective order and criminal charges were subsequently dismissed.

In the summer of 2009, when Angel moved out of the parties' marital home near Muscatine, she again obtained a protective order against Marc. The June 24, 2009 protective order by consent agreement in Muscatine County gave Angel temporary physical care of the children and established visitation for Marc two nights per week, every other weekend, and every other Sunday. On July 24, 2009, the district court in Clinton County entered an order after a contested hearing on temporary custody, physical care, and support finding that the children should remain with Angel pending final disposition. The temporary order

acknowledged the Muscatine County protective order but otherwise was silent as to Marc's visitation, so the parties continued to abide by the visitation provisions in the June 24 protective order.

Marc moved to DeWitt in July 2009 after he received a promotion, and he continued to reside there at the time of trial. After Angel left the parties' marital home near Muscatine, she moved several times and has enrolled the children in three different school districts. At the time of trial, Angel had been renting a home in Wheatland for four months and testified that she intended to continue to reside at that location. She testified she moved from Muscatine to Wheatland so the children could be closer to their father.

The June 24 Muscatine County protective order was either dismissed or lifted in August 2009.

Angel testified that in the early fall of 2009, Marc would return the children after his mid-week visits and they would not have bathed, eaten, or done their homework. Since the court order establishing a visitation schedule was no longer in effect, Angel proposed a new visitation schedule for Marc to alleviate the problems associated with Marc's mid-week visits. Marc was not happy with Angel's proposed schedule, and he continued to follow the pick-up requirements in the June 24 order, although the children were not there because Angel was not operating under that order. As a result, between October 20, 2009, and November 20, 2009, Marc did not have visits with his children.

On December 2, 2009, the district court entered an order agreed to by the parties establishing visitation for Marc every other weekend, every Tuesday, and an optional additional Friday once per month. Angel testified that the children

had acclimated to this schedule and she believed it would be in the children's best interests to continue this schedule. Angel testified she wanted to be flexible and was willing to negotiate additional parenting time for Marc, especially in the summers.

After a hearing, the district court entered a decree on June 2, 2010, granting Angel physical care of the parties' children with visitation for Marc every other weekend. The district court also ordered Marc to pay child support and in calculating his payment did not impute income to Angel. Marc filed a motion for new trial pursuant to Iowa Rule of Civil Procedure 1.1004(7), based on facts not in the record, which the district court denied.

Marc appeals, arguing: (1) the district court erred in granting physical care of the children to Angel; (2) the district court erred in reducing his visitation; and (3) the district court erred in declining to impute income to Angel for purposes of calculating child support.

II. Standard of Review.

We review the district court's ruling de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50–51 (Iowa 1999). In doing so, we give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. *Id*. at 51.

III. Physical Care.

Marc argues the district court erred in granting physical care of the children to Angel when he can offer more stability and a more wholesome

environment, better provide for the children's physical, mental, and social health, and better encourage the children's relationship with the other parent. We disagree.

In determining a physical care arrangement, we seek to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683. We consider statutory factors as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974), in determining the grant of physical care. *See* Iowa Code § 598.41(3) (2009); *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). Our first and governing consideration is the best interest of the children. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984).

A. Wholesome Environment

We acknowledge Marc's claim that Angel's new boyfriend, Jake, is a factor to consider in awarding physical care. "If a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the children becomes a significant factor in a custody dispute." *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). Angel admits that Jake once assaulted Marc. At the time of trial, she was pregnant with Jake's child. However, we believe Angel is still able to provide the more wholesome environment for the children for all of the reasons explained below.

The district court found a history of domestic violence existed in Marc and Angel's marriage. As stated by the district court:

> Based on the admission by Marcus of domestic violence in the home, the entry of a protective order by consent, the testimony of witnesses, and the demeanor and body language of Marcus, the

> Court finds that there is a history of domestic violence in this marriage.

Marc did not challenge this finding on appeal.

This court has recognized domestic abuse is a factor in determining which parent should be granted child custody. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). We agree with this finding and note that it weighs heavily against an award of physical care of the children to Marc.

B. Stability

We find that Angel can provide sufficient stability for the children. Angel has been the children's primary caretaker for their entire lives. Though the fact that a parent was the primary caretaker does not guarantee an award of physical custody, the role of the primary caretaker is critical in children's development, and we give careful consideration in custody disputes to allowing children to remain with the primary caretaker. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003). The record establishes that the children are well-behaved, healthy, well-rounded children. Further, Angel testified that Mark struggled in the past when given more of the responsibilities of a primary caretaker. We believe allowing the children to continue in their daily routines with their mother will provide necessary stability for the children.

We agree with Marc that Angel's frequent moves, especially moves that involved a change in school district for the children, are not in the children's best interests. However, when we consider all of the factors, we determine that Angel is best able to provide for the children's physical, mental, and social maturity.

C. Encouragement of Other Parent's Relationship

Marc asserts Angel has not encouraged his relationship with the children. We give deference to the district court's findings that in this regard, "It is clear from the totality of the evidence and witness testimony that Marcus recalls facts in a way that is beneficial to his own needs." The record establishes that Angel was very willing to allow Marc to visit his children, including visits at times not provided by the parties' visitation agreement. Angel testified that she offered to allow Marc to see the children an extra weekend or an extra day, but from November 2009 to the time of trial in May 2010, Marc only took advantage of this opportunity on three occasions.

In addition, several witnesses testified that Marc and Marc's extended family would speak negatively about Angel in front of the children. At trial Angel expressed an understanding that the children should not be exposed to disputes between her and Marc. Angel testified the kids enjoyed spending time with Marc, and she was willing to allow Marc visitation even when it was not court-ordered. We find Angel has shown a dedication to allowing the children to maintain their relationship with their father.

After considering all of the relevant factors, we affirm the district court's award of physical care of the children to Angel.

IV. Reduction in Marc's Visitation.

Marc argues the district court erred in reducing his visitation in spite of Angel's testimony that she would like Marc to see the children more often. "[I]t is generally in children's best interests to have the opportunity for maximum

continuous physical and emotional contact with both of their parents." *In re Marriage of Thielges*, 623 N.W.2d 232, 238 (Iowa Ct. App. 2000).

Angel testified at trial that she was "fine with" the parties' current visitation schedule allowing Marc a mid-week visit with the children. She also testified the problems the parties had previously experienced with mid-week visitations had been resolved. She testified the children had acclimated to the schedule and it would be in the children's best interests to continue with that schedule. She later stated that she "would like to keep the visitation the same as what it is," but was willing to be more flexible during the summer. The district court found that "each parent would do a good job raising the children" and that Marc was entitled to "liberal visitation."

We consider only the facts in the record presented to the district court. On the basis of that record, we believe it is in the best interests of the children to allow Marc a mid-week visit, which Marc previously enjoyed and which Angel testified she was willing to continue. We modify the parties' decree to provide Marc visitation with the children Tuesday night from 3:45 p.m. to 7:00 p.m.

V. Imputed Income.

Marc argues the district court erred in declining to impute income to Angel for purposes of calculating child support. In ordering child support,

> The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

Iowa Ct. R. 9.11(4). In determining whether to use a parent's earning capacity, "[w]e examine the employment history, present earnings, and reasons for failing

to work a regular work week." *Malloy*, 687 N.W.2d at 115. The district court found Marc had not "presented evidence to support imputing income to Angel." We agree with the district court that Marc has not presented evidence to support his argument that the district court should have imputed income to Angel. On our de novo review, we find Marc has failed to show that imputing income to Angel is necessary to provide for the needs of the child, to do justice between the parties, or to prevent a substantial injustice. We affirm the district court's decision not to impute income to Angel.

VI. Appellate Attorney Fees.

Both parties request an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the appellate court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). 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 district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We decline to award appellate attorney fees.

Costs on appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.