IN THE COURT OF APPEALS OF IOWA

No. 1-224 / 10-1617
Filed May 11, 2011

**IN RE THE MARRIAGE OF JEFFREY DAVID TROEN
AND KATHY LOUISE TROEN**

**Upon the Petition of
JEFFREY DAVID TROEN,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
KATHY LOUISE TROEN,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Jasper County, Darrell Goodhue, Judge.

Jeffrey Troen appeals and Kathy Troen cross-appeals from the decree dissolving their marriage. **AFFIRMED.**

Jeffrey A. Smith, Oskaloosa, for appellant/cross-appellee.

Deborah L. Johnson, Altoona, for appellee/cross-appellant.

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

DOYLE, J.

The parties' marriage was dissolved by a decree entered September 10, 2010. The parties were awarded joint legal custody of their two minor children.[1] Jeff was awarded physical care of their seventeen-year-old son, and Kathy was awarded physical care of their seven-year-old daughter. Liberal visitation provisions were included in the decree, and Jeff was ordered to pay child and medical support. Neither party was awarded spousal support.

On appeal, Jeff argues the district court erred in failing to award the parties "joint physical custody."[2] On cross-appeal, Kathy argues the district court erred in denying her request for spousal support. We affirm.

---

[1] At the time of trial, the parties also had two adult sons: one twenty years of age and the other nineteen. They resided with Jeff and are not the subject of this litigation.

[2] Although Jeff refers to "joint physical custody," we believe he means "joint physical *care*." We note the terms "joint physical custody" and "physical custody" are not defined in Iowa Code Chapter 598 (although the term "physical custody" is defined in Iowa's Uniform Child-Custody Jurisdiction and Enforcement Act, Iowa Code § 598B.102(14) (2009), as "the physical care and supervision of a child"). Historically, physical care was referred to as "custody" in divorce actions. The terms "joint custody," "joint legal custody," and "physical care" were first introduced and defined in 1982 amendments to Chapter 598. *See* 1982 Acts ch. 1250, § 1. Now, the word "custody," in the context of dissolution of marriage actions, actually refers to legal custody, not physical care. *See* Iowa Code § 598.1(5) ("Rights and responsibilities of legal custody include, but are not limited to, decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction."). "Physical care" is separately defined as "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." *Id*. § 598.1(7). "Joint physical care" was for the first time defined by the legislature in 1997. *See* 1997 Acts ch. 175, § 199; *see also In re Marriage of Hansen*, 733 N.W.2d 683, 691 (Iowa 2007). Section 598.1(4) states "'[j]oint physical care'" means an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child . . . ." *See also* Iowa Code § 598.41(5)(a). On the other hand, "joint custody" or "joint legal custody" refers to an award of legal custody of a minor child to both parents jointly under which both parents have legal custodial rights and responsibilities and under which neither parent has legal custodial rights superior to the other. *Id*. § 598.1(3); *see also id*. § 598.41(1)–(4). Our supreme court discussed the differences between joint legal custody and joint physical care in *Hansen*, 733 N.W.2d at 690-91. Although, we recognize it is not uncommon for the bench and bar to use the

***I. Scope and Standards of Review*.**

Our scope of review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

***II. Discussion*.**

***A. Physical Care*.**

The parties were married in 1989. Jeff is a self-employed dump truck driver. His employment is seasonal, so he works the summer months virtually every day from six in the morning until six or seven at night. He is generally home from October to March. For the first ten years of the marriage, Kathy was a stay-at-home mother. When the parties' youngest son started school, Kathy began working as a paraprofessional for a school district. She had been employed in this position for twelve years at the time of trial, working from eight in the morning until three in the afternoon on school days during the school year.

The parties had been separated for about two and a half years when Jeff filed a petition for dissolution of marriage in March 2010. After they separated, the parties' sons continued to live with Jeff in the family home. Kathy moved to a one-bedroom apartment she shared with a cousin. The parties do not dispute that they let their daughter "go wherever she wanted to be at that time" with no restriction, but they were exchanging custody "every other week."

---

word custody as a reference to physical care in dissolution of marriage actions, we will use the term "physical care" in this opinion.

In his petition, Jeff requested temporary and permanent physical care of the parties' minor children. Kathy also requested temporary and permanent physical care of the parties' minor children. Prior to the hearing on temporary matters, Kathy made a proposal, characterizing it as a "split care arrangement." She proposed that Jeff have "primary physical care"[3] of the parties' minor son and that she have primary physical care of their daughter, and that the children spend the weekends together with Kathy. After an unreported hearing, the district court entered a temporary order awarding the parties joint legal custody of their minor children. Jeff was awarded physical care of their son, and the parties were awarded joint physical care of their daughter with the shared care alternating weekly.[4]

Prior to trial, the parties agreed that Jeff would be awarded physical care of their son. The contested issues at trial concerned the parties' dueling requests for physical care of the parties' daughter and Kathy's request for spousal support. After trial, the final decree awarded the parties joint legal custody of the children. Jeff was awarded physical care of their son, and Kathy was awarded physical care of their daughter. No spousal support was granted.

No party disputes the district court's award of joint legal custody. Jeff seeks to overturn the district court's decree awarding physical care of their daughter to Kathy. He seeks joint physical care.

---

[3] The term "primary physical care" is not defined in chapter 598, but we acknowledge it is not uncommon for the bench and bar to use the term as a reference for "physical care." *See* Iowa Code § 598.1(7).

[4] The terms "primary physical care," as well as "joint physical custody," appear in the text of a pre-printed court form utilized by the district court for its order on temporary matters.

Kathy argues Jeff did not make proper application for joint physical care pursuant to Iowa Code section 598.41(2)(a) (2009). Requests for joint physical care are governed by section 598.41(5)(a), which states, in relevant part:

> If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent.

Although Jeff never amended his pleadings from requesting physical care of the parties' daughter to requesting joint physical care, we nevertheless construe, particularly in the context of the parties' previous arrangement for joint physical care during their separation and the court-ordered joint physical care provided under the temporary order, his request at trial to continue with the then current physical care arrangement (sharing physical care every other week) as sufficient under section 598.41(5)(a). We therefore conclude the issue of joint physical care was properly before the district court and the record is adequate to permit de novo review of whether joint physical care was in the child's best interest.[5]

"When considering the issue of physical care, the child's best interest is the overriding consideration." *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in section 598.41(3), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *See In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the custodial factors in

[5] In his brief, Jeff cites to section 598.41(5)(a), which requires a court, upon denying a request for joint physical care, to set forth its reasons why the award of joint physical care is not in the best interests of the child. But Jeff does not argue the district court erred in allegedly failing to explain why it denied an award of joint physical care. Kathy argues that since the issue of joint physical care was not properly before the district court, it had no obligation to set forth the reasons for its denial. Since we find the issue of joint physical care was properly before the court and the record adequate to permit a de novo review of whether joint physical care was in the child's best interests, we need not determine whether the district court's stated reasons for denying joint physical care were minimally sufficient.

section 598.41(3) apply equally to physical care determinations). "[T]he courts must examine each case based on the unique facts and circumstances presented to arrive at the best decision." *Id.* at 700. 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; *see also 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). The court shall then determine placement according to which parent "can minister more effectively to the long range best interest of the child." *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; *see also 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.").

Against the backdrop of a multiplicity of applicable factors, Jeff contends the facts and circumstances dictate an award of joint physical care to the parties. In support of his contention, he asserts: (1) Jeff had a better living situation for the children than Kathy, (2) it was important for the daughter to have as much contact with her brothers and with Jeff, (3) if the daughter resided with Jeff she would be right across the street from most of Kathy's family, (4) the parties could communicate effectively with each other concerning the daughter, (5) the parties basically had a joint physical care arrangement from the time the daughter was approximately three-and-a-half until the time of trial and she had thrived thereunder, and (6) throughout the course of the marriage the parties shared time being primary caretaker of the daughter. Kathy counters that, among other things: (1) she had been the primary caregiver as a stay at home mother, (2) she was the one who helped with and participated in the daughter's school activities, (3) while in the care of their father, the boys got into criminal trouble, (4) Jeff kicked the boys out of the house for a month when he couldn't deal with them, (5) there is a communications problem between the parties, (6) Jeff's behavior has been controlling and derogatory towards Kathy, and (7) the sleeping arrangements at Jeff's house were not ideal.

There is no dispute that both parties are suitable custodians. The focus, therefore, is on whether the interests of the daughter are better served by substantial and nearly equal contact with both parents through a joint care arrangement or by naming one parent the physical care parent, and providing the

other with visitation. After a de novo review of the record[6] and considering the foregoing factors and parties' arguments, we agree with the district court that Kathy should have physical care of the parties' daughter.

In its post-trial comments, the district court found Kathy had been the primary caretaker of the children prior to the parties' separation. Upon our de novo review of the record, we agree. The court was concerned that Jeff had kicked his sons out of the house for a month. It was also concerned that one of the boys was charged with and plead guilty to possession of drug paraphernalia. The court also noted the communications problems between the parties, including the two-month period they did not speak to each other. To set forth the numerous incidents of conflict between the parties would serve no purpose here, and, no doubt many of the incidents arose from the conflict, frustrations, and tensions normally associated with parties going through a dissolution of marriage, but Jeff's conduct is concerning nevertheless. Sleeping arrangements are less than ideal at Jeff's home as there is no bedroom for the daughter, so she has to sleep with one of her brothers or with Jeff. Sleeping arrangements are improved at Kathy's one-bedroom apartment. There are now two beds in the bedroom, so one is available for their daughter. Kathy's cousin now sleeps in the living room. Additionally, the shared care arrangement in place at the time of trial had been the source of confusion for the daughter as to who was picking her up after school.

[6] We note a not uncommon breach of the rules of appellate procedure. No witness names were inserted at the top of each transcript page included in the appendix. *See* Iowa R. App. P. 6.905(7)(*c*).

At the end of the day, after reviewing all of the evidence and applying the appropriate factors, we cannot say the award of physical care of the parties' daughter to Kathy is not in the child's best interest. We therefore see no reason to disturb the district court's award of physical care in this case. Accordingly, we deny Jeff's request for joint physical care of the parties' daughter.

B. Spousal Support.

On cross-appeal, Kathy argues the district court erred in denying her request for spousal support. She contends "some sort of rehabilitative [support] is appropriate."

Spousal support "is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa 1988). Spousal support is a discretionary award dependent upon each party's earning capacity and present standards of living, as well as the ability to pay and the relative need for support. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). Spousal support "is not an absolute right; an award depends on the circumstances of each particular case." *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in section 598.21A(1). *See id*. We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Property division and spousal support "should be

considered together in evaluating their individual sufficiency." *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

> Rehabilitative spousal support is "a way of supporting an economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting." The goal of rehabilitative spousal support is self-sufficiency and for that reason "such an award may be limited or extended depending on the realistic needs of the economically dependent spouse."

In re Marriage of Becker, 756 N.W.2d 822, 826 (Iowa 2008) (internal citations omitted).

The district court determined that "neither party shall owe the other any spousal support of any kind." "Although our review of the trial court's award is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity." *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996).

During the last ten years of the marriage Kathy worked as a paraprofessional for a school district earning approximately $10,000 per year. Jeff earns two-and-a-half times as much. Jeff does not work in the off-season and Kathy does not work in the summer. Kathy testified she would like to take classes to improve her teaching. Jeff argues it appears Kathy has no intentions of furthering her education since "[s]he never inquired as to the availability of financial assistance or student loans; moreover, she had not even applied to any schools." We find Jeff's argument to be a bit disingenuous. There is no testimony in the record to support Jeff's contentions. Nor did Jeff rebut Kathy's testimony that Jeff did not allow her to take classes because he controlled all the money during the marriage and he had not provided any support or alimony to

her since the parties separated. Further, in asserting he simply does not have the resources to pay alimony, Jeff points out he is raising the parties' three sons, without noting two are adults (albeit one, at the time of trial, had three months of school to finish before getting his diploma). Nonetheless, after a thorough review and consideration of the evidence presented, we agree with the district court's ruling denying Kathy's request for spousal support.

C. Attorney Fees.

Kathy seeks 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 Kathy appellate attorney fees in this case in the amount of $1000. Costs on appeal are assessed to Jeff.

AFFIRMED.