IN THE COURT OF APPEALS OF IOWA

No. 1-314 / 10-1964
Filed May 25, 2011

IN RE THE MARRIAGE OF ANDREA LEA GEARY AND RYAN STILLMAN HAYNES

Upon the Petition of

ANDREA LEA GEARY,
Petitioner-Appellant,

And Concerning

RYAN STILLMAN HAYNES,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Andrea Geary appeals the physical care provisions in the decree dissolving her marriage to Ryan Haynes. **AFFIRMED.**

Teresa Ann Rastede of Dunakey & Klatt, P.C., Waterloo, for appellant.

Timothy John Luce of Anfinson & Luce, P.L.C., Waterloo, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

Andrea Geary appeals the physical care provisions in the decree dissolving her marriage to Ryan Haynes. She contends the district court failed to carefully consider the factors for granting joint physical care outlined in *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007). In our de novo review of the record, we find both parties are suitable caregivers and have the ability to communicate effectively regarding day-to-day parenting decisions. Because joint physical care is in the best interest of their two young daughters, we affirm the district court.

I. *Background Facts and Proceedings*

Andrea and Ryan were married in July 2004. Andrea purchased a bakery shortly before their marriage and ran the business while Ryan obtained his Master's degree in musicology at the University of Illinois. Ryan worked as a teaching assistant, taught piano lessons, and helped at the bakery. Their daughters were born in 2006 and 2007. In the fall of 2007, the couple sold the bakery and moved back to Iowa, where Ryan worked as an elementary school music teacher and Andrea stayed at home to care for the girls. In 2008, Andrea started a part-time job at the University of Northern Iowa (UNI).

On October 9, 2009, Andrea filed a petition to dissolve the marriage. She asked for joint legal custody and physical care of the girls, who were four and three years old at the time of the trial. In his answer, Ryan asserted that "shared physical placement should be awarded as it is in the best interests of the children." The district court held the divorce trial on November 1, 2010, and

issued the decree on November 4, 2010. Andrea appeals, challenging the grant of joint physical care, and asking for child support to be adjusted if she is awarded physical care in the appeal. Both parties seek appellate attorney fees.

II. *Standard of Review/Credibility Determinations*

Our review of divorce appeals is de novo. *In re Marriage of Sullins,* 715 N.W.2d 242, 247 (Iowa 2006). We give weight to the findings of the district court, especially to the extent credibility determinations are involved. *Id.* We defer to the district court's opinion regarding the believability of the parties because of the trial judge's superior ability to gauge their demeanor. Iowa R. App. P. 6.904(3)(*g*); *In re Marriage of Pundt,* 547 N.W.2d 243, 245 (Iowa Ct. App. 1996).

In this case, the district court believed that Andrea had "gone out of her way to exaggerate isolated instances of what she perceives as substandard parenting by [Ryan]." The court also found that Andrea's characterization of Ryan as unstable and aggressive was "not supported by other more believable testimony" and was "contradicted by [Ryan's] own appearance and demeanor during trial."

On appeal, Andrea conveys the following frustration with the district court's doubts about her testimony:

> At most, a reading of the Decree expresses that the Court has based his joint physical care determination of the parties' children solely on the strength of the Court's knowledge that the Appellate Courts give great deference to credibility determinations made by the Trial Judge.

When evidence is in conflict, it is the trial court's role to resolve the conflict in light of its own credibility assessments. *State v. Hopkins,* 576 N.W.2d 374, 377 (Iowa 1998). Nothing in the decree indicates that the court improperly attempted to immunize its findings from our de novo review by assessing the relative credibility of the parties' testimony. Rather, the court did its job to resolve conflicts in the evidence concerning Ryan's parenting skills and character traits. We find no cause to disturb its credibility assessment.

Andrea also compares the findings in the temporary order and the final decree, noting that the judge presiding over the temporary hearing found her testimony to be more credible. This comparison has no persuasive force in the appeal from the final order. *Cf. In re Marriage of Denly*, 590 N.W.2d 48, 51 (Iowa 1999) (holding that temporary custody orders are subsumed in the final custody determination and can be separately enforced).

III. *Discussion*

A. Joint Physical Care

In cases where the court grants joint physical care, "both parents have rights to and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, [and] providing routine care for the child . . ." Iowa Code § 598.1(4) (2009). We examine the propriety of joint physical care on "the unique facts" of each divorce case and do not entertain the presumption that joint physical care is disfavored. *Hansen*, 733 N.W.2d at 695.

A multitude of factors go into a determination of whether joint physical care is warranted. As a starting point, the factors listed in section 598.41(3)[1] regarding joint legal custody are relevant to the question of joint physical care. *Hansen*, 733 N.W.2d at 696. Where both parents are suitable caregivers and the question is whether joint physical care will be in the children's best interests, the *Hansen* decision directs us to four key considerations: (1) stability and continuity of caregiving; (2) the ability of spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree to which parents are in general agreement about their approach to daily matters. *Id*. at 696-99.

As to the first of these considerations, Andrea argues that during the marriage she was primarily responsible for the children's care while Ryan obtained his advanced degree and then worked as a school teacher. She invokes the "approximation rule" to support her position that the girls would have the more continuity if she were granted physical care with visitation to Ryan.

Ryan acknowledges that he spent more time working outside the home, but counters that he always has been active in the girls' lives, especially when he

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[1] Those factors include: (a) whether each parent would be a suitable custodian for the child; (b) whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents; (c) whether the parents can communicate with each other regarding the child's needs; (d) whether both parents have actively cared for the child before and since the separation; (e) whether each parent can support the other parent's relationship with the child; (f) whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity; (g) whether one or both the parents agree or are opposed to joint custody; (h) the geographic proximity of the parents; (j) whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation; and (j) whether a history of domestic abuse, as defined in section 236.2, exists. Iowa Code § 598.41(3).

had time off from teaching in the summer. Ryan also presented the testimony of family members who observed his involvement in the everyday activities of the girls. His brother testified that during the couple's time in Illinois Ryan and Andrea were "working together in a very stressful environment" trying to balance the demands of graduate school, a young family, and starting a business. Ryan's brother generally found "no distinction between their roles, in terms of who did how much parenting."

The fact that a parent was the primary caretaker before the couple separated does not assure he or she will be awarded sole physical care. *See In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003). While this couple reached a mutual decision that Andrea would stay at home with their young daughters and Ryan would work outside the home, the record shows that Ryan also has been very involved with the girls' care. We view the couple's success in joint care during their marriage and separation as a good sign that joint physical care is a viable option post-divorce.

Turning to the second and third *Hansen* factors, we do not perceive a level of conflict between Ryan and Andrea that would inhibit their ability to show each other mutual respect and to communicate pertinent information about the children. It appears that during their marriage, both parties supported the other's career goals: Andrea's to open a bakery and Ryan's to be a music instructor. Andrea admitted in her testimony that it was possible for her and Ryan to get along and that they had done so "at times" during the year leading up to the dissolution trial. The record showed that the parents came together for a

birthday celebration and teacher conference after their separation. As our supreme court observed: conflict is a continuum. *Hansen*, 733 N.W.2d at 698. If there was not a certain degree of conflict between these parties, it is not likely their marriage would have broken down to the point where dissolution was necessary. But we do not find that Ryan and Andrea are feuding to the point where they are unable to effectively share information about their daughters. This is not a case like *In re Marriage of Hynick*, 727 N.W.2d 575, 580 (Iowa 2007), where the father consistently engaged in "hostile and petty conduct" toward the mother.

The fourth factor set out in *Hansen* is the degree to which the parents share an approach to daily child rearing practices. Nothing in this record indicates that either Andrea or Ryan have been using or will in the future use the girls as "pawns in continued post-dissolution marital strife." *See Hansen*, 733 N.W.2d at 699. Evidence presented at trial indicated that the girls were flourishing despite dividing their time between their parents' homes. Both parents place a high premium on assuring the girls obtain quality educational experiences and both approve of their older daughter's enrollment at the Price Laboratory School on the UNI campus. Andrea cites examples of Ryan's inattention to medical problems arising with the girls when they are in his care. But Andrea also acknowledged at trial that Ryan had communicated with her when such health issues arose. This record reveals no fundamental disagreements concerning child rearing practices between Ryan and Andrea.

We agree with the district court's conclusion that these parents are capable of cooperating to make the joint physical care arrangement work to the benefit of their daughters. Because we do not disturb the physical care award, there is no call to recalculate Ryan's child support obligation.

B. Appellate attorney fees

Both parties ask us to award them attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within this court's discretion based on the parties' relative abilities to pay and the merits of the appeal. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa Ct. App. 1995). Having rejected Andrea's appellate claim, we do not find that she was obligated to challenge the district court's decree. But we also do not believe that given the parties' financial positions that Andrea should be required to pay Ryan's attorney fees. Each party should be responsible for his or her own legal fees on appeal. Costs are assessed half to each party.

AFFIRMED.