

IN THE COURT OF APPEALS OF IOWA

No. 1-611 / 11-0515
Filed October 19, 2011

**IN RE THE MARRIAGE OF NANCY MARIE DIERSEN
AND RYAN MICHAEL DIERSEN**

Upon the Petition of

NANCY MARIE DIERSEN,
Petitioner-Appellant.

And Concerning

RYAN MICHAEL DIERSEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Boone County, Steven J. Oeth,
Judge.

The petitioner appeals from the decree dissolving her and the
respondent's marriage. **AFFIRMED AS MODIFIED.**

Michael D. Tungesvik and Dorothy L. Dakin of Kruse & Dakin, L.L.P.,
Boone, for appellant.

Pamela A. Vandell, Des Moines, for appellee.

Heard by Eisenhauer, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

Nancy Diersen appeals from the decree dissolving her and Ryan Diersen's marriage. She challenges the child custody provisions of the decree, arguing that she should have been granted physical care of the children rather than the parties being awarded joint physical care. She also argues the district court should not have ordered that the children attend school in their present school district and the district court should have provided for alternating holiday visitation. We find the district court considered the appropriate factors in making a physical care decision and defer to its credibility assessments. Further, we find that joint physical care is in the children's best interests. Additionally, the school district provision does not prevent Nancy from moving out of that school district and the parties are free to agree to any other school district. We affirm that provision. Finally, we modify the decree to provide for the specified holiday visitation. Therefore, we affirm as modified.

I. Background Facts and Proceedings.

Nancy and Ryan were married in February 1988. They have three daughters, born in 1999, 2000, and 2003. Nancy filed a petition for dissolution of marriage in April 2010. During the pending litigation, the parties continued to reside in the family home. Ryan moved to the basement and they somewhat alternated leaving the home on weekends.

At the time of trial in March 2011, the parties had lived in Madrid for ten years. Nancy had operated a daycare out of the family home from September 2001 until August 2010, when she began working at a day care facility in Story

City. She worked from 8:00 a.m. to 4:00 p.m., but commuted forty minutes to and from work. Ryan worked as a computer programmer for Wells Fargo in Des Moines. He generally worked from 6:45 a.m. to 3:30 p.m., but commuted forty-five minutes to and from work.

Ryan requested the parties be awarded joint physical care of the children and Nancy requested she be awarded physical care. Ryan also agreed to keep the family home if the parties were awarded joint physical care of the children.

On March 29, 2011, the district court entered its decree of dissolution of marriage. The district court awarded the parties joint legal custody and joint physical care of the children, with the parties alternating weeks with the children. Additionally, the court ordered the “holidays and special days that occur throughout the year shall belong to the parent as they fall within their parenting time.” Finally, the court ordered that the “children shall remain in the Madrid School District unless a change in school districts is agreed to between the parties.” Nancy appeals and challenges the physical care provisions of the decree, including the award of joint physical care, the school district provision, and the holiday visitation schedule. She also requests appellate attorney fees.

II. Standard of Review.

We review dissolution actions de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007).

However, we recognize that the district court was able to listen to and observe the parties and witnesses. Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them.

In re Marriage of Gensley, 777 N.W.2d 705, 713 (Iowa Ct. App. 2009) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984)).

III. Physical Care.

In determining whether to award joint physical care or physical care with one parent, the best interests of the child remains the principal consideration. Iowa R. App. P. 6.904(3)(o); *Hansen*, 733 N.W.2d at 695. The district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2009), as well as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). See *Hansen*, 733 N.W.2d at 698 (holding that although Iowa Code section 598.41(3) does not directly apply to physical care decisions, “the factors listed [in this code section] as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child”). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

In making its physical care decision, the district court considered the appropriate factors. It found that this was a close case and both Nancy and Ryan would be suitable custodians for the children. Further, the court found that the “approximation factor” weighed in favor of Nancy, but that Ryan had been “involved in [the children’s] lives.” The court acknowledged the parties did not

have the best communication, but found that the parties could develop the ability to communicate with respect to the children's needs. Further, the court found that "[b]oth Nancy and Ryan are good people" and "will support the other parent's relationship with the children." Ultimately, the court found it was in the children's best interests that the parties be awarded joint physical care.

Nancy asserts the district court should have awarded her physical care of the children. She argues that because she has been the children's primary caregiver and the parties' communication is poor, joint physical care is not in the children's best interests. The testimony demonstrated that Nancy was the primary caregiver, but both parents were actively involved with the children. Nancy made the doctor's appointments and did a lot of the driving. Both parties attended the children's school functions and sporting events, and did household chores. Nancy coached the girls' sporting teams, while Ryan practiced pitching with them. Nancy had worked in the family home until 2010, although she now worked outside of the home. Ryan testified that he worked the hours he did so that he would have more time to spend with the girls in the late afternoon and early evening.

In making its decision, the district court carefully considered both parties' testimony and made credibility assessments. Nancy testified that she provided nearly all the care for the children and did all the housework. She testified that she provided ninety-five percent and Ryan provided five percent of the children's care. Contrary to this, Ryan testified that prior to the filing of the dissolution petition, he did the majority of the cooking and the laundry for the family. After

the petition was filed, Nancy started cooking for the children and prevented him from doing the laundry by locking it in her bedroom. It appears that Nancy's testimony focused on the events following the filing of the dissolution petition, when she may have attempted to exclude Ryan from the parenting activities. Nancy's testimony attempted to overinflate her role, and at times was not convincing regarding Ryan's parenting abilities. Ryan testified that after the dissolution petition was filed, he "kind of relented for harmony sake in the house" in order to not have conflict in the family home. Although the district court found that Nancy was the primary caregiver, it did not agree with Nancy's characterization of the division of parenting duties. Rather, the court found "Ryan did cook, did laundry, and did go to parent-teacher conferences and other events, including athletics and church related activities. Ryan also helped with homework, disciplined the girls and tucked them in at night." The court further found that Ryan was a good parent.

Both parents were involved with the children and Ryan demonstrated more stability. He had a long-term job and agreed to remain in the family home, which permitted the children to remain in the same school district. Whereas Nancy's plans were not entirely clear. Her testimony indicated she may want to move near her new employment in Story City or back to her hometown of Odebolt. There was also a possibility she would return to school, which may or may not necessitate a move. The district court recognized the parties had some communication problems, but found they had the ability to communicate regarding the children. Throughout the dissolution proceedings, the parties

managed to live in the same home and make arrangements for the children. Some of the communication difficulties were that of the normal animosity surrounding dissolution proceedings.

After considering all the evidence, we agree with the district court that both Nancy and Ryan are good parents and will support the other parent's relationship with the children. The district court carefully considered the appropriate factors in making its physical care determination. We defer to the credibility assessments of the district court and find its fact findings were fully supported by the record. We find that joint physical care is in the children's best interests.

IV. School District.

Nancy next asserts the district court should not have dictated the children's school district and states a "court cannot foreclose in advance the right of a custodial parent to move elsewhere." The district court ordered that the children shall continue to attend school in the Madrid school district unless a change is agreed to by the parties. See Iowa Code § 598.41(5)(b) (providing that parents with joint legal custody shall have "equal participation in decisions affecting the child[ren]'s . . . education"). The children attended school in the Madrid school district and at the time of trial, both parties were living in Madrid. Ryan planned on remaining in the family home, whereas Nancy indicated that she may move. The decree does not prohibit Nancy from moving and even acknowledges that she may move to nearby communities for her employment. Under the decree, the parties are free to agree to another school district. Finally,

Nancy may move anywhere, although a distant move may require a change in physical care given the parties have joint physical care. We affirm this provision.

V. Holiday Visitation.

Nancy's next issue relates to holiday visitation. At trial, Nancy proposed a visitation schedule of alternating holidays, with Ryan having the children on Father's Day and Christmas Eve and Nancy having the children on Mother's Day and Christmas day every year. Ryan proposed that each party have the children during the holidays that fall within the party's alternating week. The district court's decree stated, "The holidays and special days that occur throughout the year shall belong to the parent as they fall within their parenting time." Nancy argues that the same parent will have the children on the same holidays every year and requests we provide for alternating holiday visitation for Easter, Memorial Day, Independence Day, Labor Day, Thanksgiving, and Christmas. Ryan argues that if the holidays are alternated, the children will have to be shuffled around more than necessary.

We modify the visitation schedule so that the parties shall alternate Easter, Memorial Day, Independence Day, and Labor Day. Further, the parent with physical care during Thanksgiving week shall have the children on Thursday and Friday and the other parent shall have the children on Saturday and Sunday. The parent having physical care during the week of Christmas shall have the children on Christmas Eve and the other parent shall have Christmas Day. Additionally, Nancy shall have the children on Mother's Day and Ryan shall have the children on Father's Day. As most of the holidays (Easter, Memorial Day,

Labor Day, Mother's Day, Father's Day, Thanksgiving Saturday and Sunday) fall at the beginning or end of a week, if the parent who has physical care that week does not have holiday visitation, their week will simply be shortened and the children will not have to be "shuffled around" more than usual. Thus, we modify the decree to provide for the above specified holiday visitation, with the parties free to agree otherwise.

VI. Appellate Attorney Fees.

Nancy requests an award of appellate attorney fees in the amount of \$10,000. An award of appellate attorney fees is not a matter of right, but rests within the 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. *Id.* We award Nancy \$1000 in appellate attorney fees. Costs on appeal are assessed to Ryan.

AFFIRMED AS MODIFIED.