

IN THE COURT OF APPEALS OF IOWA

No. 2-069 / 11-1355
Filed February 29, 2012

**IN RE THE MARRIAGE OF ARON MARIE HAKE
AND RODNEY GALE HAKE**

**Upon the Petition of
ARON MARIE HAKE,**
Petitioner-Appellee,

**And Concerning
RODNEY GALE HAKE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Des Moines County, John M. Wright, Judge.

Rodney Hake appeals the physical care provisions in the decree dissolving his marriage to Aron Hake. **AFFIRMED.**

Robert J. Engler of Swanson, Engler, Gordon, Benne & Clark, L.L.L.P., Burlington, for appellant.

Marlis J. Robberts of Robberts & Kirkman, L.L.L.P., Burlington, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

The July 2011 dissolution decree entered for Aron and Rodney Hake provided they would have joint legal custody of their children, ages eight and six, and Aron would provide physical care. Rodney appeals seeking joint physical care. We affirm.

I. Background Facts and Proceedings.

Aron and Rodney were married in October 1997. After their first child was born, they agreed Aron would work part-time as a dental hygienist. Rodney is a CAD coordinator for Brockway Mechanical and, depending on the firm's construction projects, worked long hours to provide for the family.

In March 2006, Rodney moved out while Aron remained in the family home with the children. By summer, Rodney had moved back home. In July 2006, Aron and the children moved in with Aron's parents. Aron filed her first petition for dissolution of marriage. Eventually, the parties reconciled and the dissolution petition was dismissed.

While the dissolution was pending, in August 2006, Aron left her sleeping four-year old in a locked car with the windows rolled up while she took her younger child into a Wal-Mart store. When Aron returned to the car twenty minutes later, she found police had removed her crying and perspiring child from the vehicle.

Based at least partially on this incident, in September 2006, Rodney was awarded temporary physical care of the minor children with Aron having care on Wednesday and Thursday, her non-working days, from 7:00 a.m. to 7:00 p.m. and on alternating weekends. The parties dispute the amount of care actually

provided by each of them during 2006's family upheaval. The district court found: "The evidence provided to this Court indicates Aron has been the primary physical caretaker since the birth of the children. Even during the dissolution of marriage proceedings in 2006, Aron provided the care a majority of the time."

The Iowa Department of Human Services investigated the 2006 Wal-Mart incident, and social worker Brenda Almack met with Aron weekly for three months. The DHS notes show, and Aron admits, on a few occasions she also had left the children home alone in the early morning hours while she went jogging. Almack's discharge report shows Aron diligently cooperated with DHS services and the case was successfully resolved. At the 2011 dissolution trial, Almack testified she worked with Aron on parenting and supervision skills and was supportive of the DHS report being changed from founded to confirmed.

In August 2010, Aron again filed to dissolve the marriage. Aron requested joint physical care and, alternatively, physical care. Rodney answered and requested joint physical care and, alternatively, physical care. In November 2010, the parties stipulated to temporary joint physical care of the children. However, Rodney's work schedule required him to remain at a northwest Iowa construction site during the work week, and the parties did not share equally in physical care until January 2011. From January to May 2011, Rodney and the children spent Tuesday evenings at his parents' home before Rodney left for northwest Iowa early Wednesday morning. Rodney believes he is unlikely to be required to work at a distant jobsite in the future.

At the June 2011 trial, Aron testified the attempt at joint physical care was not successful, and she sought physical care. Aron explained:

Q. How much difficulty did the children have getting used to the joint physical care schedule when Rodney started exercising that in January of [2011]? A. It was quite an adjustment. It was very emotional.

Q. Were there any issues that arose with school? A. [Our son's] teacher had noted in February that he seemed more disrespectful.

Q. What do you believe will happen with Rodney's work schedule in the future? A. I believe that it will do as it has always done since we've been married, and that is fluctuate with whatever job is currently going on.

. . . .
Q. If joint physical care is awarded, do you believe the two of you will be to communicate effectively? A. I think it will be strained, as it is now.

. . . .
A. . . . [Communication] is very strained, and it's very difficult. It's never just a conversation. It's always—it's just a struggle

And it just doesn't flow, and it's not respectful at all. The attitudes that are there, whether it's body language or verbal over the phone, the heavy sighs and the tones are not thoughtful and not considerate and not respectful.

Aron testified her part-time schedule "allows me to be more available to them. It keeps them on a schedule they are used to." Further:

A. I am asking for [physical care] because . . . that is the way it has been. I have been the one that has been hands on. Rodney has willingly let me do that even when he was away in South Dakota and the temporary order was instilled. I was still the one that they were with. I'm not asking for anything more than what I've been doing.

The parties communicate by text and e-mail. When Rodney arrives at Aron's home to pick up the children, he texts: "I'm here." Rodney acknowledges the vast majority of the parties' communication is electronic and admits they can go back and forth quite a few times before resolving issues. Aron testified:

Q. How often do you go to Rodney's house to pick up the kids? A. I have not been there.

Q. Why is that? A. It doesn't seem to work out that I could be the one to take the kids to him.

Q. And how did you find out Rodney's address? A. I asked him verbally, and he never got back to me. And then I e-mailed to him, and I eventually heard back from him.

.....
Q. When the two of you talk in person, do both of you keep your tempers in check? A. I think we try. And I think we feed off of each other's mannerisms and body language and tone, and we react.

.....
Q. Have there ever been threats that have been thrown out?
A. [The children] have witnessed very volatile verbal attacks between Rodney and [me]. They have seen him physically push me Most of the time it was a lot of yelling is what they witnessed, a lot of very volatile yelling.

Anna Hastings, a former neighbor with children the same ages as the Hake children, testified Aron always had activities for the children at home and childhood friends visited frequently. Hastings stated Rodney was not as involved with the children as Aron.

Shawn Perkins, preschool and daycare director, testified both children are bright and well-behaved. Perkins saw Aron weekly and did not see Rodney as frequently until recently. Rodney agreed that up until the past year, Aron was at the school more than he was. Perkins had no concerns about the parenting Aron provides her children.

Up to trial, Aron sought to keep the children in the district where they had recently completed second grade and kindergarten, and Rodney sought to change schools to a district nearer his new home. During trial, Rodney agreed the children could remain in their current district.

In July 2011, the district court awarded physical care to Aron, ruling:

Each parent would be a suitable caretaker for the children since each has shown in the past the love and nurturing these children need. A communication problem exists between the parents, however. The emails and text messages admitted at trial

indicate little face to face discussion takes place. Aron and Rodney seem to prefer to avoid confrontation, but by doing so they give up the opportunity to fully discuss the facts of any given situation.

By way of example of the effect of poor communication the Court notes that Rodney objects to the number of extracurricular activities in which the children are involved. Aron denies the number of sports and other activities has increased. It is the same level of involvement as when the family lived together. There has been no indication the children suffer from the amount of activity in which they participate. Aron and Rodney must do better at discussing the children's well being in regard to these activities.

Greater primary care experience is one of many factors the Court considers in the award of physical care. (Citations omitted). The facts of this case clearly indicate Aron has more experience in caring for the children on a daily basis

The court awarded Rodney visitation on alternating weekends, Friday at 5:30 p.m. until Monday at 7:30 a.m., and Tuesday nights from 5:00 to 7:30 p.m.

Rodney filed an Iowa Rule of Civil Procedure 1.904 motion arguing the court should reevaluate the credibility of the testimony of the parties supporting its finding "Aron has been the primary caretaker of the children since birth, even during the time Rodney was awarded primary care." In denying this request, the court stated: "The Court has weighed the credibility of the parties regarding the issue of physical care for the children and has concluded as stated in the final Decree. Further clarification or modification will not be made."

Rodney appeals the court's physical care decision arguing the court should have awarded joint physical care.

II. Standard of Review.

Our review is de novo. *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). "We give weight to the findings of

the district court, especially to the extent credibility determinations are involved.”
Hansen, 733 N.W.2d at 690.

III. Merits.

Physical care is the sole issue before us. “Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*.” *Id.* at 695. In determining physical care, our overriding consideration is the children’s best interests. *Id.* at 696. In assessing which physical care arrangement is in the children’s best interests, we utilize the factors in Iowa Code section 598.41(3) (2009), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate goal is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

“In considering whether to award joint physical care where there are two suitable parents, stability and continuity of caregiving have traditionally been primary factors.” *Hansen*, 733 N.W.2d at 696. Specifically,

All other things being equal, however, we believe that joint physical care is most likely to be in the best interest of the child where both parents have historically contributed to physical care in roughly the same proportion. Conversely, where one spouse has been the primary caregiver, the likelihood that joint physical care may be disruptive on the emotional development of the children increases.

Id. at 697-98.

We also consider the ability of the spouses to communicate and show mutual respect as well as the degree of conflict between the parents. *Id.* at 698. “Joint physical care requires substantial and regular interaction between divorced

parents on a myriad of issues. Where the parties' marriage is stormy . . . the likelihood that joint physical care will provide a workable arrangement diminishes." *Id.* Additionally, we consider "the degree to which the parents are in general agreement about their approach to daily matters." *Id.* at 699. For joint physical care to work, "the parents must generally be operating from the same page on a wide variety of routine matters." *Id.*

As the district court recognized, Aron and Rodney are both competent and loving parents who are sincere in their desire to care for their children. Thus the choice of physical care necessarily turns on narrow and limited grounds. In such cases "stability and continuity of caregiving are important factors" and "preservation of the greatest amount of stability possible is a desirable goal." *Id.* at 696-97. These factors favor a parent who was primarily responsible for the physical care of the minor child. *Id.* For all but the six months preceding trial, Aron has been the primary caregiver for the children. Although Rodney disputes this finding on credibility grounds, we defer to district court after its opportunity to observe the parties' demeanor. The concepts of continuity, stability, and approximation thus do not support "joint physical care as a quality alternative least disruptive to the children." *Id.* at 700.

Rodney and Aron's significant communication difficulties and unwillingness to verbally communicate also makes successful joint physical care unlikely. Further, longstanding conflicts between the parties, since at least 2006, exist. Rodney testified: "I punched a hole in a door. She punched a hole in the door. We both have done it." After the most recent separation the parties could not agree on a school district or on the children's activities.

Based on our de novo review of the record, we find many factors weigh against shared physical care and in favor of awarding Aron physical care of the children. See *Hansen*, 733 N.W.2d at 697-99. The district court's findings concerning Aron being the primary caregiver and the parties' inability to communicate are amply supported by the evidence. Under the circumstances of this case, it is impossible to find the level of communication or mutual respect necessary to warrant joint physical care. We also defer to the district court's impressions of the parties gleaned from observing their testimony at trial. Accordingly, we deny Rodney's request for joint physical care and affirm the district court's award of physical care to Aron.

IV. Attorney Fees.

Noting she was obligated to defend the district court decision on appeal, Aron seeks an award of appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). We conclude equity requires Rodney to pay \$2000 of Aron's appellate attorney fees. Costs are taxed to Rodney.

AFFIRMED.

Bower, J., concurs; Danilson, J., concurs specially.

DANILSON, J. (concurring specially)

I concur with the award of physical care to Aron as she has been the primary caretaker of the children throughout most of the parties' marriage. I disagree, however, that a communication problem exists between the parties due to the fact that they primarily communicate by email or text messages. Perhaps this manner of communication is not ideal, but the record evidence reflects that such communication was respectful and served to resolve many issues. In this regard, as long as the parties are effectively communicating in some manner to resolve the day-to-day issues concerning the best interests of their child or children without court intervention, a high degree of conflict, or physical confrontations, I would not put too much stock in the parties' method of communication.