IN THE COURT OF APPEALS OF IOWA

No. 2-210 / 11-1905
Filed June 13, 2012

**IN RE THE MARRIAGE OF STEVE T. SCURR
AND JENNIFER R. DRISCOLL**

**Upon the Petition of
STEVE T. SCURR,**
Petitioner-Appellant,

**And Concerning
JENNIFER R. DRISCOLL,**
Respondent-Appellee.

Appeal from the Iowa District Court for Grundy County, David F. Staudt, Judge.

A father appeals the physical care provision of a dissolution decree. **AFFIRMED.**

Barry S. Kaplan of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Kevin D. Engels of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Steve Scurr appeals the physical care provision of a dissolution decree, which denied his requests for joint physical care or physical care of his child.

I. Background Facts and Proceedings

Steve Scurr and Jennifer Driscoll married in 2007 and had one child together in 2009. After marrying, Jennifer moved from Cedar Falls to Steve's home near Beaman, about forty-five minutes away. She commuted to Cedar Falls for work.

Steve sought a divorce in 2010. The parents continued to live under the same roof after the filing. A month before trial, Jennifer moved back to Cedar Falls with the child, and the parents agreed to share his physical care until the trial.

Following trial, the district court denied Steve's request for joint physical care and granted Jennifer physical care of the child. On appeal, Steve seeks a modification of the court's decree to provide for a joint physical care arrangement. In the alternative, he requests physical care of the child. We elect to bypass error preservation concerns raised by Jennifer and proceed to the merits, reviewing the record de novo. *See* Iowa R. App. P. 6.907; *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

II. Analysis

In denying Steve's request for joint physical care and awarding Jennifer physical care, the district court reasoned as follows:

> The major obstacle to a resolution of the parties' disagreement as to physical care of [the child] exists because the parties have elected to live 45 minutes apart from one another. . . . [T]he court

> does not believe it is in the best interests of the child to be facing approximately an hour and a half to an hour and forty-five minutes of travel time each day. [Steve's] solution to the initial three years prior to full-time school for the young man would be to have two daycares, one in Beaman and one in Cedar Falls. If the parties had agreed and would be mutually supportive of this type of arrangement, it's possible that it might work. Here, [Jennifer] is adamant against the two daycares as she believes that it would be disruptive to the child's schedule and well-being.
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> The greater problem, as the court sees it, looms in the future if the parties were to be granted joint physical custody. It seems impractical to even attempt to create a workable solution for the raising of a child 45 minutes away from his school district every other week. . . .
>
> The court finds that in not residing in the same school district and residing approximately 45 minutes travel time apart ultimately creates problems in joint parenting that cannot be overcome. . . . [T]he court believes that the young child should be placed . . . under the physical care of his mother, Jennifer. As earlier stated, each party is an excellent parent but given the distance and travel time, it would be inappropriate to order joint physical custody on a permanent basis.

On our de novo review, we concur in this reasoning. But for the distance between the parents' homes, this would have been a paradigmatic case for joint physical care. *See In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007) (setting forth factors for consideration, including (1) stability and continuity, (2) the degree of communication and mutual respect between the parties, (3) the degree of discord and conflict prior to dissolution, and (4) the extent to which the parties agree on matters involving routine care); *see also* Iowa Code § 598.41(3) (2009).

Both Steve and Jennifer actively participated in the child's daily care. *See Hansen*, 733 N.W.2d at 697–98 ("[J]oint 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."). Both communicated well with

one another, even in the midst of their divorce. *See id.* at 698 (emphasizing importance of good communication and low level of conflict between joint physical caregivers). For example, several months before trial, Jennifer decided to transfer the child to a daycare center in Cedar Falls but she told Steve before doing so, and Steve did not question her ability to find the child a good daycare provider. Jennifer and Steve also discussed her impending move to Cedar Falls and, following the move, implemented a complicated temporary joint parenting schedule. Finally, Jennifer and Steve generally agreed on child-rearing issues. *Id.* at 699 ("[I]n order for joint physical care to work, the parents must generally be operating from the same page on a wide variety of routine matters."). Steve testified, and Jennifer did not disagree, that their "value systems are very similar in terms of what we hope for [the child] and what we think is important . . . in his upbringing, values that are inherent to both of us."

As the district court found, the "major obstacle" to joint physical care was the geographic distance between the parties. *See* Iowa Code § 598.41(3)(h) (stating the court must consider the geographic proximity of the parties in making a physical care determination); *accord Hansen*, 733 N.W.2d at 696. Jennifer asserted that all the joint physical care proposals advanced by Steve would deprive the child of needed stability. Her assertion finds support in the record. Jennifer testified that "bouncing [the child] back and forth" was "not good," given his difficulty warming up to people and problems calming him down following transitions to her home. Steve acknowledged these difficulties. While he believed they were outweighed by the benefits of equal time with both parents, our court has stated that equal time must sometimes give way to stability. *See In*

re Marriage of Muell, 408 N.W.2d 774, 776 (Iowa Ct. App. 1987) ("[W]hile in most cases a child's best interests will be served by associating with both parents, an attempt to provide equal physical care may be harmfully disruptive in depriving the child of a necessary sense of stability"); *see also In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998) (finding the "constant relocating" required by the court's joint physical care arrangement "would deprive the children of needed stability" and "would be destructive to the lives of the children"). In light of the acknowledged disruptions to the toddler's life resulting from travel between the parents' homes, we conclude the district court appropriately reached a decision that minimized those disruptions.

We turn to Steve's request for physical care of the child. His request is premised on Jennifer's decision to move and his belief that the decision reflected an unwillingness to support his relationship with the child. The record is clear, though, that Jennifer did not move out of spite. Her decision flowed from the fact that her job was in Cedar Falls, and she had family ties in Cedar Falls. *See In re Marriage of Thielges*, 623 N.W.2d 232, 238 (Iowa Ct. App. 2000) (recognizing several legitimate reasons a parent may move, including relocating for a job or to an area where the parent's relatives reside).

In the end, we believe the district court, with its unique ability to assess witness demeanor, was in the best position to determine which of these two good parents should serve as physical caretaker. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996) ("[I]n the end we determine this to be a close case, for both parents love their children very much and each is capable of providing for their long-range best interests. In situations such as this, we note

the district court had the parties before it and was able to observe and evaluate the parties as custodians.”). We affirm the court’s physical care determination.

III. Appellate Attorney Fees

Jennifer asks that we order Steve to pay $2500 toward her appellate attorney fees. An award rests within this court’s discretion. *See Sullins*, 715 N.W.2d at 255. Because Steve earns significantly more than Jennifer, and was unsuccessful in his appeal, we grant Jennifer’s request and order him to pay her $2500.

AFFIRMED.