IN THE COURT OF APPEALS OF IOWA

No. 2-278 / 11-1690
Filed April 25, 2012

RYAN MARK GUDENKAUF,
Petitioner-Appellant,

vs.

JENNIFER GEE,
Respondent-Appellee.

Appeal from the Iowa District Court for Buchanan County, Todd A. Geer, Judge.

A father appeals the provision in a paternity decree placing the parties' child in the physical care of the mother. **AFFIRMED.**

Kami L. Holmes of Swisher & Cohrt, P.L.C., Waterloo, for appellant.

John J. Wood and Kate B. Mitchell of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellee.

Considered by Vogel, P.J., Doyle, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

ZIMMER, S.J.

A father appeals the district court decision granting the mother physical care of the parties' child in this paternity action. He claims the district court should have granted him physical care of the child. In the alternative, he claims the court should have granted the parties joint physical care of the child. He also asserts the court should have granted him greater visitation time. The mother requests attorney fees for this appeal. We affirm the decision of the district court.

I. Background Facts & Proceedings.

Ryan Gudenkauf and Jennifer Gee are the parents of a daughter, born in April 2009. The parties were fairly young at the time of the child's birth; Ryan was nineteen and Jennifer was eighteen years old. The parties are not married, but lived together from January 2009 until August 2010. After the parties separated, the child remained in the care of Jennifer.

On October 21, 2010, Ryan filed an application for custody, visitation, and support. An order on temporary matters was entered on February 1, 2011, giving the parties shared physical care of the child, with Ryan having the child three days per week,[1] and Jennifer having the child the remainder of the time.

A hearing on Ryan's application was held on May 4, 2011. At the time of the hearing Ryan was twenty-one years old. He was living in Independence, Iowa, with his parents. He was working part-time at a Fareway grocery store. Ryan was also attending Upper Iowa University, majoring in criminology, and expected to graduate in December 2011. He had applied for jobs as a deputy

[1] Ryan had the child in his care from 8:00 a.m. Wednesday until 8:00 a.m. Friday, and then from 8:00 a.m. Sunday until 8:00 a.m. Monday.

sheriff in Johnson County and Linn County, as well as some other jobs in the field of law enforcement. Ryan testified he intended to remain close to the Independence area when he got a full-time job after he graduated from college. He has extended family members who live in the Independence area.

Jennifer was twenty years old at the time of the hearing. She was living in Independence in an apartment. Jennifer expected to graduate from Hawkeye Community College as a registered nurse later in May 2011. She testified she had a four-week internship in Independence, then planned to move to the Des Moines area and get a job as a pediatric nurse. Jennifer's father and step-mother lived in Adel, and she planned to live with them until she could purchase her own home.

The district court issued a decree granting the parties joint legal custody, with Jennifer having physical care of the child. The court noted Jennifer had established herself as the child's primary caretaker and she had shown she was capable of meeting all of the child's needs. The court found, "Ryan has not yet demonstrated that he is capable of meeting all of those needs without assistance from Jennifer or from his family." Ryan was granted visitation on alternating weekends, alternating holidays, and six weeks in the summer. Ryan was ordered to pay child support of $120 per month and $11 per month cash medical support.

Ryan filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), asking that the parties be granted joint physical care of the child, or in the alternative that he be given physical care of the child. The district court denied the motion, finding a joint physical care arrangement would not be practicable

because Jennifer planned to live in Des Moines, while Ryan would be living either in Independence or the Cedar Rapids/Iowa City area. Ryan appeals the decision of the district court.

II. Standard of Review.

Issues ancillary to a determination of paternity are tried in equity. Iowa Code § 600B.40 (2009); *Markey v. Carney*, 705 N.W.2d 13, 20 (Iowa 2005). We review equitable actions de novo. Iowa R. App. P. 6.907. When we consider the credibility of witnesses in equitable actions, we give weight to the findings of the district court, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Physical Care.

A. Ryan contends the district court did not adequately consider his request to have the child placed in his physical care. He believes the court ignored his request to have the child placed in his care and stated only that he was proposing a joint physical care arrangement.

We first note that Ryan's testimony is somewhat ambiguous as to whether he was seeking physical care of the child, or a joint physical care arrangement. At the hearing he answered affirmatively when asked, "Do you feel it's in your daughter's best interests that you be awarded custodial care?" and "do you feel that it's in the best interests of [the child] that you be awarded physical placement?" He also stated, however, that if he was awarded physical care of the child, he would permit Jennifer to have the child half of the time. Additionally, in his answers to interrogatories, Ryan stated he believed it would be best for the child if she was with each parent fifty percent of the time.

In any event, we determine the district court, after first finding a joint physical care arrangement was not practicable under the facts of the case, considered both Ryan and Jennifer as possible physical caretakers for the child. The court found:

> Jennifer has established herself as [the child's] primary caretaker, and the court has no doubt that Jennifer is very well able to meet all of [the child's] needs. Ryan has not yet demonstrated that he is capable of meeting all of those needs without assistance from Jennifer or from his family. While the court does not question Ryan's sincerity and love of his daughter, he simply has not demonstrated inability to provide for [the child's] care on his own.

Furthermore, in our de novo review,[2] we consider Ryan's request to have the child placed in his physical care. In determining physical care for a child, our first and governing consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(*o*). Our analysis is the same whether the parents have been married, or remain unwed. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1998); *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994). Our objective is to place the child in an environment likely to promote a healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

A court may grant the parents joint physical care, or choose one parent to be the caretaker of a child. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). When physical care is an issue in a paternity action, we apply the criteria found in Iowa Code section 598.41. Iowa Code § 600B.40. We also apply the

[2] Ryan has also raised a claim that the district court improperly assumed facts not in the record. Jennifer vigorously disputes this contention. We find it unnecessary to address this issue. We simply note that in considering the issues presented, we have confined our consideration to the appellate record.

factors found in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). *Lambert*, 418 N.W.2d at 42.

The district court described Ryan and Jennifer as "healthy, bright and hardworking." We agree. To their credit, the parties are able to communicate effectively with each other, and they are supportive of each other's relationship with the child. The record is replete with evidence that both parties are devoted to their daughter. Both Ryan and Jennifer have many fine qualities. Nevertheless, after carefully reviewing the evidence, we agree with the district court's ultimate resolution of this case.

The district court had the opportunity to observe the witnesses firsthand. Faced with a difficult decision, the court concluded the child should be placed in the physical care of Jennifer. Jennifer has been the child's primary caretaker since birth. Also, Jennifer's actions have shown that the child is her primary concern. After the child's birth, Jennifer devoted herself to caring for the child. Jennifer furthered her education so she would be able to support the child in the future. Ryan agreed that Jennifer had very few social activities. On the other hand, although Ryan was juggling work and school, he also continued with his social activities, including weightlifting, hunting, and partying, after the child was born, leaving the bulk of the child care to Jennifer.

The district court also found, "Jennifer has demonstrated a strong ability to parent and care for [the child] while living on her own." After Ryan moved out of the parties' apartment, Jennifer and the child remained living there. Jennifer has shown she has the ability to meet all of the child's needs. On the other hand, the district court found Ryan had always had the assistance of either Jennifer or his

family when he was caring for the child. We agree with the court's conclusion that Ryan "simply has not demonstrated an ability to provide for [the child's] care on his own."

We conclude it is in the child's best interest to be placed in the physical care of Jennifer.

B. In the alternative, Ryan asks that the child be placed in the parties' joint physical care. He notes the district court found:

> A shared placement arrangement would be strongly considered by the court if the parties were to live in the same general vicinity. However, they will be residing more than two hours apart if Ryan resides in Cedar Rapids, and more than that if he continues to reside with his parents in Independence.

Additionally, in ruling on the rule 1.904(2) motion, the court stated, "a shared placement arrangement is not practicable, in part, because the court was aware that the parties would soon be residing a significant distance apart from each other." Ryan notes that at the time of the hearing both of the parties were living in Independence. He contends that a shared physical care arrangement would have been feasible.

Joint physical care is a viable option when it is in the child's best interests. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The court considers the following factors in determining whether to grant joint physical care: (1) the historical care giving arrangement for the child 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 degree to which the parents are in general agreement about their approach to parenting. *Hansen*, 733

N.W.2d at 697-99; *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

In considering whether to grant joint physical care, one of the factors the court should consider is "[t]he geographic proximity of the parents." Iowa Code § 598.41(3)(h). Jennifer testified she planned to move to the Des Moines area after she finished an internship during the summer of 2011. She stated she had researched hospitals in Iowa and the Des Moines area gave her a greater opportunity to work as a pediatric nurse, which was her goal. Jennifer also testified she believed she could earn between $45,000-$60,000 per year working as a registered nurse in Des Moines. Ryan testified he had applied for jobs as a deputy sheriff in Linn County and Johnson County, to begin after he graduated from college in December 2011. He also testified, however, that he had no intention of moving to Cedar Rapids. He stated he wanted to remain in the Independence area, where he had family.

Even if Ryan remained in Independence, Jennifer credibly testified that she would be moving to the Des Moines area by the end of the summer of 2011. The district court properly took this testimony into consideration when determining whether to grant the parties joint physical care. We agree with the district court's conclusion that based on the parties' testimony at the hearing a joint physical care arrangement was not practicable. We affirm the court's decision denying Ryan's request for joint physical care.

IV. Visitation.

Ryan asserts the district court should have granted him greater visitation with the child. He points out that Jennifer testified that before the child started

going to school she would agree to visitation of three-day alternating weekends, shared holidays, plus one or two weeks each month during the summer. Ryan contends the district court should have permitted him this much visitation in the schedule set forth in the paternity decree.

A review of the visitation schedule shows the parties were granted alternating holidays. Also, Ryan has visitation in three two-week increments over the summer. In these two matters, he has as much visitation as Jennifer suggested. As to the issue of three-day weekends, the visitation schedule provides:

> In addition, Ryan shall have such other and further visitation as the parties may mutually agree. The court anticipates that between now and the time [the child] begins school, Jennifer will be accepting of Ryan's reasonable requests for visitation in addition to the schedule outlined above, including, for example, reasonable requests for extended weekends, extended holidays, etc., and also grant Ryan's reasonable requests for time with [the child] when he may be in the Des Moines, Iowa, area.

In this respect, the court left it to the parties to reasonably agree to extended weekends.

We affirm the visitation schedule as set out in the paternity decree. At the time of the hearing, neither party knew what their future work schedules would be like. Rather than specifically ordering alternating three-day weekends, the court left it to the parties to reasonably and amicably address the issue of additional visitation based upon their future circumstances. Jennifer's testimony indicates she will be accepting of Ryan's requests for extended visitation so long as they are practicable.

V. Attorney Fees

Jennifer seeks attorney fees for this appeal. In paternity actions, section 600B.25 provides, "[t]he court may award the prevailing party the reasonable costs of suit, including but not limited to reasonable attorney fees." "An award of appellate attorney fees is within the discretion of the appellate court." *Markey*, 705 N.W.2d at 26. We award no appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Ryan.

AFFIRMED.