

IN THE COURT OF APPEALS OF IOWA

No. 6-1082 / 06-0867
Filed February 14, 2007

**IN RE THE MARRIAGE OF JEFFREY WILLIAM
HEINRICHS AND KARY JO HEINRICHS**

**Upon the Petition of
JEFFREY WILLIAM HEINRICHS,**
Petitioner-Appellee,

**And Concerning
KARY JO HEINRICHS,**
Respondent-Appellant.

Appeal from the Iowa District Court for Marshall County, Dale E. Ruigh,
Judge.

Kary J. Heinrichs appeals the dissolution decree awarding joint physical
care. **AFFIRMED.**

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

John J. Haney of Hinshaw, Danielson, Kloberdanz & Haney, P.C.,
Marshalltown, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

HUITINK, J.

Kary J. Heinrichs appeals from the trial court's decree awarding the parties joint physical care of their three children. We affirm.

I. Background Facts and Proceedings.

Kary and Jeffrey Heinrichs were married in 1992. They have three sons: ten-year-old William, eight-year-old Seth, and two-year-old Avery. Kary was forty-one years old and Jeffrey was forty years old at the time of the dissolution. Kary is employed full-time as the Lifeline coordinator at the Marshalltown Medical and Surgical Center. Jeffrey is employed full-time as the director of maintenance at a local nursing home.

On January 25, 2005, Jeffrey filed a petition requesting dissolution of the parties' marriage. At the time the petition was filed, Jeffrey and Kary agreed that Kary would have physical care of the children. In August 2005 Jeffrey filed an application for "Temporary Joint Physical Custody." Jeffrey claimed Kary continually made disparaging remarks to the children about him. He also claimed Kary interfered with his visitation rights by denying him telephone access to the children. On September 16, 2005, the trial court denied Jeffrey's request.

The court's ruling stated:

Since [Jeffrey] voluntarily permitted [Kary] to be the primary caretaker for the parties' three children for a period of 10 months and there are no dire consequences which suggest a different arrangement is necessary, the Court finds it imprudent to award joint physical care.

The court also noted allegations concerning Jeffrey's alcohol abuse, as well as the parties' continuing communication problems. Jeffrey was awarded additional visitation "so long as he is not consuming alcohol."

Prior to trial, Kary and Jeffrey agreed to a custody evaluation by Dr. Brian Steiner, a licensed psychologist. Dr. Steiner's report included the following summary and recommendations:

In view of the information contained within this letter and supported by the evaluation information, I recommend that, to the greatest extent possible, primary physical care of the three children be shared equally between Kary and Jeff. While there can be inherent difficulties built into such a custody arrangement, there does not appear to be evidence that those difficulties would be insurmountable in this situation. Furthermore, this arrangement appears to be highly desired by both Will and Seth, who spontaneously voiced a preference for this arrangement.

The trial court agreed with Dr. Steiner's recommendation, and the dissolution decree entered on March 28, 2006, provided that Jeffrey and Kary "shall share the joint custody and joint physical care" of their three children. Kary's motion to amend and enlarge, requesting midweek visitation while Jeffrey is caring for the children, was denied.

On appeal Kary raises the following issues:

- I. A joint physical care arrangement is improper in this case due to the inability of the parties to communicate in a civil and reasonable manner.
- II. It is in the children's best interests that Kary be awarded primary physical care subject to reasonable and liberal visitation to Jeffrey.
- III. In the event the reviewing court deems an award of joint physical care to be appropriate a half week rotating schedule is in the best interests of the children particularly given their young ages and bond with their mother.

II. Standard of Review.

Our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). We give weight to the fact

findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991). We based our decision primarily on the particular circumstances of the parties presented. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Merits.

Joint physical care is:

an award of physical care to both joint legal custodial parents [whereby] both parents have rights and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has rights superior to those of the other parent.

Iowa Code § 598.1(4) (2005). “If joint legal custody is awarded to both parents, the Court may award joint physical care to both joint custodial parents upon the request of either party.” Iowa Code § 598.41(5)(a). However, if the court denies the request for joint physical care, the court shall provide “specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.” *Id.*

“Although there is a multitude of case law stating joint physical care is strongly disfavored, the legislature recently proclaimed joint physical care a viable disposition of a custody dispute if in the best interests of the children.” *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Joint physical care is no longer disfavored. *In re Marriage of Ellis*, 705 N.W.2d 96, 101 (Iowa 2005). Joint physical care can work “if the parents of the children are able to cooperate and respect each other’s parenting and lifestyles” *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998). However, if the parents

are unable to work amicably towards their children's best interests, joint physical care cannot serve the children's best interests. *Id.* If the court determines joint physical care is not in the best interests of the child, the court must award one parent primary physical care.

Based on our de novo review of the record, we are unable to say an award of joint physical care is not in the children's best interests. Although Kary has greater primary care experience, there is no credible claim that Jeffrey is unable to provide for the children's primary care needs. Kary's claims concerning the parties' inability to communicate and Jeffrey's alcohol abuse are overstated, if not entirely belied by the record. Dr. Steiner's report notes that professional alcohol and substance abuse evaluations indicate Jeffrey does not have an alcohol or substance abuse problem. Dr. Steiner's report also states:

It was obvious during observation times spent with the family that there is a good deal of tension remaining between Kary and Jeff. When I met with each of them privately, both indicated an interest to avoid anger and conflict and to improve communications. In fact, Jeff indicated that he is more than willing to do whatever it takes to try to get along and reduce that tension, provided it does not mean limiting his contact with the children. Kary indicated that she would like to improve the communication and realizes that this is going to be an issue between them, but she remains quite hurt and angered by the entire situation, which makes it difficult for her to behave in a relaxed and open fashion in Jeff's presence. While it is certainly possible that some relief from this tension will occur naturally as the divorce proceedings are concluded and there is less reason for ongoing conflict and hostility, this is not necessarily inevitable. If these parents do find themselves in an ongoing tense situation when it comes to their communication, it would likely be beneficial for the two of them to have some post-marital family counseling to resolve those issues. This could be done on an individual basis or with the entire family together to discuss pertinent concerns.

While the parties' communication skills could use improvement, we do not find their past inability to communicate to be a significant impediment to joint physical care.

The record also contains other evidence weighing in favor of joint physical care; in particular we note the parties' residences are in the same community, their strong extended family relationships, and the parties' shared interest in the children's religious, educational, and social development. We accordingly affirm on this issue.

The trial court additionally denied Kary's request that the children spend Mondays and Tuesdays with her and Wednesdays and Thursdays with Jeffrey and alternate the Fridays through Sundays. The court concluded that this arrangement would be too disruptive to the children, especially during the school year. We agree and also affirm on this issue.

IV. Attorney Fees.

Jeffrey requests appellate attorney fees. 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. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). After considering these factors, we decline to award appellate attorney fees to Jeffrey. Costs are taxed equally to the parties.

AFFIRMED.