IN THE COURT OF APPEALS OF IOWA

No. 6-142 / 05-1601
Filed April 26, 2006

Upon the Petition of

ROBERT EVANS,
Petitioner-Appellant,

And Concerning

TOSHYA STANERSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson, Judge.

A father appeals a ruling placing physical care of his son with the child's mother. **AFFIRMED AS MODIFIED AND REMANDED.**

John C. Wagner of John C. Wagner Law Offices, P.C., Marengo, for appellant.

Victoria R. Siegel of Victoria R. Siegel Law Office, Ottumwa, for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

A father appeals a ruling placing physical care of his son with the child's mother. We modify the physical care portion of the decree.

I. Background Facts and Proceedings

Robert Evans and Toshya Stanerson are the unmarried parents of Leland, born in 2002. Both have a long history of substance abuse.

When Leland was almost two, Evans filed a petition to establish custody of the child. He sought joint physical care of Leland or, in the alternative, primary physical care with extensive visitation. At the time of his filing, the State had initiated a juvenile court to have Leland adjudicated a child in need of assistance. This action was based on Stanerson's use of methamphetamine and marijuana while Leland and two of her other children were in her care.

On Evans's application, the juvenile court granted the district court concurrent jurisdiction to proceed with his custody petition. Following trial, the district court assigned Stanerson physical caretaker of Leland.

Evans appealed. Our review is de novo. Iowa R. App. P. 6.4.

II. Joint Physical Care

The criteria governing physical care determinations are the same whether the parents are dissolving their marriage or have never been married to each other. *Jacobson v. Gradin*, 490 N.W.2d 79, 80 (Iowa Ct. App. 1992). The determinative factor is the child's best interests. *See In re Marriage of Ford,* 563 N.W.2d 629, 631 (Iowa 1997).

Preliminarily, Evans argues that the district court did not comply with Iowa Code section 598.41(5)(a) (2005), governing requests for joint physical care. The provision states:

> 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 parent. If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

We agree with Evans that the findings and conclusions required by this provision were not made. However, the record is adequate to permit de novo review of whether joint physical care was in Leland's best interests. *Cf. In re Marriage of Meier*, 267 N.W.2d 46, 47 (Iowa 1978) (concluding record inadequate to permit de novo review); *Lessenger v. Lessenger*, 258 Iowa 170, 175-76, 138 N.W.2d 58, 61 (1965) (noting record inadequate to permit de novo adjudication).

For several months prior to trial, the parties had worked out what essentially amounted to a joint physical care arrangement. Evans cared for Leland from Wednesday through Sunday of one week and on Wednesday and Thursday of the second week, with Stanerson caring for the child on the other days of the two-week period.

This arrangement was in the child's best interests. When Stanerson was asked how it was working, she responded "[o]kay for the most part." When she was asked if the court should tinker with the schedule, she answered "I would probably keep it the way it is except I'd try to get the nights changed." Although she later equivocated, she pointed to no serious problems with the arrangement. Notably, a service provider who evaluated both parties in connection with the

juvenile court proceedings testified the parties "were doing a good job of working things out between the two of them." In a report prepared several months before trial, she concurred with a relative's assessment that both parents were "very nurturing." She stated, "Leland feels comfortable with both parents and in both homes." A Department of Human Services employee similarly testified that Leland was "thriving" under the existing arrangement. In addition, the parties lived in the same school district, making joint physical care a viable option for the future.

Joint physical care was not only workable but was arguably necessary to safeguard Leland. As the district court noted, both parties had "a significant, long-term, and at times debilitating substance abuse history, [Stanerson], to a greater extent, than [Evans]." As a consequence, both parties were at risk of relapsing.

Evans admitted that he had not sought treatment for his drug use since the 1980s, despite the fact that a hair test revealed the presence of methamphetamine in his system as recently as June 2004. When a service provider asked him about his drug use, he told her he practiced responsible drug usage.

In contrast, Stanerson testified to extensive substance abuse treatment over the years, including participation in four inpatient programs. At trial, she stated she had been "clean" for over a year, but admitted to a history of relapses, including one just two weeks after leaving an inpatient program.

In light of the parties' lengthy substance abuse history and the significant risk of relapse, a support system was critical. *See In re Marriage of Barry*, 588

N.W.2d 711, 714 (Iowa Ct. App. 1998); *In re Marriage of Cupples*, 531 N.W.2d 656, 658 (Iowa Ct. App 1995). The families of both parties could and did furnish such support. Stanerson testified she shared a good relationship with her mother. Stanerson's mother seconded this opinion, noting she had frequent contact with her daughter. She agreed with counsel's assertion that, for several months prior to trial, she and her daughter maintained "a pretty decent relationship [with Evans] in exchanging Leland and working together."

Similarly, Evans shared a close relationship with his family. His mother and father lived a mile away from him and assisted Evans with day care and transportation of Leland to and from Stanerson's apartment. Evans's mother testified that Leland seemed to be "very secure" with the joint physical care arrangement. Evans's sister also assisted with Leland's care and even took Leland into her home for a period of time.

In addition to family support, the Department of Human Services provided Stanerson with counseling and other services. A representative of the agency stated the agency would continue its involvement with Leland, if Evans were awarded physical care of the child.

We recognize, as the district court did, that "addressing and overcoming the problems caused by [the parties'] lifestyle choices is and will continue to be exceedingly difficult." The parties' combined support systems may aid them in meeting this significant challenge.

III. Disposition

We affirm the portion of the decree granting the parties joint custody of Leland, but modify the portion of the decree granting Stanerson physical care of

the child. Our conclusion that the parties should exercise joint physical care requires a remand to revise the child support and visitation provisions of the decree.

We find it unnecessary to address the parties' remaining arguments. We deny Stanerson's request for appellate attorney fee, as she did not prevail on appeal. A copy of this opinion shall be sent to the Mahaska County Department of Human Services, in care of Shelli Epperson.

AFFIRMED AS MODIFIED AND REMANDED.