IN THE COURT OF APPEALS OF IOWA

No. 6-348 / 05-1156
Filed June 28, 2006

IN RE THE MARRIAGE OF ANITA KAY FAY
AND MICHAEL JOSEPH FAY

Upon the Petition of
Anita Kay Fay,
Petitioner-Appellee,

And Concerning
Michael Joseph Fay,
Respondent-Appellant.

Appeal from the Iowa District Court for Bremer County, Paul W. Riffel, Judge.

A father appeals the custody and visitation portions of a dissolution decree. **AFFIRMED.**

David A. Roth of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

Richard D. Stochl of Elwood, O'Donohoe, Stochl, Braun & Churbuck, New Hampton, for appellee.

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

VAITHESWARAN, J.

Michael and Anita Fay had three children during their thirteen-year marriage. When they divorced, the district court granted Anita physical care of the children, subject to visitation with Michael. The visitation schedule included one weekday evening per week, as well as alternate weekends and holidays.

Michael has appealed the custody and visitation portions of the dissolution decree. He contends that the district court should have awarded the parties joint physical care. Alternately, he argues the visitation schedule should include weekday overnight visits. Our review of these issues is de novo. Iowa R. App. P. 6.4.

I. Joint Physical Care

The district court considered and rejected Michael's request for joint physical care on the following grounds:

> The shared physical placement arrangement as proposed by Michael is not in the long-term best interest of the children nor is it feasible under the circumstances herein. The parties do not communicate well with each other regarding matters pertaining to their children. Anita has been the children's primary caregiver since the parties separated for the last time in October 2003. She should continue in that role. She is better able both emotionally and physically to minister to the children's day-to-day needs.

Michael argues the ruling was inequitable for the following reasons: (A) a statutory amendment created a preference for joint physical care; (B) the parents' communication difficulties were not insurmountable; and (C) a joint physical care arrangement was practicable.

A. Statutory Amendment. Michael first argues that this portion of the court's ruling is inconsistent with a recent statutory amendment relating to joint physical

care. 2004 Iowa Acts ch. 1169, § 1 (now codified at Iowa Code § 598.41(5) (2005)). That amendment 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." *Id.* In Michael's view, the provision creates a "new public policy preference" in favor of joint physical care.

Our court recently rejected an identical argument. *See In re Marriage of Ellis*, 705 N.W.2d 96, 101 (Iowa Ct. App. 2005). In *Ellis*, we stated that the amendment "constitutes neither a ringing endorsement of joint physical care, nor a mandate for courts to grant joint physical care unless the best interest of the child requires a different physical care arrangement." *Id.* We find no reason to deviate from this reasoning.

B. Communication Difficulties. Michael next concurs with the district court's finding that he and Anita did not communicate effectively with each other, but contends the communication issues "would be no different under a joint physical care arrangement" than they are with the court-ordered arrangement. We agree with Michael that the communication difficulties the parties experienced were not so troublesome as to preclude a joint physical care arrangement. *Cf. In re Marriage of Swenka,* 576 N.W.2d 615, 617 (Iowa Ct. App. 1998) (finding the parties did not "respect the parenting or lifestyles of the other" and blamed "the other for the children's problems").

Our court has stated, "when a marriage is being dissolved we would find excellent communication and cooperation to be the exception and certain failures in cooperation and communication not to be surprising." *Ellis,* 705 N.W.2d at 103. Anita conceded that she and Michael were "cordial" when they discussed

the children's schedules. While she testified she avoided communication with Michael because he made reconciliation overtures in front of the children, she admitted she kept Michael informed of the children's activities and welfare. Indeed, while the case was pending before the district court, the parents agreed to a joint physical care arrangement involving alternate day transfers. They communicated effectively enough to implement it for approximately a year and a half.

There is no question there were difficulties along the way. For example, Michael declined to enforce Anita's disciplinary rules in his home. However, there was scant evidence that the children took advantage of the parents' inconsistencies in this realm or that the children were adversely affected. In short, the record supports Michael's mother's testimony that the parents "worked together to make it as good as possible for the children."

C. Practicalities. We turn to the practicalities of an alternate day joint physical care arrangement, as proposed by Michael. Anita testified that the children were "pretty confused" with the arrangement. She also noted the arrangement was "inconvenient." The record supports her concerns.

Before trial, Michael had the children on Tuesday and Thursday nights and Anita had them on Monday, Wednesday, and Friday nights, with the parties alternating weekend visitation. This arrangement accommodated Michael's need for three-hour dialysis treatments, scheduled for Monday, Wednesday, and Friday evenings.

On the nights Michael had the children, Michael conceded they went to bed at approximately 8:00 or 8:15 p.m., leaving him a little over four hours with

them. On those nights, Michael's mother stayed with him to care for the children in the mornings, because Michael left for work at 5:00 a.m. On those mornings, Anita drove nine miles out of her way to pick up and deliver the youngest child to preschool in the town where she worked. During these and other transfers, school papers sometimes were left at Michael's house and activity schedules sometimes got mixed up. More importantly, the children did not always know where they were supposed to be on a given day.

There was also a lack of clarity as to how the arrangement would work during the summer months. Michael stated that his mother might care for the children on Tuesdays and Thursdays until he returned from work. He testified that on Wednesday and Friday mornings, his mother would either transport the children to Anita's house or Anita would pick them up. Anita countered that this proposal made little sense, because she did not earn wages during the summers and was available full-time to care for the children.

While we commend the parties for voluntarily implementing a fairly complicated joint physical care plan, we are not convinced this arrangement afforded the children enough stability. *See Swenka*, 576 N.W.2d at 617 ("An attempt to provide equal physical care may be harmful and disruptive by depriving children of the necessary sense of stability."). The plan also did not afford Michael significant additional contact with the children. We conclude Michael's joint physical care proposal was not in the children's best interests.

II. Visitation

In the alternative, Michael asks for expanded visitation. As noted, he was awarded visitation on one weekday evening per week. Michael contends "one

overnight visit per week, if not two, would not only give the children an opportunity to spend more time with their father at his home, but also an opportunity to spend time with other paternal family members."

Where appropriate, liberal visitation should be ordered. Iowa Code § 598.41(1)(8). In this instance, a grant of two overnight visitation days per week would amount to joint physical care. We have already affirmed the district court's rejection of this proposal.

Turning to Michael's request for a single weekday overnight visit each week, we are not convinced that this additional time will materially enhance his relationship with the children, given the children's bed times and his work schedule. There is also evidence that Anita intended to move to the town where she worked, which was thirty-two miles away from Michael. Such a move would exacerbate the previously mentioned problems with weekday overnight visitation.

Our conclusion that the district court's visitation schedule is equitable does not mean that the parents are limited to the visitation set forth in that schedule. The court specifically noted that the parents could arrange for more visitation time. Notably, Anita's employment as a school social worker helped her recognize that maximum contact with Michael would benefit the children. She testified, "I'm not proposing that he be restricted from them. Just the overnights do not make sense during the school week or the weeknight I mean." We believe an informal expansion of the visitation schedule, as appropriate, will better serve the children's interests than a formal alteration of the existing schedule.

III. Disposition

We affirm the physical care and visitation provisions of the dissolution decree.

AFFIRMED.