IN THE COURT OF APPEALS OF IOWA

No. 6-494 / 05-1590
Filed October 11, 2006

IN RE THE MARRIAGE OF MARILEE S. DONATH AND FREDERICK D. DONATH

Upon the Petition of
MARILEE S. DONATH,
Petitioner-Appellee/Cross-Appellant,

And Concerning
FREDERICK D. DONATH,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Respondent appeals and petitioner cross-appeals from provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Thomas A. Bitter of Bitter Law Offices, Dubuque, for appellant.

Jeffrey A. Trannel, Dubuque, for appellee.

Heard by Huitink, P.J., Mahan, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HUITINK, P.J.

Respondent Frederick D. Donath (Fred) appeals from the child custody provisions of the decree dissolving his marriage to Marilee S. Donath, petitioner. Marilee cross-appeals, arguing the district court erred in its calculation of child support. She also requests an award of appellate attorney fees. We affirm as modified.

I. Background Facts and Proceedings

Fred and Marilee lived together for more than two years before marrying on July 10, 1999. It was the third marriage for both parties. Marilee has six grown children from her two previous marriages. Fred has no children from his previous marriages. The parties' only child, Zachary (Zach), was born on October 5, 1999. At the time of trial, Marilee was fifty-one years old, and Fred was forty-nine years old.

Fred is employed as a union electrician. He works Monday through Friday from 7:00 a.m. until 3:30 p.m. and an occasional Saturday. Marilee holds a full-time clerical position with a local business, working Monday through Friday from 8:00 or 9:00 a.m. until 5:00 p.m. After Zach's birth, Marilee took two years off from work to care for him. Marilee also earns money putting on karaoke shows in bars in the evenings on the weekends.

Marilee filed a petition for dissolution of marriage on October 8, 2004. Following an incident between the parties during the early morning hours of October 13, Marilee filed a petition for relief from domestic abuse pursuant to

Iowa Code chapter 236 (2003).[1] The district court entered a temporary protective order that same day and set the matter for hearing. Fred filed his answer to the dissolution petition on October 20, requesting an award of joint physical care.

A modified protective order was entered on October 29, providing a care schedule for Zach by which the parties would share equally in Zach's care over a two-week period. The parties followed the schedule without incident for the nine months preceding trial. The modified order further provided for visitation exchanges to avoid direct contact between the parties. The parties stipulated the modified order was a compromise settlement of disputed issues that was not to serve as any precedent in the matter, and that no findings of abuse were being made at the time.

The district court filed its judgment and decree on July 29, 2005. In pertinent part, the decree placed primary physical care of Zach with Marilee with reasonable visitation to Fred. The court applied a twenty-five percent extraordinary visitation adjustment to the guideline amount of child support, resulting in a child support obligation from Fred of $427 per month.

Fred appeals, arguing the district court erred in not awarding the parties joint physical care of Zach. Marilee cross-appeals, arguing the district court erred in granting Fred a twenty-five percent extraordinary visitation credit. Marilee requests appellate attorney fees.

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[1] The petition was assigned the same case number as the dissolution action and was never considered a separate action.

II. Standard of Review

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Joint Physical Care

The primary consideration in any physical care determination is the best interests of the child. Iowa R. App. P. 6.14(6)(*o*); *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). In considering which physical care arrangement is in the child's best interest, we consider the factors set forth in Iowa Code section 598.41(3), as well as the factors identified in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). In determining which parent serves the child's best interests, the objective is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683; *Courtade*, 560 N.W.2d at 38.

Joint physical care is defined as:

> [A]n award of physical care of a minor child to both joint legal custodial parents under which 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 physical care rights superior to those of the other parent.

Iowa Code § 598.1(4). Effective July 1, 2004, the legislature amended the Code section related to joint physical care to provide:

> 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.

2004 Iowa Acts ch. 1169 § 1 (codified at Iowa Code § 598.41(5)(a) (2005)).

The district court observed that both Fred and Marilee "have a very close and loving relationship with Zachary," and "are capable of being the primary caregiver." However, the court concluded joint physical care was not in Zach's best interests. The court made the following findings to support its conclusion:

> Zachary has been in preschool on a part-time basis. Beginning this fall, he will be in kindergarten Monday through Friday of each week. This will make the present shared physical care arrangement less feasible. More importantly, the Respondent refuses to communicate with the Petitioner. This includes any communication as to Zachary. When the parties were living together, the Respondent was controlling and uncompromising. There is no reason to believe that he would be any different with the Petitioner today. Under the present arrangement, Zachary stays overnight with his paternal grandmother, Patricia Felderman, when the Respondent must work the next day.
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> The Petitioner has historically been the primary physical care giver. She quit her job upon the birth of Zach and remained unemployed until Zach was two years old so that she could devote all of her time to Zach. The fact that the Petitioner is still the primary caregiver can be illustrated through an incident which occurred on July 3, 2005. On that date, Zachary sustained a rather severe burn on his foot. He was in the custody of the Respondent at the time. The Petitioner was not informed of the incident until July 5, 2205, at which time the Petitioner took the child to the doctor to have the foot examined.
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> The Respondent not only refuses to communicate with the Petitioner, but he also fails to communicate with other people, with the exception of Zachary and the Respondent's mother. The fact that the Respondent isolates himself to this extent is of concern and is certainly not a trait to be emulated.

> The Respondent assaulted Petitioner on October 13, 2004. This assault caused the Petitioner to sustain multiple injuries. It resulted in the issuance of a Chapter 236 protective order. While this incident, standing alone, does not establish a "history of domestic abuse," it is nevertheless another concern that this Court has as to the Respondent. It is especially true in view of the fact that the Respondent blames the Petitioner for his actions on October 13, 2004. He testified that the Petitioner "pushed his buttons" which resulted in the physical altercation.

On appeal, Fred takes issue with each of the district court's findings, asserting that the court's findings were in error. On our de novo review of the record, however, we conclude the district court's justification for denying joint physical care to be persuasive and well-supported. We therefore adopt those findings as our own. We affirm the district court's custody determination.

IV. Extraordinary Visitation Credit

Our child support guidelines provide that the noncustodial parent "shall receive a credit to the guideline amount of child support" if the noncustodial parent's court-ordered visitation exceeds 127 days per year. Iowa Ct. R. 9.9. If visitation is 167 or more days, but less than equally shared care, the credit applies to reduce the guideline amount of child support by twenty-five percent. *Id.* Here, the district court calculated the guideline monthly amount of child support owed by Fred to Marilee at $569, and then reduced the monthly amount to $427 by applying the twenty-five percent extraordinary visitation adjustment.

Marilee, in her cross-appeal, argues the district court erred in its calculation of child support. Based on the court's visitation schedule, Marilee calculates Fred has 112 nights of visitation, resulting in no extraordinary visitation credit.

In his reply brief, Fred acknowledges he will not have 167 overnights with Zach under the court's visitation award. Fred does not dispute Marilee's calculation of 112 total overnights per year.[2] After reviewing the calculations, we conclude the district court erred in applying the extraordinary visitation credit to the guideline amount of child support. Accordingly, we modify the child support provision of the decree to require Fred to pay $569 per month in child support.

V. 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). We deny Marilee's request for appellate attorney fees. Costs shall be divided equally between the parties.

AFFIRMED AS MODIFIED.

[2] Fred does, however, dispute the district court's calculation of Marilee's income from the karaoke business. This claim comes too late, and we will not consider it. *See Sun Valley Iowa Lakes Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996) ("Parties cannot assert an issue for the first time in a reply brief.").