

**IN THE COURT OF APPEALS OF IOWA**

No. 6-791 / 06-0669  
Filed January 18, 2007

**IN RE THE MARRIAGE OF KELLY LYNN RIXEN  
AND DAVID A. RIXEN**

**Upon the Petition of  
KELLY LYNN RIXEN,**  
Petitioner-Appellee,

**And Concerning  
DAVID A. RIXEN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Clinton County, David H. Sivright,  
Jr., Judge.

David A. Rixen appeals the district court's ruling in his dissolution  
proceeding. **AFFIRMED.**

Christopher Farwell of Farwell & Bruhn, Clinton, for appellant.

Mary Lynn Wolfe of Wolfe Law Office, Iowa City, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**MAHAN, P.J.**

We filed our opinion in this case on December 28, 2006, but subsequently granted respondent-appellant David A. Rixen's petition for rehearing. Our December 28, 2006 decision is therefore vacated, and this opinion replaces it. Rixen appeals the district court's ruling in his dissolution proceeding. He argues the district court erred in (1) awarding physical care of the parties' child to Kelly Lynn Rixen; (2) failing to award joint physical care; (3) providing inadequate visitation; and (4) failing to grant a new trial. We affirm.

**I. Background Facts and Proceedings**

David and Kelly were married in February 2001. Their daughter was born in May 2002. Kelly filed a petition for dissolution on May 20, 2005. The primary issue at trial was their daughter's physical care.

David was approximately forty years old at the time of trial. He works as a housepainter for his brother ten months out of the year. He collects unemployment the remaining two months. Based on his income from painting and unemployment over the last four years, the district court determined his annual income was approximately \$20,000. Currently, David lives with his sister Kim, using a converted porch as a bedroom. The couple's daughter also has a bedroom at Kim's house. David is in good health; he has had, however, some mental health issues in the past.<sup>1</sup> He has a thirteen-year-old son with whom he exercised sporadic visitation for a time, but whom he has not seen since July

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<sup>1</sup> David testified he had an anxiety disorder, but Kelly testified he threatened suicide. In July 2004, he was hospitalized for three days for psychiatric care. He stated that the panic attack was the result of a job change and he has returned to normal since he started working for his brother.

2001. According to witnesses, he occasionally has difficulty controlling his temper.

Kelly was approximately thirty years old at the time of trial. She works as the kitchen manager at an assisted living facility. Her annual income is \$26,300. She also has physical care of a seven-year-old daughter from a previous marriage. The two girls get along well together and have "sister-like" bonds. Kelly received some psychiatric treatment related to the break-down of the marriage, but is no longer receiving the treatment. She also has a history of methamphetamine use from her first marriage. She and her first husband were arrested on drug charges in 1995, but the charges against her were later dropped. There is no evidence she continued to use methamphetamine, although she testified both she and David have used marijuana occasionally in the past.

Kelly has been dating a man named James since August 2005. He occasionally stays at Kelly's home. James is employed and has two teenage children from his marriage. An action to dissolve that marriage is currently pending. He has a good relationship with both of Kelly's daughters. The girls, however, reported to their counselor that David makes negative remarks about James.

The district court determined Kelly's claim that David had been verbally abusive toward her was credible. It also found he was jealous and controlling. On the day Kelly intended to move out of the parties' marital home, David tried to prevent her from leaving with their daughter. The child was literally caught between the two during a struggle. Kelly dialed "911" on her cell phone. David

smashed the phone and attempted to deflate the tires on Kelly's vehicle. Both were arrested for domestic abuse assault and both spent the night in jail. Upon his release, David took the child to his sister Kim's house and denied Kelly any contact with her until a temporary custody order was entered two weeks later.

After the parties' separation, they shared physical care of their daughter, exchanging her at 5:30 p.m. every fourth day. Kelly testified that the arrangement was hard on the child. She argued her daughter was acting out as a result of lack of consistency and enrolled her in counseling and play therapy. The child also attends daycare when she is in Kelly's care. David, however, did not take her to daycare when she was in his care. Kelly's opinion that the child would benefit from routine daycare is shared by both the child's therapist and the director of her daycare program.

The district court specifically rejected continuing the parties' shared physical care. Instead it awarded joint legal custody, with Kelly responsible for physical care. David was awarded reasonable visitation, including but not limited to Wednesday from 5:30 p.m. to 8:00 p.m. and alternate weekends from 5:30 p.m. Friday to 8:00 p.m. Sunday. David was also awarded two nonconsecutive weeks each summer, with two consecutive weeks the summer after the child completes kindergarten, and four weeks after she completes fifth grade. The parties were ordered to alternate Christmas Eve Day and Christmas Day until the child begins kindergarten, when they must begin dividing Christmas vacation from school. They were also ordered to share alternate holidays, giving Kelly Easter, July 4th, and Thanksgiving in odd-numbered years, and David Memorial Day and Labor Day in odd-numbered years.

David filed a motion to enlarge the court's findings and motion for new trial arguing the court's findings were contrary to the law and not supported by sufficient evidence. He also requested shared physical care and increased visitation. The district court granted the motion to enlarge and awarded David visitation from 5:30 p.m. the first Wednesday of every month to 8:00 p.m. the following Sunday, 5:30 p.m. the third Wednesday of every month to 8:00 p.m. the following Sunday, and every other Wednesday from 5:30 p.m. to 8:00 p.m.<sup>2</sup>

David appeals the award of physical care, and alternately, visitation. He also argues he should have received a new trial.

## **II. Standard of Review**

We review dissolution decrees de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *Id.*

## **III. Merits**

### **A. Physical Care**

David argues he should have been awarded physical care of the couple's child. We review numerous factors in determining which parent should have physical care of a child. See Iowa Code § 598.41(3) (2005). Our primary consideration, however, is the best interests of the child. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003). Specifically, we look to which parent can administer most effectively to the child's long-term interests. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). We also

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<sup>2</sup> Subsequently, the court granted Kelly's motion to enlarge requesting the visitation be moved to the second and fourth Wednesday to facilitate the child's interaction with her sister, who has also visitation with her father on the second and fourth weekends.

consider the emotional and environmental stability each parent offers. *Id.* at 762. There is no inference favoring one parent over the other. *Decker*, 666 N.W.2d at 177. The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain physical care in an original dissolution proceeding. *Id.*

As the district court noted, this is a close case. It is obvious both parents love their child and want what is best for her. Some of David's behavior, however, has been troubling. First, his temper causes us concern. Though his family testified that he had overcome his anger, there was no testimony as to how or why he ceased being angry. Kelly presented persuasive evidence that David's temper is, in fact, still quite destructive. Second, we are also concerned about David's lack of contact with his thirteen-year-old son, whom he has not seen since July 2001. David claims he stopped seeing the boy because the boy's mother made it difficult. He also claimed he stopped because he and Kelly were newly married and Kelly did not want him to see his son. Third, testimony indicated Kelly would be more supportive of the child's visitation and relationship with David than either David or his family would be of her visitation and relationship with the child. Finally, we also question David's decision to upset the girl's routine by refusing to take her to daycare when both her therapist and daycare director suggest consistency and stability are in her best interests.

David points out that Kelly has invited James to stay overnight on occasion, and claims, in fact, that the two have been cohabiting. However, there is no evidence to indicate this relationship has had a negative impact on the

child. Further, the child is bonded with her half-sister, who also lives with Kelly. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993) (noting siblings or half-siblings should only be separated for compelling reasons). We therefore defer to the district court ruling granting Kelly physical care.

### **B. Shared Physical Care**

David argues that he and Kelly should share physical care of their daughter. He also claims the district court did not adequately address his request for joint physical care. See Iowa Code § 598.41(5). We disagree with both arguments.

In addressing David's request for joint physical care, the court wrote:

The Court rejects the suggestion that the parties continue to share her physical care. This issue presents a close question, as both parents clearly have great love and affection for their daughter. After a troublesome beginning and with counseling, [the child] has adjusted to the present arrangement. However, the Court is not convinced that its continuation is in her long-term best interests. *The reasons for this doubt also support the Court's choice of Kelly as the custodial parent.*

(Emphasis added.) The court then went on to enumerate its reasons for awarding Kelly physical care. Because the court stated its reasons for awarding Kelly physical care were the same for denying shared physical care, we conclude the court adequately addressed David's claim.

We also conclude that shared physical care is not a viable long-term option for this family. It is clear that David is unwilling to cooperate with Kelly's parenting decisions or respect her lifestyle. See *In re Marriage of Ellis*, 705 N.W.2d 96, 101 (Iowa Ct. App. 2005). He has demonstrated episodes of irritability and anger, and has had difficulty inhibiting impulses when he is angry.

He has displayed no effort to moderate the hostility between his sister and Kelly, making communication concerning the parenting of the couple's child difficult. For these reasons, including the reasons we stated for awarding Kelly physical care, we affirm the district court's ruling denying shared physical care.

### **C. Visitation**

David argues the district court erred in setting his visitation. He claims the court considered only one factor: the child's age. See *In re Marriage of Drury*, 475 N.W.2d 668, 671 (Iowa Ct. App. 1991). He also requests we set visitation for the child's birthday, the parties' birthdays, President's Day, Martin Luther King Day, and Columbus Day.

Taking the decree in its entirety, it is clear the court not only considered the girl's age, but David's parenting skills, his ability to control his anger, his home and family environment, and the stability he has provided the child in the past. Further, the visitation schedule meets the goal of maximum continuing physical and emotional contact. See Iowa Code § 598.41(1). David sees the child six out of every fourteen days. For these reasons, we see no need to alter the visitation schedule set by the district court.

### **D. New Trial**

David gives no reason for a grant of a new trial other than his above-stated arguments about physical care and joint physical care. Because we find the evidence was sufficient to support the district court's findings concerning physical care, we affirm the decree.

**E. Attorney Fees**

Kelly requests \$1000 in 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). Kelly's request for appellate attorney fees are denied. Costs of the appeal are taxed one-half to each party.

**AFFIRMED.**