

IN THE COURT OF APPEALS OF IOWA

No. 6-881 / 06-1056
Filed January 18, 2007

MICHAEL STEPHEN WITYK,
Plaintiff-Appellant,

vs.

EMILY MAE PATTERSON,
Defendant-Appellee.

Appeal from the Iowa District Court for Guthrie County, Paul Huscher,
Judge.

Michael Stephen Wityk appeals from a custody decree that awarded Emily
Mae Patterson physical care of the parties' daughter. **AFFIRMED.**

Jean Pendleton of Pendleton Law Firm, P.C., West Des Moines, for
appellant.

Jeffrey Mains of Mains Law Office, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Michael Stephen Wityk appeals from a custody decree that placed physical care of the parties' daughter with Emily Mae Patterson. We affirm the district court.

I. Background Facts and Proceedings

Michael met Emily in June 2003, and they began residing together in December of that year. Michael has a high school education and works as a mechanic. Emily also has a high school education and works in construction building homes. The parties never married. Their only child, Hailey Mae Wityk, was born in July 2004. After Hailey's birth, Michael took a job working for a construction company. He was on the road approximately twenty weeks between October 2004 and October 2005. Emily and Hailey moved out of the home they shared with Michael in September 2005.

Emily has a ten-year-old daughter, Bryana, from a prior relationship. In 2000 Emily voluntarily entered a residential treatment program for alcohol and drug abuse and gave her mother, Marlene, temporary custody of Bryana. After successfully completing treatment, Emily and Marlene decided Bryana should remain in Marlene's care. Emily continued to see Bryana regularly and often provided care for her. Bryana began living with her mother on a full-time basis in February 2006.

On October 11, 2005, Michael filed a petition to establish child custody and child support. He requested that the court grant the parties joint legal custody, award him physical care, and order Emily to pay child support. On January 17, 2006, the court granted temporary physical care to Michael, set

visitation for Emily, and ordered Emily to pay \$225 per month in temporary child support.

The district court heard the child custody action on May 24, 2006, and on May 25 the court granted the parties joint legal custody and placed physical care of Hailey with Emily. The court also ordered visitation for Michael and ordered him to pay \$309 per month in child support. Michael filed a motion pursuant to Iowa Rule of Civil Procedure 1.904 requesting that the court reverse its ruling granting Emily physical care, amend the amount of child support, and order Emily to pay child support arrearages and a portion of uncovered medical expenses. The court ruled on Michael's motion on June 12, 2006. It reduced Michael's child support obligation to \$293.79 per month, but denied his remaining requests for modification or expansion of the decree. Michael now appeals.

II. Scope and Standard of Review

We review a district court's ruling on child custody de novo. Iowa R. App. P. 6.4; *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa Ct. App. 1998). Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

III. Physical Care

Michael contends the district court erred in granting physical care to Emily. He maintains both parties were primary caregivers for Hailey, and he contends he demonstrated superior ability to minister to Hailey's long-term best interests.

When we determine physical care, our primary consideration is the best interests of the child. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa

1999). When we consider which physical care arrangement is in the child's best interests, we consider the factors set forth in Iowa Code section 598.41(3) (Supp. 2005), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).¹ 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). Our primary objective is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). We must also consider the willingness of each party to allow the child access to the other party. *Id.* With the foregoing principles in mind, we now address the district court's decision.

¹ We consider the following factors from *Winter*, 223 N.W.2d at 166-67 when making physical care determinations:

1. The characteristics of each child, including age, maturity, mental and physical health.
2. The emotional, social, moral, material, and educational needs of the child.
3. The characteristics of each parent, including age, character, stability, mental and physical health.
4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
5. The interpersonal relationship between the child and each parent.
6. The interpersonal relationship between the child and its siblings.
7. The effect on the child of continuing or disrupting an existing custodial status.
8. The nature of each proposed environment, including its stability and wholesomeness.
9. The preference of the child, if the child is of sufficient age and maturity.
10. The report and recommendation of the attorney for the child or other independent investigator.
11. Available alternatives.
12. Any other relevant matter the evidence in a particular case may disclose.

The district court found this to be a case where joint physical care would not be workable for the parties because they live approximately ninety-five miles apart. Furthermore, Hailey will soon reach school age and have to reside in one school district. We agree with the court's conclusion that joint physical care is not a viable option in this case.

We now address the court's decision to place physical care of Hailey with her mother. The district court concluded either Michael or Emily could adequately parent Hailey. We agree. Although the parties currently have a variety of complaints about each other, it is apparent that both Michael and Emily are capable and loving parents who are able to meet their daughter's needs. Clearly, both parents wish to promote Hailey's best interests.

We agree with the district court's conclusion that Emily has been Hailey's primary caregiver. Emily undertook the responsibility of caring for Hailey when Michael's job took him on the road for approximately twenty weeks after Hailey was born. A number of witnesses with firsthand knowledge testified Emily provides excellent care for her daughters. The record is also clear that Hailey has formed a strong relationship with her half-sister, Bryana, despite their difference in age. We agree with the district court's conclusion that it is in Hailey's best interests to maintain a close relationship with her sister. Changes in custody that require a separation of a child from his or her siblings are discouraged. *In re Marriage of Mayer*, 347 N.W.2d 681, 684 (Iowa Ct. App. 1984). Awarding physical care to Michael would deprive Hailey of frequent contact with her half-sister.

Although Michael contends he would be more likely to nurture Hailey's relationship with Emily, the court found he had promoted their relationship mainly because "it is much easier to [promote] that relationship and [be] cheerful and positive when you have the temporary physical custody of the child." Our review of the record supports the district court's conclusion that once this custody dispute has concluded, each parent will promote a relationship between Hailey and the other parent.

Upon our de novo review of the record, we find no reason to disagree with the district court's decision to place physical care of Hailey with Emily. Like the district court, we believe this physical care arrangement is in the child's best interests. In reaching this conclusion, we recognize the court had the parties before it, was able to observe their demeanor, and was in a better position to evaluate them as caregivers than we are. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993).

IV. Parenting Plan, Child Support Arrearage, & Medical Expenses

If he is not awarded physical care, Michael contends we should modify the district court's visitation schedule by adopting the "parenting plan" he submitted at trial. Upon our de novo review of the record, we conclude the district court's visitation schedule is equitable and reasonable under the facts of this case. We affirm the court's visitation schedule without modification.

Michael also contends Emily had an unpaid child support obligation at the time of trial, and he claims he is entitled to reimbursement for unpaid medical expenses in some amount. Emily argues these issues were not properly preserved or should be waived because they are too vague. If issues exist

regarding either party's compliance with temporary orders previously entered in this case, those issues may be addressed and resolved by the district court upon appropriate application by either party under the controlling statutes.

V. Attorney Fees

Emily requests appellate attorney fees. An award of appellate attorney fees rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). Whether attorney fees should be awarded depends on the needs of the party making the request and the respective abilities of the parties to pay. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). We also consider whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We decline to award appellate attorney fees in this case.

VI. Conclusion

Because we agree with the district court's resolution of all disputed issues, including the court's decision to place physical care of Hailey with Emily, we affirm the court's decree.

AFFIRMED.