

IN THE COURT OF APPEALS OF IOWA

No. 7-295 / 06-1881

Filed June 27, 2007

**IN RE THE MARRIAGE OF KIMBERLY L. WARNICK AND SCOTT P.
WARNICK**

**Upon the Petition of
KIMBERLY L. WARNICK,**
Petitioner-Appellee,

**And Concerning
SCOTT P. WARNICK,**
Respondent-Appellant.

Appeal from the Iowa District Court for Jasper County, William Joy, Judge.

Respondent Scott Warnick appeals from the district court's decree granting petitioner Kimberly Warnick physical care of the parties' minor children.

AFFIRMED.

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Dennis Chalupa of Brierly & Charnetski, L.L.P., Newton, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

Scott Philip Warnick (Scott) appeals from the decree of dissolution of marriage entered by the district court granting Kimberly Lynn Warnick (Kim) physical care of the parties' minor children. We affirm.

BACKGROUND FACTS AND PROCEEDINGS.

Scott and Kim were married in May 1992. Two children were born of their marriage: Trenton, born in August 1997, and Wyatt, born in September 2000. The parties resided in Kellogg, Iowa, during their marriage. Kim filed a petition for dissolution of marriage on January 31, 2006. The major issue in the dissolution proceedings was the custodial arrangement for the two minor children. Kim requested physical care of the children, and Scott requested joint physical care or in the alternative physical care.

Kim is thirty-four years old. She has a B.A. degree in business management. At the time of trial, she was employed as a special market customer coordinator for floor care in the Hoover division of Maytag. Her position was expected to end in April 2007 because Maytag Corporation had been purchased by Whirlpool Corporation. Her monthly income at the time of trial was \$2,700.00.

Scott is thirty-seven years old at the time of the dissolution proceedings. He has a political science degree in criminal justice and has been working as a correctional officer at Newton Correction Facility for the past ten years. His monthly earnings at the time of trial were \$3,793.82.

Scott and Kim continued living in the same household for about six months after the dissolution petition was filed. A temporary order was entered on

February 14, 2006, holding that the parties were going to share expenses and responsibilities for the children during the pendency of the dissolution proceedings. Approximately six weeks before trial Kim moved out of the family home with the children and rented an apartment in Ankeny, Iowa. She then filed an application for additional temporary orders. Responding to this application, the district court granted the parties temporary joint physical care alternating the children's care on a weekly basis.

The case was tried on August 31, 2006. The district court found joint physical care was not appropriate and granted Kim physical care of the children. Scott appeals.

STANDARD OF REVIEW.

We review the trial court's decision regarding custody de novo. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). We give weight to the findings of the district court, but are not bound by them. *Id.* This is because the district court had a firsthand opportunity to hear the evidence and view the witnesses. *Id.*

ANALYSIS.

In assessing the issue of child custody, the controlling consideration is the best interest of the child. Iowa R. App. P. 6.14(5)(o). The district court found it was reasonable and in the children's best interest to grant Scott and Kim joint legal custody. See Iowa Code § 598.41(1)(a). Neither party challenges this decision on appeal. However, Scott alleges that the district court erred in granting Kim physical care. He argues the district court should have awarded the parties joint physical care or granted him physical care.

I. Joint Physical Care. The district court found joint physical care was inappropriate for two reasons: first, the physical distance between the parties, and second, the domestic abuse Scott inflicted on Kim and the children. Scott challenges both factors.

Physical Distance between Parties: At the time of trial, Scott was still living in the parties' family home in Kellogg, while Kim was living approximately forty-five miles away in Ankeny, Iowa. Kim testified that in order to maintain employment with the same company, she might have to transfer to Arkansas. She also indicated an interest in moving to Canton, Ohio, where she had friends.

Scott argues that Kim can find new employment and housing in Kellogg, Newton, or Des Moines, and in that case, joint physical care would be plausible. However, Kim testified that she would not return to the Kellogg and Newton area because she believed the community did not provide the best environment and educational opportunities for the children. Under this circumstance, even if Kim found a new job in the Des Moines area allowing her to remain in Iowa, the children would have to travel constantly and enroll in different school districts if they were in the parents' joint physical care. This instability would not serve the children's best interest. See *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998).

Scott also indicates that Kim began a relationship with a man in Ohio, and Kim intends to move out of state simply to satisfy her own personal and emotional needs. Kim denied that she had a boyfriend in Ohio, and we find no

other evidence supporting this allegation. We conclude the physical distance between the parties weighs against joint physical care.

Domestic Abuse: At trial Kim alleged several instances of physical assault Scott inflicted on her. She claimed Scott once locked her out of the house in the wintertime. She also alleged that on one occasion, Scott forced himself on her while she was in the shower and caused bruises on her body. Kim's sister testified that she saw Scott spank one of the children because the child interfered with him watching television. Scott denied he had been abusive to Kim or the children. However, the district court found that "[b]ased upon the observations of the parties while in the courtroom and while testifying, and other evidence the fact finder found credible, the respondent is found to have been a domestic abuser during this marriage."

On appeal Scott points out that Kim never called the police or filed for a protective order, and there was no eye witness testimony to his abusive behavior against Kim. He further argues that a single spank on the child does not constitute abuse. He claims the district court was simply wrong in finding there was domestic abuse. We disagree. A petition for protective order and police involvement are only some of the factors the court may consider when determining the existence of domestic abuse. Testimony of the parties and the witnesses are also considered. In the present case, Kim's mother and sister reinforced Kim's testimony and testified to Scott's temper and aggressive behavior. Even if these events do not amount to a history of domestic abuse, they indicate the tension between the parties and Scott's tendency to use physical force against his spouse and children when they disagree or disobey

him. We believe Scott's temper is a barrier to the parties being able to work together in a joint physical care arrangement.

Scott also argues that even if there was abuse, the district court, by granting the parties joint legal custody, must have found allegations of domestic abuse were rebutted. Iowa Code § 598.41(1)(b). The district court did not elaborate how the factor of domestic abuse was weighed in its decision of granting joint legal care. Even if the domestic abuse is rebutted in determining legal custody, it does not prevent the court from considering Scott's aggressive temper when deciding the proper physical care arrangement. The physical conflicts between the parties, combined with the difficulties caused by the distance between the two households, make joint physical care inappropriate. *See In re Marriage of Hynick*, 727 N.W.2d 575, 580 (Iowa 2007).

II. Physical Care. When joint physical care is not warranted, the court must choose one party to be the primary caretaker, awarding the other party visitation rights. *See generally* Iowa Code § 598.41(5) (Supp. 2005). In determining which physical care arrangement is in the children'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 Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Our objective is to place the children in the environment most likely to bring them to healthy physical, mental and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

The district court awarded Kim primary care based on the following findings: (1) Kim was the primary caretaker to the children, (2) Scott had a violent temper evidenced with several incidents of physical assaults against Kim, (3) Kim

had better parenting and interpersonal skills compared to Scott, (4) Kim was better able than Scott to support the other parent's relationship with the children, and (5) Kim presented a more positive parental role model for the children.

Our de novo review of the record reveals no reasons for us to disagree with the district court's findings and conclusion. During their marriage Scott worked second shift, 2:00 p.m. to 10:00 p.m. In the morning Scott got the children up, fed them, and got them ready during the day. He took the children to the babysitter between 11:00 and 11:30 a.m., and the children would have lunch there. After the children started school, Scott would take them to the bus stop where they boarded the school bus. Kim worked between 7:00 or 8:00 a.m. to 4:00 or 5:00 p.m. during the weekdays. Kim would pick up the children from the babysitter or school after work, and take care of the children through the evening. She helped the children with their homework and did most of the cooking and cleaning. The parties' work schedule suggests that Kim spent more time with the children in the past. The babysitter who worked for the Warnicks for the last seven years also testified that, based on her observation, Kim was the primary caretaker of the children, and Scott started doing more after the dissolution proceedings had commenced. We agree with the district court that Kim has been the primary caretaker of the children.

We acknowledge the disruptions the children have to experience when moving away from their home, school and community. However, evidence shows that granting the physical care to Kim is in the children's best interest. She is highly concerned with the children's education and makes effort to provide them with best possible opportunities. Her schedule allows her to spend time

with children after school and help them with their homework. Scott, on the other hand, will have to rely on a babysitter or his brother every evening during the week. Kim also recognizes the importance of the relationship between Scott and the children and is willing to promote the communication between them. These factors, combined with the domestic abuse discussed above, lead us to conclude the district court did not err in granting Kim physical care.

AFFIRMED.