IN THE COURT OF APPEALS OF IOWA

No. 7-360 / 06-1182
Filed August 8, 2007

MATTHEW L. ELIN,
Petitioner-Appellee,

vs.

HEIDI A. SEEDORFF,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Respondent appeals a placement order awarding joint physical care. **AFFIRMED.**

Ryan J. Rasmussen of Hagemann & Goeke, Waverly, for appellant.

Timothy J. Luce of Anfinson & Luce, P.L.C., Waterloo, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

HUITINK, P.J.

Heidi Seedorff appeals from the trial court's order awarding the parties joint physical care of their daughter, Ariana. We affirm.

I. Background Facts and Proceedings

Heidi Seedorff and Matthew Elin had a brief romantic relationship in Waterloo in early 2003. Shortly after the relationship ended, Heidi told Matthew she was pregnant. Heidi did not contact him when she had the baby in November, 2003. Once Matthew found out about the birth, he immediately went to see his new daughter, Ariana. Heidi did not list Matthew as the father on the birth certificate, but a subsequent paternity test confirmed Matthew was Ariana's father. When Heidi refused to allow unsupervised visitation, Matthew filed the present petition requesting physical placement. Upon Matthew's request, the court established a set schedule for temporary non-supervised visitation.

Over the next two years, Matthew continued to work full-time in Waterloo and became engaged to another woman. They purchased a home and started a family of their own. Matthew paid Heidi monthly child support and kept Ariana on his insurance.

During the same time period, Heidi met another man and became pregnant with his child. She then moved to Illinois to live with him. After a heated argument, she and Ariana fled to a woman's shelter and eventually returned to Waterloo to live with her mother. She then moved into the House of Hope, a project designed to assist single mothers. Shortly thereafter, she met a new man and moved with him to Tripoli, a small community located

approximately twenty-five miles north of Waterloo. They became engaged shortly before this matter came to trial in May of 2006.

Ariana was approximately two-and-a-half years old at the time of trial. After a full hearing, the court ordered that the parties have joint legal custody and shared placement of Ariana. Under the plan set forth by the court, Ariana would live with Heidi for two weeks and then live with Matthew for two weeks.

Heidi now appeals, claiming joint physical care is inappropriate because: (1) both parties reside in different school districts and live more than twenty-five miles apart; (2) the parties are not able to communicate effectively; (3) she has been Ariana's primary caretaker since birth and she provides the most stable environment for the child; and (4) Matthew and his fiance smoke and this is detrimental to Ariana's health. Both parties request appellate attorney fees.

II. Standard of Review

Our review of a custody order is de novo and our primary consideration is the best interests of the child. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). In assessing a custody order, we give considerable weight to the judgment of the district court, which has had the benefit of hearing and observing the parties first-hand. *Id.* at 278.

III. Merits

Joint physical care is

> an 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) (2005). Joint physical care is a viable option if the parents are able to "cooperate and respect each other's parenting and lifestyles." *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998). However, if the parents are unable to work together amicably, joint physical care cannot serve the child's best interests. *Id.*

Distance. Heidi contends the distance between her residence in Tripoli and Matthew's residence in Waterloo and the fact that each reside in different school districts "will create a logistical nightmare for the parties" when Ariana starts attending school. The record belies this argument. Even though Heidi lives in Tripoli, Ariana's daycare is in Waterloo. Also, Heidi works in Waterloo and goes to school in Waterloo. While joint physical care will require cooperation between the parties, we see no reason why it will be more burdensome than the existing arrangement.

Lack of Communication. Heidi claims joint physical care is inappropriate because Matthew does not communicate effectively. In support of this argument, she points out that Matthew's attendance at prenatal appointments was inconsistent, he did not return her phone messages on a handful of occasions, and he used his attorney to communicate during settlement negotiations. We find Heidi's claims concerning the parties' inability to communicate are overstated. After a thorough review of the record, we find both parties could be more courteous to each other, but there is no reason to conclude the existing communication is a significant impediment to joint physical care.

Smoking. Heidi argues Ariana should not be placed with Matthew and his fiance because both smoke cigarettes and the second-hand smoke is detrimental

to Ariana's health. Heidi testified that she used a mail-order kit to test Ariana for second-hand smoke inhalation. After her visitations with Matthew, the test indicated Ariana's smoke inhalation was a "two" on a scale of zero to seven. Beyond her anecdotal evidence that Ariana coughs after visitations with Matthew, there is no medical evidence to suggest Ariana has asthma or other breathing related problems. At trial, Matthew testified that he and his fiance take steps to limit Ariana's exposure to smoke by not smoking in the house and not smoking in the car when Ariana is present. Based on the facts in the record, we, like the district court, find Matthew's smoking habit does not preclude him from having joint physical care of Ariana.

Stable Environment and Prior Physical Care. Heidi argues joint physical care is inappropriate because she is "more prone to maintain a stable environment" for Ariana and she has been Ariana's primary caretaker since birth. She also argues Matthew's prior use of marijuana reflects on his inability to use proper judgment.

Heidi's contention that she would be able to provide a more stable environment for Ariana is contradicted by the record. Heidi has moved Ariana several times since she was born. Throughout the course of these moves, she has lived with two different men and spent time in a shelter for abused women. Conversely, Matthew has held the same job for almost three years. He is in a stable relationship, and he lives in a large home he purchased with his fiance.

At trial, Matthew admitted that he used marijuana in the past, but insists that he does not do so now. Testimony from his fiance and his mother reinforce that Matthew is now a "family man" and that he has grown past that immature

phase in his life. While we find Matthew's prior drug use concerning, we find nothing in the record to suggest that he has recently smoked marijuana or that he will do so in the future.

Based on our de novo review of the record, we are unable to say an award of joint physical care is not in Ariana's best interests. The record shows Matthew to be an active and caring father. Although Heidi has more primary care experience in specific relation to Ariana, Matthew has ample experience caring for both Ariana and his other child.

IV. Attorney Fees

Both parties seek attorney fees for this appeal. An award of appellate attorney fees is not a matter of right, but rests within our 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 was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). After considering these factors, we decline to award appellate attorney fees to either party. Heidi shall bear the costs of this action.

V. Conclusion

Having considered all issues presented on appeal, whether or not specifically addressed in this opinion, we find the custody and placement provisions set forth by the district court are appropriate.

AFFIRMED.