

IN THE COURT OF APPEALS OF IOWA

No. 7-718 / 07-0814
Filed January 16, 2008

**IN RE THE MARRIAGE OF CHRISTINE MARIE WEBER
AND JAMES MICHAEL WEBER**

**Upon the Petition of
CHRISTINE MARIE WEBER,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
JAMES MICHAEL WEBER,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Johnson County, Mitchell E.
Turner, Judge.

Christine Weber appeals and James Weber cross-appeals from the
physical care provisions of the trial court's decree dissolving their marriage.

AFFIRMED AS MODIFIED AND REMANDED.

Sharon A. Mellon of Mellon & Spies, Iowa City, for appellant.

Randall B. Willman of Leff Law Firm, L.L.P., Iowa City, for appellee.

Heard by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

Christine Weber appeals and James Weber cross-appeals from the physical care provisions of the trial court's decree dissolving their marriage. We affirm as modified and remand.

I. Background Facts and Proceedings

Christine and James were married in 1996. They have three children—Alexis, born in 1996; Mikayla, born in 1998; and Jacob, born in 2003. At the time of trial, Christine was thirty-four years old. She was employed as a part-time nurse at the University of Iowa Hospitals. James was forty years old. He was employed as a pharmaceutical consultant, salesman, and trainer with Millennium Pharmaceuticals, Inc.

On October 14, 2005, Christine filed a petition for dissolution of marriage, requesting temporary and permanent primary physical care of the children. The trial court's December 1, 2005 order awarded Christine temporary primary physical care of the children and James liberal visitation. The trial court's March 23, 2007 dissolution decree granted James's request for joint physical care and denied Christine's request for primary physical care of the children. The trial court's decree provides:

Historically, James and Christine have worked together very admirably to accommodate each other's schedules and still provide superior care for all of their children. While it is true that Christine provided more than 50 percent of the daily care of the children in recent years, James has always provided significant, meaningful, and excellent care of the children as well. Contrary to the Petitioner's assertions, James is not a "Daddy come lately" in the lives of his children, nor, so far as the Court can see, has he placed his desires above the best interests of his children. . . . This Court is very confident that these parties absolutely have the ability to communicate with one another in a respectful and nondictatorial

fashion so as to accommodate (if necessary) each other's work schedules in the future, just as they have in the past.

. . . Without recounting the specifics, the Court finds that both Christine and James are bonded to and have superior relationships with all three children. Further, the Court finds from the testimony adduced at trial that all of the children love and are bonded to each of their parents. . . . Christine's complaint that James only encourages those activities in which he, personally, has an interest has not been borne out by the evidence. This Court's primary concern in evaluating the custodial status issue, quite frankly, is Christine's repeated sentiment that she deserves to be awarded primary physical care of the children (testifying in at least one instance that she should really get sole custody of the children because of all of the aggravation and turmoil and that James has selfishly put her through), and that she has "earned" the right to be the children's primary caretaker. These sentiments are disturbing. The custody and custodial access schedule for these children should neither be considered to be a reward for alleged good conduct, nor a punishment for perceived bad conduct. Christine has somewhat inflexibly adopted the position that whatever is in her best interests or the best interests of her family is automatically in the best interests of the children. This belief is not necessarily accurate and appears to have led to many of the minor communication problems which Christine cites as being an impediment to a shared care arrangement. Based upon the demeanor of the parties testifying during this trial, this Court believes that once some ground rules are established by this Decree, the parties will have little difficulty communicating with one another as they have for years in the past with respect to the children, in a respectful and nondictatorial fashion by both parties. No valid reason exists to deny James' request for a shared-care arrangement. Stated differently, this Court believes that both Christine and James are excellent parents and that the children should have the maximum opportunity to spend time with both of them without one parent granting or withholding access to the children based upon the myopic perception of how that parent is being treated.

Based on these findings of fact, the trial court ordered the following weekly care schedule: Mondays and Tuesdays with Christine, Wednesdays and Thursdays with James, with each parent having the children every other Friday, Saturday, and Sunday. The trial court also ordered an alternating holiday care schedule.

On appeal, Christine claims the trial court erred in denying her request for primary physical care of the children and in awarding joint physical care of the children. On cross-appeal, James claims (1) the trial court's award of joint physical care of the children should be affirmed and (2) if shared care is not in their best interests, he should be awarded primary physical care.

II. Standard of Review

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Merits

"Joint physical care" means

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 the other parent.

Iowa Code § 598.1(4) (2005). If the trial court awards joint legal custody to both parents, the trial court may, upon the request of either parent, award joint

physical care of the children. *Id.* § 598.41(5)(a) (Supp. 2005). If the trial court denies the request, the trial court must specifically find and conclude that awarding joint physical care is not in the best interests of the children. *Id.*

The focus is on what is in the best interests of the *children*, not on the perceived fairness to the *parents*. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 1997). “The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity.” *Id.* at 695-96.

In making this determination, our supreme court recently devised a nonexclusive list of factors to be considered whereby no one factor is determinative. *Id.* at 697. The factors are whether one parent was the primary caregiver, “the ability of the spouses to communicate and show mutual respect,” the degree of conflict between the parents, and “the degree to which the parents are in general agreement about their approach to daily matters.” *Id.* at 696-99.

Where the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In such cases, “stability and continuity of caregiving are important factors. . . .” *Id.* at 696. These factors favor a parent who was primarily responsible for physical care of the children. *Id.* Also relevant are the factors listed in Iowa Code section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974). *Id.* at 696. Finally, we must examine the unique facts and circumstances of each case. *Id.* at 700.

Christine argues the *Hansen* factors weigh against an award of joint physical care and in favor of awarding her primary physical care of the children.

She cites her dominant role as the children's primary care provider during the marriage, as well as James's limited interest and experience in attending to the children's primary care, medical, and educational needs. Christine also cites the parties' failure to constructively communicate or otherwise amicably resolve visitation issues while this case was pending. Christine blames the parties' resulting conflict on James's lack of respect for her personal and parental autonomy. Lastly, Christine cites differences in the parties' approaches to daily parenting matters. For example, she claims James imposes his avocational preferences on the children and favors the children who share his interests in athletics and outdoor activities while ignoring the other children's interests in activities Christine prefers.

On the other hand, James argues the *Hansen* factors weigh in favor of an award of joint physical care. Alternatively, James argues he should be awarded primary physical care should we decide not to affirm the trial court's award joint physical care. The gist of his arguments is Christine has dramatically understated his primary care interest and experience and overstated the severity and implications of the parties' disagreement over physical care and visitation issues while this case was pending. James also claims Christine has attempted to sabotage his relationship with the children by arbitrarily denying his requests for access to the children beyond that specified in the temporary custody order.

As noted earlier, the trial court concluded it was in the children's best interests to award the parties joint physical care. Based on our de novo review of the record, we conclude otherwise.

Contrary to James's assertions, the evidence indicates Christine was the children's predominant primary caregiver during the marriage. Most notably, Christine reduced or otherwise changed her employment schedule so she could spend more time with the children while James was away on business. The evidence also indicates Christine was more familiar with and assumed virtually full responsibility for addressing the children's education and medical care needs. While James was generally supportive of Christine's primary care efforts, he has not historically contributed to the children's physical care in the same proportion as Christine.

We additionally find James has understated the severity and implications of the parties' inability to constructively communicate and resulting conflicts concerning physical care issues while this case was pending. The record includes multiple instances of hostile confrontations and exchanges of incivility between the parties. While each blames the other, we find it sufficient to note that both must share responsibility for the level of tension and hostility in their relationship. More importantly, the level of anger and conflict between the parties can and has negatively affected the children's emotions and behaviors.

In addition to our conclusion that the *Hansen* factors weigh against an award of joint physical care, we also find the record contains additional and compelling evidence supporting an award of physical care to Christine. Dr. Payne, a psychologist who interviewed all of the children, expressly noted her reservations about the proposed joint care schedule and its negative implications for the children's educational development. Dr. Payne also intimated, if not

expressly stated, her preference for the physical care arrangement established by the court's temporary custody order.

We, for all of the foregoing reasons, find the children's long-term best interests are better served by placing their physical care with Christine. We accordingly affirm the trial court's award of joint legal custody and modify the physical care provisions of the decree by awarding Christine primary physical care of the children. Because our resolution of the physical care issues will require modification of the decree's child support, visitation, and related provisions, we remand those issues to the trial court for further proceedings in conformity with our opinion. While we do not instruct the trial court on the resolution of these issues, the trial court is encouraged to consider the children's school calendar in structuring the modified decree's physical care and visitation provisions. Additionally, we reiterate the trial court's admonition to the parties concerning their obligation to support the children's relationship with the other parent.

We have carefully considered the remaining issues and arguments raised by the parties on appeal and conclude they are without merit or are controlled by the foregoing.

IV. Appellate Attorney Fees

"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 making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d

561, 568 (Iowa 1999). Based on these factors, we decline to award either party appellate attorney fees. Costs shall be shared equally by the parties.

AFFIRMED AS MODIFIED AND REMANDED.