IN THE COURT OF APPEALS OF IOWA

No. 8-475 / 07-1860
Filed August 13, 2008

IN RE THE MARRIAGE OF STEPHANIE LYNN WHITMORE AND RODNEY WAYNE WHITMORE

Upon the Petition of
STEPHANIE LYNN WHITMORE,
Petitioner-Appellee,

And Concerning
RODNEY WAYNE WHITMORE,
Respondent-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

A father appeals the child custody provisions of a dissolution decree. **AFFIRMED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Barry S. Kaplan and Melissa Nine of Kaplan & Frese, L.L.P., Marshalltown, for appellee.

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

VOGEL, J.

Rodney Whitmore appeals from the decree dissolving his marriage to Stephanie Whitmore. Rodney contends that he and Stephanie should have been granted joint physical care of their daughter. We affirm.

Rodney and Stephanie were married in June 2002. Their marriage resulted in one child: Sadie, born in July 2003. In September 2006, Stephanie filed a petition for dissolution of marriage. Subsequently, Rodney moved out of the family home. During the pending litigation, the parties agreed Sadie would stay in the marital home with Stephanie and Rodney would have visitation part of the day on Tuesdays and from Thursday morning to Saturday at 2:00 p.m. This arrangement accommodated both of their work schedules. Rodney is a Marshalltown police officer and currently works Saturday through Wednesday from 2:45 p.m. to 11:00 p.m. Stephanie is a child development specialist and works Monday through Friday from 8:00 a.m. to 4:30 p.m.

Prior to the dissolution hearing, Rodney and Stephanie reached an agreement as to most matters, but did not agree as to physical care of Sadie. A hearing was held in August 2007, during which Rodney requested joint physical care and Stephanie requested Sadie be placed in her physical care. The district court entered a decree dissolving the parties' marriage, which granted Rodney and Stephanie joint legal custody, with Stephanie having physical care and Rodney having visitation. Rodney appeals seeking joint physical care.

We review the provisions of a dissolution decree de novo. Iowa R. App. P. 6.4; *In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). However, we recognize that the district court was able to listen to and observe the parties

and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.14(6)(*o*).

Rodney asserts that the district court erred in not granting joint physical care of Sadie. In determining whether to award joint physical care or physical care with one parent, the best interests of the child remains the principal consideration. *Hansen*, 733 N.W.2d at 695. The district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2007), as well as other nonexclusive factors enumerated in *Hansen*, 733 N.W.2d at 696-99, and *In re Marriage of Winter*, 233 N.W.2d 165, 166-67 (Iowa 1974). *See Hansen*, 733 N.W.2d at 698 (holding that although Iowa Code section 598.41(3) does not directly apply to physical care decisions, "the factors listed [in this code section] as well as other facts and circumstances are relevant in determining whether joint physical care is in the best interest of the child"). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *Hansen*, 733 N.W.2d at 699.

In the present case, we agree with the district court's finding that joint physical care is not in Sadie's best interest. Stephanie has been Sadie's primary caretaker since Sadie's birth. While Stephanie acknowledged that Rodney is an

involved parent, the record demonstrates that Stephanie has been the one primarily responsible for handling Sadie's day-to-day needs. *See id.* at 696 ("In considering whether to award joint physical care where there are two suitable parents, stability and continuity of caregiving have traditionally been primary factors."). Additionally, as the primary care parent, Stephanie has demonstrated her willingness to involve Rodney in day-to-day decisions, describing Sadie's care as a "team approach."

Furthermore, Rodney's work schedule had changed throughout the years and may again change depending on the police department's needs. Although an irregular work schedule does not necessarily preclude joint physical care, it was a consideration of the district court in finding Stephanie would provide Sadie with more stability. Rodney introduced three different joint physical care schedules that were based on the possibility of him working a day, evening, or night shift. Even though Rodney requested joint physical care, his changing and difficult work schedule may not always be supportive of that arrangement. Indicative of this was Stephanie's testimony that Rodney had stated that if his work schedule conflicted with his shared time with Sadie, he would utilize a babysitter in order to facilitate a joint physical care schedule. *See id.* at 695 ("[T]he quality, and not the quantity, of contacts with the non-custodial parent are the key to the wellbeing of children."). While Rodney complains that the court provided no supporting rationale for determining that "[j]oint physical care may be disruptive to Sadie's emotional development," it did so only after considering multiple factors, including the parties' work schedules and their historical care giving of Sadie. *See id.* at 697 ("[I]mposing a new physical care arrangement on

children that significantly contrasts from their past experience can be unsettling, cause serious emotional harm, and thus not be in the child's best interest.").

It appears from the district court's ruling that this was a close case and a difficult decision. Sadie is fortunate to have two parents who love, care for her, and are attentive to her needs. The parties were both satisfied with the visitation and care giving schedule they were using prior to trial and the custody evaluator essentially affirmed that arrangement, concluding "[t]herefore, it is recommended that legal and physical care of Sadie be shared within the bounds of the current custody and visitation arrangement." The district court granted Rodney the visitation as currently scheduled along with birthday, holiday, and summer vacation visitation. Additionally, the district court stated: "Rodney shall be entitled to any additional visitation that can be agreed upon by the parties." The parties have shown they have previously been able to work together to implement visitation and support the other parent's relationship with Sadie. We conclude that the district court put forth a physical care and visitation arrangement that is in Sadie's best interests and therefore affirm the district court.

Stephanie requests 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). The district court found that Stephanie has an annual income of $30,000 and

Rodney has an annual income of $42,000. Having considered the appropriate factors, we grant Stephanie $3000 appellate attorney fees. Costs on appeal are assessed to Rodney.

AFFIRMED.