

IN THE COURT OF APPEALS OF IOWA

No. 8-670 / 07-1993
Filed November 13, 2008

**IN RE THE MARRIAGE OF JOAN M. ZUBROD
AND RONALD W. ZUBROD**

**Upon the Petition of
JOAN M. ZUBROD,
n/k/a JOAN M. FLECKSING,**
Petitioner-Appellant,

**And Concerning
RONALD W. ZUBROD,**
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Denver D. Dillard,
Judge.

Joan Zubrod, n/k/a Joan Flecksing, appeals the physical care provisions
of the district court's decree dissolving her marriage to Ronald Zubrod.

AFFIRMED.

Stephen B. Jackson and Stephen B. Jackson Jr., Cedar Rapids, for
appellant.

Karen A. Volz of Ackley, Kopecky & Kingery, Cedar Rapids, for appellee.

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

DOYLE, J.

Joan appeals the physical care provisions of the district court's decree dissolving her marriage to Ronald. She contends the court erred in not placing "primary physical care"¹ of the parties' daughter with her and instead granting Ronald's request for joint physical care. Upon our review, we affirm.

I. Background Facts and Proceedings.

Joan and Ronald were married in August 2003. At the time Joan was twenty-six years of age and Ronald was forty-six. This was Joan's first marriage and Ronald's third. One child was born to the marriage, Olivia, who was born in February 2005. The parties separated in October 2006, the day after Ronald filed a petition for a domestic abuse protective order. The protective order was dismissed at a hearing because there had been no act of physical violence. Joan then filed a petition for dissolution of marriage and an application for temporary custody, child support, and medical support. Between the time they separated and entry of the temporary order, Joan and Ronald participated in a shared care arrangement of Olivia. After hearing on the motion for temporary custody, the district court found:

Joan and Ron both obviously love Olivia a great deal. Both are capable parents. They each are capable of providing consistent, nurturing, safe care for Olivia. Both have done so in the past. Regardless of Joan's concerns that a shared care arrangement between her and Ron cannot work, both she and Ron have demonstrated that it can. Each [is] to be commended for their efforts in making it work. Despite their personal differences, they have managed to maintain a high enough degree of civility and

¹ Although the term "primary physical care" is not defined in Chapter 598 (Supp. 2005) of the Code of Iowa, we nevertheless use the term in this opinion since it was used by the parties and the district court.

communication with each other to foster a shared care environment.

The temporary order granted joint legal custody and shared physical care of Olivia. The order's parenting schedule for the child's living arrangements involved frequent transfers of custody. Over the next ten months under the court-ordered temporary shared care arrangement, Olivia seemed to be thriving and was a happy, active child. It was obvious she loved both her parents.

Trial was held over three days in September 2007. The main disagreement between the parties at trial was physical care of Olivia. Joan requested primary physical care. Ronald requested the court continue the shared physical care arrangement. The district court entered a decree dissolving the parties' marriage and granted Joan and Ronald joint legal custody and joint physical care of Olivia. The care schedule supplement to the decision issued by the court provided:

1. The regular care schedule shall be applied for Olivia living with [Ronald] as follows:
 - A. October 28, 2007 – January 1, 2009
 - (1) Beginning Thursday, November 1, 2007, and every Thursday thereafter from Thursday at 4:30 p.m. to Friday at 4:30 p.m.
 - (2) Alternating weekends commencing at 4:30 p.m. on Friday, November 2, 2007, to 4:30 p.m. on Sunday, November 4, 2007.
 - B. January 1, 2009 – August 1, 2010
 - (1) Every Tuesday at 4:30 p.m. to Wednesday at 4:30 p.m.
 - (2) Every Thursday at 4:30 p.m. to Friday at 4:30 p.m.
 - (3) Alternating weekends commencing at 4:30 p.m. on Friday to 4:30 p.m. on Sunday.
 - C. August 1, 2010, and thereafter until Olivia reaches majority Olivia shall live with [Ronald] for seven days commencing at 5:00 p.m. on Sunday, August 1, 2010, and ending on the following Sunday at 5:00 p.m. Olivia shall then live with [Joan] for an equivalent

- seven-day period and the parties shall alternate the seven-day care schedule thereafter, with the exception of holidays and summer care schedules.
2. The summer care schedule shall apply during the months of June, July and August of the years 2008, 2009 and 2010. [Ronald] shall have care of Olivia for a total of four weeks which shall be in seven-day increments with no more than two consecutive seven-day increments. The summer visitation increments shall include the regular care schedule previously described. [Ronald] shall notify [Joan] of the summer care schedule increments on or before May 15 of each respective year. A failure to comply with the notice requirement shall apply to selection of increment dates and shall not result in a reduction of care schedule time. The weekend increments shall commence at 5:00 p.m. on a Sunday and end at 5:00 p.m. on the following Sunday.
 3. Holiday care schedule shall be divided as follows:
 - A. In the even-numbered years [Ronald] shall have Olivia on Easter, Fourth of July, Thanksgiving and New Year (beginning New Year's Eve Day at 8:00 a.m. until January 2nd at 8:00 a.m.); and [Joan] shall have Olivia on Olivia's birthday, Memorial Day, Labor Day and Christmas (beginning Christmas Eve Day at 8:00 a.m. until December 26th at 8:00 a.m.) In the odd-numbered years this holiday schedule shall alternate. Unless otherwise agreed upon by the parties, the holiday visitation shall be from 7:00 a.m. to 7:00 p.m. The care schedule for July 4 shall commence at 7:00 a.m. and shall end at 10:30 p.m.
 4. Olivia shall be with [Joan] on Mother's Day each year from 7:00 a.m. until 7:00 p.m. Olivia shall be with [Ronald] on Father's Day each year from 7:00 a.m. until 7:00 p.m.
 5. The parties are further ordered and encouraged to cooperate with each other and be flexible in the implementation of the care schedule when circumstances justify variations, and the parties are further encouraged to consider Olivia's activities in their implementation of the schedule.

On appeal Joan claims the district court erred in failing to place primary physical care of Olivia with her. She maintains joint physical care is not in Olivia's best interests and they would be better served if Joan had primary physical care. Ronald responds that joint physical care is in Olivia's best

interests and that evidence shows Olivia has thrived under the shared care arrangement.

II. Scope and Standards of Review.

We review the provisions of a dissolution decree de novo. Iowa R. App. 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 children. Iowa R. App. P. 6.14(6)(o); *Hansen*, 733 N.W.2d at 695 (stating that in determining whether to award joint physical care or physical care with one parent, the best interests of the children remains the principal consideration).

III. Joint Physical Care.

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. Iowa Code § 598.1(4) (2007). The rights and responsibilities include, but are not limited to, shared parenting time with the child, maintaining homes for the child, and providing routine care for the child. *Id.* With joint physical care “neither parent has physical care rights superior to the other parent.” *Id.* Iowa Code section 598.41(5)(a) provides:

If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent If the court denies the request for joint

physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

Any consideration of joint physical care must still be based on Iowa's traditional and statutorily required child custody standard of the best interest of the child.

See Iowa Code § 598.41(5)(a); *Hansen*, 733 N.W.2d at 695.

Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child. 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.

Hansen, 733 N.W.2d at 695 (citing *Phillips v. Davis-Spurling*, 541 N.W.2d 846, 847 (Iowa 1995)).

With this consideration in mind, our supreme court recently devised a nonexclusive list of factors to be considered when determining whether a joint physical care arrangement is in the best interests of the children. *Id.* at 697-99.

The factors are (1) "approximation"—what has been the historical care giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) "the degree to which the parents are in general agreement about their approach to daily matters."

In re Marriage of Berning, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (quoting *Hansen*, 745 N.W.2d at 697-99).

A. Approximation.

Joan argues that her historical role as Olivia's primary physical caretaker warrants a finding that she should be awarded primary physical care of Olivia. In addressing the issue, the district court found:

The evidence shows that the care of Olivia prior to the separation of the parties was maintained in a relatively traditional

way. [Joan] devoted more of her time to the care of Olivia than did [Ronald]. Both because of her decision to use “reverse cycle feeding” (a form of breast feeding) and because fewer of her hours were devoted to her employment than were [Ronald’s]. [Joan] is employed by the Department of Natural Resources as the manager at the Pleasant Creek Nature area and has been since before Olivia’s birth. [Ronald] is now employed as a customer service mechanic and was previously a lineman for Alliant Energy. In addition, [Ronald] raises bison, maintains the farm ground upon which they are raised, and rents two rural residences, which are a part of the real estate complex owned by him. Following the separation, [Ronald] has devoted substantially more time than before to Olivia’s care and needs. The record indicates that [Ronald] has not used surrogates, such as daycare providers, to any greater extent than has [Joan].

Accordingly, Joan’s role as the predominate caretaker prior to the parties’ separation is a factor in this case, but it is not an overwhelming factor mandating that she be awarded physical care of Olivia.

B. Communication.

Joan argues the parties do not have the communication or the mutual respect sufficient to support an order of joint physical care. The district court found “even though the parties have a very poor communication relationship at this time, they have operated within the court’s temporary custody order and have not involved Olivia in their disagreements.” Joan testified that the lack of communication with Ronald was partly due to her fault. She further testified that if there were a medical problem or other problem she would always communicate with Ronald and would continue to do so in the future—“Always for Olivia’s best interests and benefit.” Ronald testified communication could be better, but would not characterize communication as “not good.” After a thorough review of the record, we find there is no reason to conclude the existing communication or

level of respect between the parties would be a significant impediment to joint physical care.

C. Conflict.

Joan devotes considerable effort arguing the degree of conflict and lack of agreement between the parties does not support an order of joint physical care. The trial court noted the parties have a poor relationship, but they had operated within the court's temporary custody order and had not involved Olivia in their disagreements. Additionally, the trial court concluded that "[w]hile [Joan] would prefer to have as little contact with [Ronald] as possible, the reality is that [Joan] and [Ronald] can work together with Olivia's best interests in mind." Upon our review of the record, we agree with the district court.

Additionally, the trial court found "[i]t was exceptionally clear to the court that both parties have bonded with Olivia and are devoted to her. The record further reflects that Olivia has very positive feelings for both parents." As soon as she saw either parent, Olivia's eyes would light up. Olivia's daycare provider testified that it was obvious that Olivia loved both her parents. The court noted that Olivia's welfare was of prime importance. It appeared to the court at that time that Olivia was doing well and had a good daycare provider. The court noted, concerning the custody and welfare of Olivia, that "the witnesses called by the parties helped the court conclude that Olivia is a happy, healthy, well-adjusted, and loved child." The court was convinced that shared care was appropriate and that the shared care schedule should be implemented in phases consistent with Olivia's age and development. We agree and share the district

court's confidence that the parties will cooperate in the future and provide a healthy and loving environment for Olivia.

D. Approach to Daily Affairs.

There does not appear to be any evidence to indicate that Joan and Ronald cannot agree on the daily matters of child care.

IV. Conclusion.

After reviewing all of the evidence and applying the appropriate factors, we find the district court properly awarded joint physical care in this case. Accordingly, we deny Joan's request for physical care and affirm the district court's award of joint physical care.

AFFIRMED.