IN THE COURT OF APPEALS OF IOWA

No. 8-687 / 08-0420
Filed January 22, 2009

IN RE THE MARRIAGE OF MICHELLE ELAINE STANFORD AND CHARLES LEONARD STANFORD

Upon the Petition of
MICHELLE ELAINE STANFORD,
Petitioner-Appellee,

And Concerning
CHARLES LEONARD STANFORD,
Respondent-Appellant.

Appeal from the Iowa District Court for Buchanan County, Thomas N. Bower, Judge.

Charles Stanford appeals from the trial court's decree awarding Michelle Stanford physical care of their two children. He contends the evidence supports an award of physical care to him or alternatively an award of joint physical care. He also requests an increased extraordinary visitation credit against his child support obligation. **AFFIRMED.**

Daniel Swift, Manchester, for appellant.

John Wood, Waterloo, for appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

HUITINK, S.J.

Charles Stanford appeals from the trial court's decree awarding Michelle Stanford physical care of their two children. He contends the evidence supports an award of physical care to him or alternatively an award of joint physical care. He also requests an increased extraordinary visitation credit against his child support obligation. We affirm.

I. Background Facts and Proceedings.

Charles and Michelle were married in May 1998. They have two children, Jonathan (age eight) and Brandon (age six).

Michelle filed for a dissolution of marriage in January 2007. On February 26, 2007 the trial court entered an order awarding Michelle physical care subject to Charles's right to visitation as specified in the order.

At trial Charles and Michelle both requested physical care of the children. Charles also requested the court consider an award of joint physical care as an alternative to awarding physical care to Michelle. The trial court resolved the parties' conflicting physical care demands in favor of Michelle. The district court's decree provides:

> The Court determines that [Michelle] has been the primary caretaker of the children. She has seen to their daily needs and has presented herself a far superior parent to [Charles]. In addition to the Court's concerns of discipline and inappropriate language, the Court also has concerns about [Charles's] lack of anger management. Although it does appear as though [Charles] has improved in that area, as well as in the area of not placing the children in the middle of this dissolution, the Court finds that it is in the children's best interests that their physical care be placed with [Michelle].

Michelle and Charles were granted joint custody of Jonathan and Brandon. Michelle was granted physical care subject to the following visitation schedule:

> [Charles] shall have visitation of two days per week when he is not working and shall have visitation with the children on weekends when he is not working. A weekend is defined from Friday after school at 3:00 p.m. until Sunday at 3:00 p.m.

In its February 13, 2008 ruling on Charles's posttrial motion to amend, enlarge, and modify the decree, the court addressed Charles's request for joint physical care. The court stated its reasons for denying joint physical care were:

> Contrary to the statements in paragraph N and O of [Charles's] motion, the Court is required to consider shared or joint physical care, but the Court is not required to grant shared/joint physical care as noted in the Court's ruling. This Court again finds that it is not in the best interests of the children to move every two days from [Charles's] home to [Michelle's] home. Although the parties do live in the same town, the Court finds that the children would have no sense of belonging to one home or the other. As a result, [Charles's] request for a shared/joint physical care arrangement is denied.

Following a series of posttrial motions concerning the extent of Charles's visitation rights and resulting extraordinary visitation credits against his child support obligation, the court entered the following ruling:

> [Charles] has read the decree to mean that he is entitled to 172 days of overnight visitation with the children and as a result would be entitled to a 25 percent reduction in his child support obligation. [Michelle] reads the court's decree to mean that [Charles] will have the children overnight for approximately 128 days and as a result would receive a 15 percent reduction in his support for a child support payment of $728.45 per month.
>
> The court, having reviewed all of the pleadings and the arguments of counsel, determines that it was the court's intention to allow [Charles] to have 128 days of visitation, therefore, reflecting a 15 percent reduction in his child support obligation. As the decree indicates, [Charles] has an unusual work schedule working two days on and two days off. The court indicated in its ruling that he should have two days of visitation every week that he is not working and the weekends when he is not working. The court's intention

> would be shown in taking the month of March, 2008. Assuming, for the sake of argument, that the respondent worked Saturday, March 1, and Sunday, March 2, he would have March 3 and March 4 and would return to work March 5 and 6. In such a scenario he would have one full weekend, meaning Saturday and Sunday, where he would not work and would have the children's attention for the entire day. This was the court's intention when the decree was issued. Taking two days per week for 52 weeks and one weekend per month, the weekend being Saturday and Sunday of each month, [Charles] would have 128 days of overnight visitation. As a result, [Charles] is entitled to a reduction of 15 percent in the child support obligation previously ordered.

As noted earlier, Charles appeals, requesting physical care or, alternatively, joint physical care of the children. He also requests an extraordinary visitation credit based on his interpretation of the extent of his visitation rights granted in the decree as amended.

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*). Prior cases have little precedential value, and we must base our decision on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Merits.

Physical Care. When a district court dissolves a marriage involving minor children, the court must determine who is to have legal custody of the children and who is to have physical care. "Legal custody" carries with it certain rights and responsibilities, including, but not limited to, "decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.1(3), (5) (2007). When parties are awarded "joint legal custody," "both parents have legal custodial rights and responsibilities toward the child" and "neither parent has legal custodial rights superior to those of the other parent." *Id.* § 598.1(3).

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). 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.*

Our 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.*

When joint physical care is not warranted, the court must choose one parent to be the physical caretaker, awarding the other parent visitation rights. *See generally* Iowa Code § 598.41(1)(a) (5). Under this arrangement, the parent with physical care has the responsibility to maintain a residence for the child and has the sole right to make decisions concerning the child's routine care. *See generally id.* § 598.1(7). The noncaretaker parent is relegated to the role of hosting the child for visits on a schedule determined by the court to be in the best interests of the child. Visitation time varies widely and can even approach an amount almost equal to the time spent with the caretaker parent. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). We also consider the factors listed in Iowa Code section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974). *Hansen*, 733 N.W.2d at 696. We must examine the unique facts and circumstances of each case. *Id.* at 700.

Based on our de novo review of the record, we find the foregoing factors weigh against an award of joint physical care. We share the trial court's concern about Charles's temperament and negative implications for the children's emotional wellbeing, as well as his ability to communicate and show respect for

Michelle. We also note that Michelle has been the children's primary caregiver during the marriage and the children's continued placement with her will facilitate their interests in stability and continuity of caregiving. We accordingly affirm the trial court's decree denying joint physical care and award of physical care to Michelle.

Visitation/Extraordinary Visitation Credit.

The gist of Charles's challenge to the trial court's ruling on his posttrial motions is that the trial court sua sponte modified the visitation provisions of the original decree even though that issue was not raised in the posttrial motions or properly before the court. We disagree.

The issues raised by Charles's posttrial motions included the amount of extraordinary visitation credit to which Charles was entitled. That issue implicitly, if not expressly, required the court to interpret the original decree as a predicate to the calculation of Charles's extraordinary visitation credit. As the earlier quoted portions of the relevant ruling indicate, the trial court determined that Charles is entitled to 128 days of overnight visitation and a corresponding fifteen percent extraordinary visitation credit. Because the ruling at issue was based on the trial judge's interpretation of his own decree, we defer to that interpretation and affirm on this issue. *See Peters v. Peters*, 214 N.W.2d 151, 157 (Iowa 1974) (finding a trial court's interpretation of own decree given great weight on appeal).

Michelle requests 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 award Michelle appellate attorney fees in the amount of $1000.

Costs of this appeal are assessed to Charles.

AFFIRMED.