

IN THE COURT OF APPEALS OF IOWA

No. 9-855 / 09-0331
Filed December 30, 2009

**IN RE THE MARRIAGE OF JOHN FLIBOTTE
AND JAMIE FLIBOTTE**

**Upon the Petition of
JOHN FLIBOTTE,**
Petitioner-Appellant,

**And Concerning
JAMIE FLIBOTTE,**
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Gordon C.
Abel, Judge.

John Flibotte appeals from the economic and child custody provisions of
the district court's dissolution decree. **AFFIRMED AS MODIFIED.**

Karen Dales, Council Bluffs, for appellant.

Joseph Hrvol, Council Bluffs, for appellee.

Heard by Eisenhauer, P.J., and Potterfield, J. and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, J.**I. Background Facts and Proceedings**

John and Jamie Flibotte met while on active duty in Texas and were married on June 15, 2001. Jamie gave birth to the first of the parties' two children in February of 2002. John was deployed to Iraq in December of 2002. He finished his tour of duty in Iraq and returned to Texas in July of 2003. Shortly after John's return, the parties' second child was born. In November of 2003 John ended his active duty service and moved with the children to North Carolina while Jamie completed her active duty service obligation in Texas. In July of 2004, Jamie finished her service and moved to North Carolina to join the family. Both John and Jamie remained members of the Army's inactive reserve.

In October of 2004 John and Jamie decided to move the family to Omaha, where they stayed only a short time before moving to Honey Creek, Iowa. During this time, the parties were equally responsible for caring for their two children. In January of 2006, Jamie was called back to active duty. Jamie participated in stateside training for several months, during which she visited the children as much as possible. John facilitated the reunions between Jamie and the children. After Jamie left for training, Jamie's cousin, Kerry Aschinger, Kerry's fiancé, Nathan, and Nathan's mother moved in with John to help with the children and expenses.

Jamie left for Iraq in May of 2006. John testified at trial that he informed Jamie prior to her departure for Iraq that he wanted to end their marriage. Jamie testified that she and John had an argument before she left, but they had agreed

to work things out. However, on June 22, 2006, Jamie received an email from John informing her that he wished to end their marriage.

At some point in time after Jamie was mobilized in January of 2006, John became romantically involved with Jamie's friend, Melissa. John testified that he did not begin a relationship with Melissa until after he sent Jamie the email ending their marriage. However, other testimony suggested John's relationship with Melissa began earlier, although John reportedly did not spend time with Melissa until after the children were asleep. When Jamie returned to Iowa on a two-week leave in August of 2006, John would not allow her into their marital home. Jamie visited with the children at her father's home.

While in Iraq, Jamie sustained injuries on two separate occasions when her vehicle was blown up by improvised explosive devices. After the first incident, Jamie suffered a concussion and ruptured eardrums. The second incident was more serious, and Jamie was awarded a Purple Heart after receiving shrapnel wounds to her right side.

In October of 2006, John moved to Council Bluffs with Melissa, her child, and his and Jamie's two children. John has been employed full-time with Union Pacific since March of 2007.

Jamie completed her tour of duty in May of 2007 and returned to Omaha. Jamie worked regularly until three weeks before trial when she quit her job so she could stay at home with her children and receive treatment for the injuries she incurred while in Iraq. Jamie testified that she was capable of working, but it was difficult to schedule work around her doctor appointments.

Jamie and John agreed without a court order that Jamie would have the children on weekends. John works Thursday through Monday, so this schedule was amenable to both parties. The record shows that the parties have been cooperative with one another in sharing time with the children. However, at trial, John expressed a desire that Jamie's visits with the children be reduced to every other weekend so that he could spend time with the children on the weekends after work.

On March 25, 2008, John filed a petition for dissolution of the marriage in which he requested physical care of the children with reasonable rights of visitation for Jamie. On April 25, 2008, Jamie filed an answer to the petition for dissolution of marriage in which she requested physical care of the children with reasonable and liberal rights of visitation for John. After trial the district court awarded physical care of the children to Jamie with reasonable visitation for John. The district court also ordered John to pay child support to Jamie in the amount of \$999.59 per month based on a finding that John's annual income was \$52,000 and Jamie's annual income was \$15,600. John appeals from the district court's decree arguing the district court erred in: (1) awarding physical care of the children to Jamie, (2) failing to make findings regarding the reasonableness of joint physical care, and (3) calculating the child support award.

II. Standard of Review

Our standard of review in this equitable proceeding is de novo. Iowa R. App. P. 6.907 (2009). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We give weight to the district court's findings of fact,

especially in determining the credibility of witnesses, but are not bound by them.
Iowa R. App. P. 6.904(3)(g).

III. Custody

A. Joint Custody

John argues the district court erred by failing to comply with the requirements of Iowa Code section 598.41(2)(b) (2007) by citing clear and convincing evidence that joint custody is unreasonable and not in the best interests of the children. Section 598.41(2)(b) applies to the district court's award of legal custody. See Iowa Code § 598.1(3) (defining "joint custody" as "an award of legal custody of a minor child"). Because the district court awarded joint legal custody of the children, John's argument implicates Iowa Code section 598.41(5)(a), which involves an award of joint physical care.

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.

A review of the record reveals that neither party ever requested joint physical care. John's petition for dissolution requests physical care, as does Jamie's answer to the petition. Further, both parties articulated at trial that they were seeking physical care of the children. Because neither party requested joint physical care, the district court was not required to make specific findings. See *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007) (stating no specific findings were required when one party requested physical care and the other

party abandoned his prior request for joint physical care by asking for physical care during trial and testifying that joint physical care was not appropriate).

B. Physical Care

John argues the district court's decision to award physical care of the children to Jamie is not supported by the record. When we determine physical care, the first and governing consideration is the best interests of the children. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). We consider the relevant factors outlined by Iowa Code section 598.41(3) and the Iowa Supreme Court in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). The court considers stability and continuity of caregiving as important factors, though a parent's prior role as the primary caregiver does not necessarily render that parent the primary caregiver permanently. *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). Our primary objective is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). We must also consider the willingness of each party to allow the child access to the other party. *Id.*

The district court found that if given a chance, John would diminish the amount of contact his children have with Jamie. We agree with John's assertion that this finding of the district court is not supported by the record. The record shows that John is supportive of the children's relationship with their mother. John requested at trial that the court reduce Jamie's visits so he could spend time with the children on the weekends. However, John allowed Jamie to visit

the children every weekend without a court order. He also allowed Jamie's family to visit the children every other weekend while Jamie was deployed. Jamie testified that not only was John "cordial and abiding of the time [she] had with the kids," but further that she believed if she called John and asked to see the kids, he would let her. John's past performance belies the district court's suggestion that he would not encourage the children's relationship with their mother.

The record suggests that Jamie, on the other hand, may not be entirely supportive of John's relationship with the children. John and Melissa testified that the children repeated snide and threatening remarks they claimed to have heard from their mother, although Jamie denied making any such remarks. Further, the record shows Jamie sent a threatening email to Melissa and called the Iowa Department of Human Services alleging John physically abused the children. The child abuse assessment found the incident was not confirmed and that it was unlikely the injury was caused during a time period in which John was watching the children. The record suggests Jamie's actions may be motivated by anger or retaliation against John.

The district court also found, "John's credibility is challenged by his deceitful conduct. John has had assistance with the children at every turn. Even at the present time, he is often gone before the children are prepared for school in the morning." Aside from testimony that in 2006 John occasionally left the children with a babysitter after they were asleep while he visited Melissa, the record is void of evidence to support the district court's finding that John's conduct was deceitful. Further, this conduct never placed the children in danger,

as John always ensured someone was at the house to care for the children. Though John received help from family members and friends, Jamie also received assistance, as have most parents. John leaves for work before the children are prepared for school in the morning, but Melissa ensures that the children are prepared for and taken to school. John is then available to spend time with the children in the afternoons and evenings. John's work schedule prevents him from being available at all hours of the day, but the record does not support a finding that he is careless in leaving his children in the temporary care of others.

In determining John had engaged in "deceitful conduct," the district court likely considered John's affair with Melissa while his wife was on active duty in Iraq. Although moral misconduct is a consideration in custody determinations, it is only one factor. *Wilson*, 532 N.W.2d at 495. Further, Jamie admitted to being unfaithful to John on the weekend of their engagement. We believe the timing of John's relationship with Melissa is outweighed by other factors involving the best interests of the children. See *id.*

After considering the factors described above, we determine it is in the children's best interests that John retain physical care. In deciding which parent should be awarded physical care, "the factors of continuity, stability, and approximation are entitled to considerable weight." *Hansen*, 733 N.W.2d at 700. John has had physical care of the children since October of 2006 with little help from anyone other than Melissa, who lives with John and the children. John has established a stable home for the children. The children attend school in the area, and it is in their best interests that they continue in the same school. An

award of physical care to John best provides the children with continuity and stability in their lives.

Further, at John's house, the children spend time with Melissa's daughter and their half sister. According to the record, the children all get along and share a bond with one another. "Changes in custody which separate siblings are discouraged under Iowa law." *In re Marriage of Hunt*, 476 N.W.2d 99, 102 (Iowa Ct. App. 1991). This principle applies to half siblings as well and should be considered in determining the best interests of the children. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). Disrupting John's custodial status would affect the children's relationship with their half sister.

While we recognize this result seems harsh to Jamie, who loves her children and is capable of caring for them, we believe it is in the children's best interests. See *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). ("Our focus . . . is on the long-range best interests of the child. . . . [T]he court is not attempting to reward or punish either parent when making a custody determination"). We modify the district court's award of physical care and name John as the physical custodian. We remand to the district court to determine Jamie's visitation and child support obligation. We do not retain jurisdiction. Costs on appeal are assessed to Jamie.

AFFIRMED AS MODIFIED.