IN THE COURT OF APPEALS OF IOWA

No. 1-385 / 00-1761
Filed July 18, 2001

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CLERK SUPREME COURT

IN RE MARRIAGE OF NICOLA DANETTE CULBERTSON AND CORY JOE CULBERTSON

Upon the Petition of
NICOLA DANETTE CULBERTSON,
Petitioner-Appellant,

And Concerning
CORY JOE CULBERTSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Kossuth County, Joseph Straub, Judge.

Nicola Culbertson appeals from the custody provisions of the dissolution decree. **AFFIRMED.**

Timothy Braunschweig of Braunschweig Law Firm, Algona, for appellant.

Scott Bauermeister of Fitzgibbons Law Firm, Estherville, for appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

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ZIMMER, J.

Nicola Culbertson appeals from the custody provisions of her dissolution decree. She contends the evidence does not support the trial court's decision to order a joint physical care arrangement. She claims she is best suited to meet the long-term best interests of the children as their primary care provider. Because we find the trial court's order of joint physical care is in the children's best interests, we affirm.

I. Background Facts and Proceedings. Nicola and Cory were married in 1994. They are the parents of Joseph, born in 1994, and twin sons Joshua and Justin, born in 1997. In October of 1998, the parties separated. The parties later reconciled for a time, but Nicola filed for divorce in July 1999.

During July 2000, Nicola and Cory filed a partial stipulation resolving various economic provisions of their dissolution decree. However, the parties could not reach agreement with respect to their children. As a result, a trial was held to resolve child custody and other issues.

In September 2000, the trial court issued a dissolution decree incorporating the agreements set forth in the partial stipulation and awarding the parties joint legal custody and joint physical care of the children. Nicola was to have physical care of the children from 10 a.m. Wednesday to 8 p.m. Saturday or 8 a.m. Sunday in alternating weeks. Cory was awarded physical care from 8 p.m. Saturday until 10 a.m. Wednesday, but every other week he would not have the children until 8 a.m. Sunday. Additionally, Nicola was awarded visitation on Mother's Day and her birthday, and Cory was to receive visitation on Father's Day and his birthday. Provisions were also made for holiday and summer

visitation. Nicola was ordered to maintain health coverage on the children but neither party was awarded child support. Finally, the decree prohibited either parent from moving the children out of their school district without prior approval from the court.

Nicola appeals. She contends the evidence showed she is best suited to be the primary caregiver of the children. She also claims the physical care provision of the dissolution decree denies her right to play a practicing role in providing for the religious training of her children. She contends the decree's requirement that neither parent shall move the children from the Sentral school district interferes with the parties' right to travel and decide what is in the best interests of their children. Finally, Nicola argues that statements she made to her counselor and her doctor regarding Cory's abusive nature should have been presumed to be truthful and accurate. Cory contends joint primary care is in the best interests of the children, but if the court determines otherwise, he should be given primary physical care. Both parties request an award of appellate attorney fees.

II. Joint Physical Care. We review dissolution decrees de novo. *See In re Marriage of Knickerbocker,* 601 N.W.2d 48, 50-51 (Iowa 1999). We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. *Id.* In doing so, we give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. *Id.* at 51.

In any custody determination, the primary consideration is the best interests of the children. Iowa R. App. P. 14(f)(15); *In re Marriage of Murphy,* 592

N.W.2d 681, 683 (Iowa 1999). The court's objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683. We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *See* Iowa Code § 598.41(3) (1999); *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). These include the characteristics of the parents, as well as the capacity and desire of each parent to provide for the needs of the children. *Id.*

The trial court awarded the parties joint physical care of their children. Joint physical care is defined as

> 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 those of the other parent.

Iowa Code § 598.1(4). Although joint physical care was once strongly disfavored by the courts, the Iowa legislature has proclaimed it a viable disposition of a custody dispute. *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998); *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). An award of joint physical care is proper where "such action would be in the best interest of the child and would preserve the relationship between each parent and the child. . . ." Iowa Code § 598.41(5).

Nicola contends she is best suited to meet the long-term best interests of the children as primary care provider. Nicola first argues Cory intentionally withheld funds for child support in July and August of 1999. She claims he did so in an attempt to retaliate against her for forcibly removing him from her home.

She believes Cory's action militates against him being awarded shared primary physical care.

During the parties' initial separation, Cory voluntarily gave Nicola $100 per week to help support the children and paid one-half of some of the children's bills. After Nicola filed for divorce, Cory did not make any payments to her, instead waiting for the court to set the amount of temporary child support he was to pay. In its temporary support order of August 16, 1999, the court did not require Cory to make any payments for past child support. Cory was current with respect to all court-ordered child support at the time of trial. As a result, the trial court found Nicola's claim to be a non-issue. We agree.

The principal focus of Nicola's argument on appeal centers on her accusations that Cory has a bad temper, is verbally abusive, and tries to control her. Nicola also accuses Cory of one incident of physical abuse. A history of domestic abuse by one parent is a factor in making child custody determinations under Iowa Code section 598.41(3)(j). In assessing what is sufficient to constitute a history of domestic abuse, we weigh the evidence of abuse, its nature, severity, repetition, and to whom directed, not just count the number of incidents. *In re Marriage of Forbes,* 570 N.W.2d 757, 760 (Iowa 1997). We first note the allegations of emotional abuse surfaced for the first time during the dissolution proceedings. Earlier medical records contain no evidence of such abuse, and no complaints by Nicola that she was suffering from stress. The single incident of physical abuse alleged by Nicola was never reported to the authorities and is denied by Cory. The trial court found the evidence concerning this allegation inconclusive and concluded Nicola failed to show by a

preponderance of the evidence that Cory abused her. Upon our de novo review of the record, we agree.

Nicola also claimed that on one occasion Cory hit Joseph hard enough to leave a purple bruise covering half of his bottom. Cory did admit that in November of 1998 he spanked Joseph's wet bottom, which left a red mark. The trial court found that Nicola exaggerated when describing the mark left on Joseph's bottom when Cory spanked him. Because the trial court had the benefit of observing the parties at trial, we do not disturb this finding. Furthermore, this is the only incident of physical abuse of any of the children that Nicola has ever alleged. We find nothing else in the record to indicate Cory was abusive toward the children.

The trial court did note that Cory has had some problems with anger management. Some people in the community observed this. For example, on July 3, 1999, Cory got into an argument with a friend of Nicola's and some shoving occurred between Cory and Nicola's brother. However, it was Cory who called the police and he agreed to leave Nicola's home at the officer's suggestion. The trial court concluded Nicola's drinking contributed as much to this incident as Cory's anger.

Nicola also cites to one occasion in October of 1999 when Cory attempted to terminate his employment after an argument with his supervisor. However, Cory revoked his termination notice later that same day, citing the difficulties in his personal life as a factor in making such a hasty decision. This one incident did not affect the children as Cory continues to be employed at Murphys Family Farms with some supervisory responsibilities.

While Nicola has a number of complaints concerning Cory, the record reveals that she has also demonstrated some questionable behavior. For example, the record shows that Nicola frequently sleeps late and on many occasions the children have been downstairs unsupervised while she was still in bed. We agree with the district court that such behavior is unacceptable given the age of her children. Other examples of inappropriate behavior cited by the trial court need not be repeated here.

While neither party is a model parent, the district court found them both to be competent caretakers of the children. Each party admits the other is a good parent and loves the children. A home study conducted by the Department of Human Services concluded both parties are capable parents.

Nicola is employed by Snap-On-Tools. She works Mondays through Fridays from 3 p.m. until 11 p.m. During the time that Nicola had temporary physical care, the children were left at day care during their mother's shift. Nicola would pick up the sleeping children at approximately 11:15 p.m. and would have to put them back to bed again when they arrived home fifteen minutes later. Meanwhile, Cory is employed by Murphy Family Farms where he works Wednesdays through Saturdays from 7 a.m. until 7 p.m. In reaching its decision to order joint physical care, the trial court considered the parties' unusual work schedules, the finding that both parties were fit parents, and the parties' ability to cooperate with respect to care of the children. The trial court concluded an award of joint physical care would reduce the need for childcare and increase the amount of time the parties could spend with the children. Upon de novo review

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of the record, we conclude the joint physical care arrangement fashioned by the trial court is in the best interests of the children.

III. Religious Training. Nicola argues the dissolution decree denies her the right to play a practicing role in providing for the religious training of her children because she rarely has custody of the children on Sundays. We disagree.

Iowa Code section 598.41(5) states that where one parent has physical care of a child, the other parent's rights and responsibilities as a legal custodian are not affected. These rights and responsibilities include equal participation in decisions affecting the children's religious instruction. Iowa Code § 598.41(5). In the case of *In re Marriage of Craig,* 462 N.W.2d 692, 694-95 (Iowa Ct. App. 1990), this court stated:

> Under the plain language of [Iowa Code section 598.41(5)], both parties are entitled to participate in deciding questions regarding the religious instruction of the children. We will not prescribe what type or form of religious instruction should be provided for the children, nor which parent shall be responsible for the religious instruction of the children.

The mere fact that Cory typically has physical care of the children on Sunday does not prohibit Nicola from participating in decisions affecting the children's religious instruction in her role as joint custodian and caretaker. In addition, Nicola will have primary care of the children on Sundays during holiday visitation, Mother's Day, and during summer visitation.

IV. Right to Travel. Nicola contends the dissolution decree interferes with the parties' right to travel because it requires prior court approval before either party moves the children from their current school district.

The right of interstate travel is a basic constitutional freedom. *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 254, 94 S. Ct. 1076, 1080, 39 L. Ed. 2d 306, 312 (1974). Any infringement upon the fundamental right to travel must be justified by a compelling state interest. *Id.* at 258, 94 S. Ct. at 1082, 39 L. Ed. 2d at 315. While the court cannot foreclose in advance the right of a custodial parent to move elsewhere, it can set forth provisions to protect the rights of the non-custodial parent in such an event. *In re Marriage of Welbes,* 327 N.W.2d 756, 758 (Iowa 1982).

The dissolution decree does not require any automatic transfer in custody if a party moves outside the school district. Instead, it requires court approval before the children are relocated. The Iowa Supreme Court has interpreted provisions of a dissolution decree prohibiting a custodial parent's move except by order of the court to mean the custodial parent must provide notice of the move to the non-custodial parent, allowing them an opportunity to resist the move. *Id.* at 759. Such a requirement is certainly warranted in a case like this where the parties share joint physical care of their minor children.

Finding no violation of the parties' constitutional right to travel, we affirm the provision of the dissolution decree requiring court approval before either party moves the children outside their school district.

V. Statements Regarding Abuse. Nicola argues that the statements she made to her therapist and to a health care professional regarding Cory's alleged abuse should be presumed to be truthful and accurate. She reasons these statements are reliable because they were made for the purpose of medical treatment and because she resisted the production of her medical

records in pretrial discovery. However, Nicola does not cite any authority in support of her arguments. We find Nicola's failure to cite authority constitutes a waiver of this issue. Iowa R. App. P. 14(a)(3).

VI. Attorney Fees. Finally, both parties request appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Vieth,* 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). We are to consider the needs to 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 Wood,* 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We award no appellate attorney fees. Costs of this appeal are taxed to Nicola.

AFFIRMED.

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