

IN THE COURT OF APPEALS OF IOWA

No. 5-277 / 04-1630

Filed June 15, 2005

IN RE THE MARRIAGE OF KEVIN MICHAEL HOFFMANN

and DONNELL ANN HOFFMANN

Upon the Petition of

KEVIN MICHAEL HOFFMANN,

Petitioner-Appellant,

And Concerning

DONNELL ANN HOFFMANN,

Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, John A. Nahra, Judge.

Kevin Hoffmann appeals the district court's ruling granting physical care of their two children to Donnell Hoffman and ordering him to pay child support. **AFFIRMED AS MODIFIED AND REMANDED.**

Robert Day of Day, Hellmer & Straka, P.C., Dubuque, for appellant.

Douglas Scovil of Ruud, Scovil & Marsh, Rock Island, Illinois, for appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

VAITHESWARAN, J.

In this appeal from a dissolution decree, the fighting issue is who should have physical care of the parties' two children. We modify the physical care provision and remand for a re-determination of child support.

I. Background Facts and Proceedings

Kevin and Donnell Hoffmann were married in 1997. At the time of the marriage, Donnell had a young daughter, Lauren, from a previous relationship. During the marriage, Kevin and Donnell had two children: Kaile, born in 1997 and Korbin, born in 1999.

The parties' relationship was marred by disagreements about Lauren's upbringing, Donnell's allegations that Kevin favored Kaile, questions of who was providing greater financial security for the family, and apparent interference by the maternal grandparents.

The relationship disintegrated in 2003. Donnell was arrested for domestically abusing Kevin, although the charges were later dropped. Donnell accused Kevin of inappropriately taking Korbin to a card game at which alcohol was being served, and called police to assist in retrieving Korbin. Kevin denied he was drunk and cited a breathalyzer test result of "zero". Kevin, in turn, complained to the Department of Human Services that Donnell was not supervising the children. The Department determined the complaint was unfounded.

Kevin sought a divorce. The district court entered an order approving the parties' stipulation to temporary joint physical care of the children. Meanwhile, Donnell was involved in a motorcycle accident that required an extended hospital stay. Kevin took over full-time care of the children while Donnell was hospitalized.

Following trial, the district court awarded the parties joint physical care and ordered Kevin to pay monthly child support of \$316.87. In a post-trial ruling, the court reversed course, concluding a joint physical care arrangement was unworkable, given the parties' "vindictive behavior" and their inability to recognize the "adverse impact" of their behavior on the children. Physical care of the children was placed with Donnell and Kevin's child support obligation was increased to \$873.78 per month.

Kevin appealed. He contends: (1) the district court acted inequitably in rescinding the joint physical care ruling and, (2) if joint physical care was not warranted, physical care should have been placed with him. He also challenges the court's child support calculation.

II. Joint Physical Care

In 2003, the Iowa legislature recognized joint physical care as a viable option. See Iowa Code § 598.41(5) (2003). That provision was amended, effective July 1, 2004. The amendment provides in pertinent part:

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.

2004 Iowa Acts ch. 1169, § 1.

The district court cited and applied this amendment in its initial ruling, entered one month after the effective date of the amendment. Although the court did not cite this amendment in its post-trial ruling, the court complied with its mandate to issue written findings of fact and conclusions of law supporting the denial of a party's request for joint physical care. We will assume without deciding that the court was correct in applying the amendment. See *In re Marriage of Sojka*, 611 N.W.2d 503, 505 (Iowa 2000) (stating law in effect at time of decree should govern). Cf. *In re Marriage of Funderburk*, ___ N.W.2d ___, ___ (Iowa 2005) (determination of entitlement to secondary education support subsidy "should be based on both the facts and the law in existence when the determination is made").

Parents must be "in the frame of mind to successfully support a joint physical care relationship." *In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998). These parents were not. A child psychologist who worked with Kaile testified that the parents did not have the ability to effectively co-parent because of "[t]he open hostility that has been expressed, even felt by Kaile." When asked if it was a "two-way street," he responded, "Yes."

The trial record supports this opinion. In addition to the incidents described above, the record reveals that Donnell took the children and moved to an undisclosed location following the separation, failed to inform Kevin in any detail about her employment and additional relocation plans, and failed to disclose to Kevin that she had enrolled Kaile in therapy. Kevin, in turn, enrolled Korbin in a preschool near his home knowing Donnell disapproved, did not cooperate in arranging visitation, and was reluctant to disclose his finances to Donnell.

On our de novo review, we agree with the district court that "joint physical care is not in the children's best interest." As we have reached this conclusion based on the record created at trial, we find it unnecessary to address Kevin's argument that the court improperly considered post-trial events in rescinding the joint physical care ruling.

III. Physical Care

While the district court found that both parties refused to set aside their animosity in the interests of the children, the court also determined Donnell was "more open to continued access by the other parent." Based on this determination, the court ordered her to serve as physical caretaker. Kevin contends this result was inequitable.

In choosing a physical caretaker, a court's primary consideration is the long-term best interests of the child. *Id.* In this case, several factors lead us to conclude that Kevin would better serve these long-term interests.

First is Donnell's decision to move to another town without telling Kevin. According to Kevin, she did not inform him of her address until "probably a week or two" later. This behavior evinces a callous disregard for the emotional well-being of Kevin and the children.

Second is Donnell's failure to inform Kevin that she enrolled Kaile in therapy. Kaile told the court-appointed custody evaluator that the therapy visits were a "secret" and if her father found

out about her visits there would be “big trouble.” This failure to disclose a major medical decision is inconsistent with Donnell’s obligations as joint legal custodian. *See In re Marriage of Brainard*, 523 N.W.2d 611, 614 (Iowa Ct. App. 1994) (noting inability to effectively communicate may preclude award of joint custody).

Third, Donnell told Kaile to resist visitation with her father and coached her to indicate a desire to be with her mother. This evidence came from the custody evaluator, who made reference to Kaile’s verbal statements that she had been coached as well as notes written by Kaile and furnished to him by Donnell. He stated the notes “may suggest that there has been prompting on the part of Kaile’s mother to advocate for her position” and to not discourage “negative comments toward the father.” Notably, the evaluator’s observations of Kaile with Kevin bolstered his opinion that Kaile was coached to make those negative comments. Far from showing a dislike for Kevin, Kaile “sat next to him, she cuddled, she smiled at him, she obeyed him.” The evaluator opined, “it was a good healthy-appearing relationship. She likes her father and she talked enthusiastically about what they do on the farm and about the time she would spend with her dad.”

The fourth and final factor we consider in assessing Donnell’s openness to communication is her testimony concerning whether she would relocate to Florida. When asked about this at trial, she stated she “would like to stay and have a better workable relationship with Kevin.” However, she acknowledged her job situation was “a little up in the air” and she did not know “where it’s going to be.” In effect, she equivocated, neither confirming nor denying she would make the move. Prior to trial, Donnell was much more certain about her plans. Just a month earlier, she told Kevin that “she would have to be moving out of this area to get a job.” She told the custody evaluator the same thing. Indeed, he testified, “[t]here wasn’t any doubt” in his mind that she intended to move to Florida. Given Donnell’s earlier relocation without notice to Kevin, this equivocation on the question of another relocation raises doubts about her sincerity. *Cf. In re Marriage of Vrban*, 359 N.W.2d 420, 425 (Iowa 1984) (noting mother planned carefully for move and testified openly about plans).

To add to these doubts, there was testimony concerning an allegedly amorous relationship between Donnell and a distant relative in Florida. Donnell categorically denied such a relationship, but Kevin offered a romantic card from the relative to Donnell as well as evidence of several trips Donnell made to Florida, numerous phone calls she made to the numbers where the relative lived, and the relative’s presence in Donnell’s Iowa apartment.

Based on all this evidence, we are not persuaded that Donnell is more likely to foster a relationship with Kevin than Kevin is with her. While it is true that Kevin also fell short in effectively communicating with Donnell, the record suggests he did not attempt to disrupt her relationship with the children to the same extent. Additionally, he exhibited strengths that favor placement of the children with him.

First, Kevin provided sorely needed stability at a time of significant upheaval in the children’s lives. *See In re Marriage of Coulter*, 502 N.W.2d 168, 171 (Iowa Ct. App. 1993) (noting stability “cannot be overemphasized”). When the parties separated, Kevin moved out of the family farmhouse and in with his parents, allowing the children to continue to live where they had grown up. When Donnell later moved them to Clinton without giving notice to Kevin, he offered to transport Korbin from Clinton to the preschool near his home, on the days the child was in Donnell’s care. When asked why he felt he should have physical care, he stated:

I have a stable job. I have been in this area my whole life. We have a good—my family, my parents, which are the children’s only grandparents alive, are in this area. I don’t feel that it would be good for the kids to have a substantial change in their living environment and changing their friends and being away from their family, and most importantly, lose some connection with their father.

Donnell, in contrast, was faced with many looming uncertainties, including where she would live, who she would live with and how she would support herself. Although the custody evaluator's ultimate recommendation was that the children be placed with her "so that the children can remain with their half-sister," he questioned the "stability" of Donnell's "lifestyle, her consistency of life;" stating she had a tendency to be a "risk taker." We believe Donnell's lack of consistency and stability outweighs the children's bond with their half-sister, particularly in light of the scant evidence concerning that bond.

In addition to Kevin's efforts to preserve stability for his children, we consider his parenting abilities. Kevin was an active parent throughout the children's lives. After Korbin's birth, Donnell worked on Saturday, Sunday, and Monday as a registered nurse, and sometimes on other days. She cared for the children on the days she was not working and Kevin, his mother, and a home day care provider cared for them on the days she was working. Kevin also served as primary caretaker for three to four weeks when Donnell was recuperating from the accident. Kaile's kindergarten teacher described Kevin as an attentive and active parent. The daycare provider described Kevin as very loving and very caring. The custody evaluator said essentially the same thing. While he found Kevin's parenting skills to be less developed than Donnell's, it appears that any deficiencies were offset by the assistance he received from his immediate family.

In concluding Kevin should have physical care of the children, we are mindful that district courts are generally in a far better position to make this determination than we are, given their ability to assess demeanor and credibility. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989)(stating "a trial court, as first-hand observer of witnesses, holds a distinct advantage over an appellate court, which necessarily must rely on a cold transcript"). Here, however, more than credibility is at issue. Donnell did not deny she relocated without notice to Kevin, did not deny she placed Kaile in therapy without notice to Kevin and did not deny she coached Kaile to make certain negative comments about Kevin to the custody evaluator. These undisputed attempts to minimize Kevin's role in the children's lives weigh heavily in our decision to change the physical care arrangement. *See In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984)

(recognizing "the need for a child of divorce to maintain meaningful relations with both parents" and decrying mother's efforts to "obscenely denigrate and deny the emotional relationship between [the child] and her father").

Notwithstanding these disruptive acts, it is clear Donnell loves her children and is loved by them. It is also clear the children would benefit from maximum contact with both parents, assuming open parental communication and cooperation. *See Coulter*, 502 N.W.2d at 171 (acknowledging "obvious gains" of having as much contact as possible with both parents). The district court recognized this fact by providing a liberal visitation schedule. Neither party challenges this schedule on appeal. Therefore, on remand, it shall remain in effect, but Donnell rather than Kevin shall be the recipient.

IV. Child Support

Kevin contends the district court overestimated his annual income for purposes of calculating child support. As custody has been changed, a remand is required to refigure child support. Because the issue Kevin raises may arise on remand, we will address it.

The district court assigned Kevin annual gross income of \$43,000 by adding the amount Kevin agreed he could earn, \$25,000 per year, to the annual rental income he would receive from his farmland, which the court found to be \$18,200. Kevin argues that his annual earning

capacity, including the rental income, is only \$25,000. However, at trial, Kevin stated he could generate \$25,000 in annual income from carpentry work alone. The district court's determination of Kevin's income is consistent with his testimony.

V. Appellate Attorney Fees

Donnell requests appellate attorney fees. Awards are discretionary and are determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App. 1999). Neither party is in a better position to pay attorney fees and Kevin's appeal was not frivolous. Accordingly, we deny Donnell's request for appellate fees.

VI. Disposition

We modify the dissolution decree to provide that Kevin shall assume physical care of the children. We remand for a re-determination of child-support and a change in the party receiving visitation.

Cost shall be taxed to Donnell Hoffman

AFFIRMED AS MODIFIED AND REMANDED.