

IN THE COURT OF APPEALS OF IOWA

No. 5-548 / 04-1897

Filed August 17, 2005

IN RE THE MARRIAGE OF ANN MUNGER and KEVIN J. MUNGER

Upon the Petition of

ANN MUNGER,

Appellee,

And Concerning

KEVIN J. MUNGER,

Appellant.

Appeal from the Iowa District Court for Lyon County, Patrick Carr, Judge.

Kevin Munger appeals from the child custody provisions of the decree dissolving his marriage to Ann Munger. **AFFIRMED AS MODIFIED AND REMANDED.**

Randy Waagmeester of the Waagmeester Law Office, P.L.C., Rock Rapids, for appellant.

Francis Honrath of Honrath Law Office, Inwood, for appellee.

Considered by Huitink, P.J., and Vogel and Zimmer, JJ.

VOGEL, J.

The sole question in this appeal is whether to affirm the district court's refusal to grant Kevin Munger's request for joint physical care of his two children following the dissolution of his marriage to Ann Munger. Upon our de novo review, we conclude this case presents a favorable setting for joint physical care and modify accordingly.

Background Facts and Proceedings.

Kevin and Ann were married in 1993 and had two children, Jacob who was born in 1994 and Marissa who was born in 1996. The family lived in Larchwood until 2004, when Kevin and Ann separated. At that time, Ann and the children moved to a nearby apartment in Larchwood. On February 15, 2004, Ann filed a petition to dissolve the marriage. During the pendency of the action, the parties signed a stipulation whereby they would have joint legal custody of the children, but that Ann would be their primary physical caretaker. Sometime later, Ann decided to take the children and move to Sioux Falls, South Dakota. Ann concealed these plans from Kevin, who only learned of the move from the children. District Court Judge John Ackerman denied Kevin's attempt to enjoin Ann from moving with the children, reasoning that trial on the merits would be held before the start of the next school year, and suggesting to counsel that the parties alternate care of the children every other week during the summer. Shortly thereafter, Judge David Lester ordered that the parties temporarily share physical care of the children.

A trial on Ann's dissolution petition began on July 29, 2004. The primary issue remaining for adjudication was the custody of the children. The court later issued a decree dissolving the marriage. In pertinent part, the court placed the children in the joint legal custody of the parties, but awarded their primary physical care to Ann. It also ordered Kevin to pay child support and set up a visitation schedule for him. Kevin appeals from the physical care portion of this decree.

Scope of Review.

We review a custody order de novo. *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). The primary consideration is the best interests of the children. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). Because the trial court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility, but we are not bound by them. *Forbes*, 570 N.W.2d at 759.

Joint Physical Care.

Kevin maintains "the best interests of the children dictate that a joint physical care arrangement . . . is the best choice. The next best option is for Kevin to have physical care" Joint physical care is defined as:

[A]n 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) (2003). Joint physical care, although once disfavored in our case law, see *In re Marriage of Roberts*, 545 N.W.2d 342, 343 (Iowa Ct. App. 1996), has been sanctioned by our legislature as a viable option under our dissolution statute. Iowa Code § 598.41(5) (“Joint physical care may be in the best interest of the child, but joint legal custody does not require joint physical care.”). Our legislature has further provided, effective July 1, 2004, that:

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 (codified at Iowa Code § 598.41(5)(a) (2005)).

For Kevin and Ann, the district court observed that “although the question is close . . . a joint physical care arrangement is not in the best interests of the children.” In support of its decision, the court relied heavily on its conclusion that Ann served as the primary caretaker to the children during the marriage. It noted that

[O]ver the course of the parties’ marriage, until their separation, the children spent more time with Ann than with Kevin. It was she who saw to their day-to-day needs, got them off to school, arranged for medical attention, and the like. The policy of the law giving careful consideration to a placement with the primary care-giver, is designed not to reward the primary care-giver or punish the other parent, but instead to provide continuity, stability and familiarity to children going through a difficult family time.

In addition, the court based its order in part on its perception that the parties’ ability to communicate with each other and to advance the needs of the children was “good, but not excellent.”

On appeal, Kevin focuses his attention on his contention that the district court improperly concluded the best interests of the children would not be served by a shared physical care arrangement. Initially, he stresses that he and Ann communicated well and had no difficulties during their temporary joint physical care arrangement. Among other things, he also argues that providing the children more time in the familiar surroundings of Larchwood is in their best interests and that more significance should have been placed on the preferences of the children.

We do believe the record supports that Ann functioned as the children’s primary caretaker throughout the marriage. However, there was also no indication that Kevin was anything but a competent, engaged, loving and attentive father. Even the district court noted its favorable impression of both parties, and expressed its belief that “each parent has the capacity to serve as a competent primary care-giver to these two children.” We concur in these findings. Thus, absent from our custody analysis will be a comparison of the relative merits of Kevin’s and Ann’s parenting skills. The record fully supports that both are fully capable of providing competent parenting to their children.

The district court's finding that the parties' communication was "good, but not excellent" does not, in our estimation, argue against joint physical care. To the contrary, Ann testified that "[w]ith our relationship I feel I can communicate about the kids. It is very important that we learn to communicate and put our relationship aside for the children so that we can co-parent." Likewise, Kevin testified that "Ann and I have been able to talk since I got the lawyer. [W]e talked very nicely, openly." We find the parties' communication regarding the children to be commendable, as each is putting the needs of the children ahead of their own marital discord. We further conclude the parties' demonstrated ability to work with each other to advance the best interests of the children is a strong attribute weighing in favor of joint physical care of the children.

We agree with the district court that the custodial preferences of Jacob and Marissa should be given little weight. See *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa Ct. App. 1993) (noting that in deciding how much weight to give the preference, we should consider the children's ages and education levels, the strength of their preference, their intellectual and emotional make-up, their relationship with family members, and the reasons they give for their preference). However, we consider the Parental Assessment Report authored by Lutheran Services of Iowa case worker Becky Groeneweg, noting that Marissa, who was seven at the time of trial, stated she "wanted to live with Kevin" and that Jacob, who was ten, expressed a desire to live with both parents. Groeneweg's report, while not recommending one parent over the other, observed that Marissa and Jacob are bonded to both parents and should maximize the contact with each parent.

By all accounts, Kevin and Ann both appear to possess the general qualities necessary to raising children in a healthy, stable, and nurturing home environment. Both have steady employment and earn respectable livings. They appear to generally agree on child-rearing and discipline methods. Kevin lives in the family home in a residential neighborhood in Larchwood, while Ann lives in a three-bedroom apartment located in a residential area of Sioux Falls. Both parents attend church and encourage their children to be likewise involved. Although each has their human shortcomings, neither parent appears to have any physical or mental health problems that would preclude them from effectively caring for the children.

We also find noteworthy that Kevin provided the district court with a detailed plan as to how a joint physical care arrangement could be implemented. His proposal laid out a schedule for every-other-week custodial care, and included comprehensive work schedules for Kevin, daily anticipated schedules for the children, and specific plans on how the exchange would work. While not specifically endorsing this proposed plan, we believe Ann and Kevin can work towards a mutually acceptable shared care schedule.

Finally, at the time of trial the family was already living according to a shared physical care arrangement. Accordingly, it cannot be said that a more permanent shared care arrangement would have greatly upset an already existing, albeit short-term, joint physical care arrangement.

Conclusion.

In this particular situation, a joint physical care arrangement most effectively serves the best interests of Jacob and Marissa. Both Kevin and Ann possess the attributes of effective and capable parents, willing to engage each other in the concerns affecting the children. Moreover, such an arrangement provides the children with the maximum continuing contact with each parent and allows them to maintain certain continuities in their life. Our legislature has deemed that joint physical care may be, in certain circumstances, a viable option. We find this to be one of those cases. We therefore modify the dissolution decree to provide for joint physical care and remand for the entry of an order detailing the specifics of such an arrangement.

AFFIRMED AS MODIFIED AND REMANDED.