

IN THE COURT OF APPEALS OF IOWA

No. 6-475 / 06-0174
Filed November 16, 2006

**IN RE THE MARRIAGE OF DAVID L. STEVENS
AND JENNIFER L. STEVENS**

**Upon the Petition of
DAVID L. STEVENS,**
Petitioner-Appellant,

**And Concerning
JENNIFER L. STEVENS,**
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

The petitioner appeals from the child custody provisions of the decree
dissolving his marriage. **AFFIRMED AS MODIFIED; REMANDED WITH
DIRECTIONS.**

Martha McCall Whitmer, Davenport, for appellant.

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for
appellee.

Heard by Huitink, P.J., and Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

VOGEL, J.

The petitioner, David Stevens, appeals from the child custody provisions of the decree dissolving his marriage to respondent Jennifer Stevens. Upon our de novo review, we believe a joint physical care arrangement is in the best interest of their daughter, Danielle. We therefore affirm as modified and remand with directions.

Background Facts and Proceedings.

David and Jennifer were married in June of 1999. One child, Danielle, was born to the marriage in May of 2002. David served in the military on funeral detail. As a result of this emotionally demanding duty, David developed a stress and depression disorder, which was being managed by medication. At the time of trial, David was not working, but was attending school fulltime and his only source of income was a veteran's benefit of \$775 per month. He hoped to complete his education within three to four years.

By agreement of the parties, Jennifer did not work while David was in the military, although she holds a cosmetology license. After their separation in November of 2004, Jennifer began working in order to support her financial needs. At the time of trial, she was working full-time as an administrative assistant.

On November 16, 2004, David filed a petition seeking to dissolve the parties' marriage. In February of 2005, Jennifer filed a petition for relief from domestic abuse and received an ex parte temporary protective order. However, in May of 2005 the application was dismissed by agreement of the parties and no finding of abuse was ever made. Around this time, the court entered a visitation

order that had been agreed upon by the parties. That order called for the parties to alternate weeks in taking responsibility for the care of Danielle.

When David moved out of the parties' marital residence, he moved in with Emily McKittrick. Except for a brief period in July of 2005 when David moved in with his mother, he has resided with Emily since the separation. Jennifer believes David's relationship with Emily has made communication with David more difficult. After the separation, Jennifer initially remained in the marital residence, but later moved in with her boyfriend, Gary Curtis.

Following a trial the court dissolved the marriage, awarded the parties joint legal custody of Danielle, but allocated her physical care to Jennifer despite David's request for joint physical care. In doing this, the court expressed concern about the parties' ability to communicate effectively about Danielle's best interests. David appeals from this ruling, contending that the court should have granted his request for joint physical care, or in the alternative should have named him Danielle's physical care parent.

Scope of Review.

We conduct a de novo review of physical care awards. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Our overriding consideration is the child's best interests. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

Joint Physical Care.

The objective in a physical care determination is to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). A district court may award joint physical care when it is in the best interests of the child, but the court is not required to do so. See Iowa Code § 598.41(5) (2005).

Our court has stated

the statute's language following the 1997 amendment, as well as its language following the 2004 amendment, constitutes neither a ringing endorsement of joint physical care, nor a mandate for courts to grant joint physical care unless the best interest of the child requires a different physical care arrangement.

In re Marriage of Ellis, 705 N.W.2d 96, 101-02 (Iowa Ct. App. 2005).

Several factors are considered in determining the long-term best interests of the child. See Iowa Code 598.41(3); *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). As each family is unique, the decision is primarily based on the particular circumstances of each case. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

Where parents respect [each other] and their children and recognize that cooperation and communication are important to their children's welfare and they put that welfare ahead of their own needs and petty differences, shared care can be beneficial to the children because it allows both parents to remain a viable and a real part of the children's lives.

Melchiori v. Kooi, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002).

Analysis.

In support of its decision to grant the parties joint legal custody of Danielle, the district court provided the following detailed explanation:

This young child's individual needs can be best met if both of her parents are active participants in her life. Both parents have provided for the child's care since their separation and each parent has been able to demonstrate the ability to appropriately meet the child's daily care needs and has shown a strong interest in the child's development. The parents continue to reside in the same community at this time and they have maintained efforts to communicate with each other even though their ability to communicate has not always been the best. Since their separation the Court finds that each parent has demonstrated the ability to be a good parent and demonstrated a commitment to the ongoing needs of the child for care and attention from both of them. The Court finds that these parties can work together and awards the parents joint legal custody of the child.

In allocating Danielle's physical care to Jennifer, the court expressed concern about David's problems with depression, which it found affected his ability care for Danielle. While the record does support that David has experienced depression and other stress-related conditions which were manifested in mood swings and excessive sleep during the marriage, there is also evidence in the record that Jennifer suffers from similar issues. David expressed concerns with Jennifer's mental health, and she admitted at trial that she had threatened suicide on two or three occasions. Accordingly, we find the evidence as to the parties' mental health to be, at a minimum, in equipoise, and not weigh against a joint physical care arrangement.

On the question of Danielle's physical care, the court determined that a shared arrangement was not suitable. It found that the temporary joint physical care arrangement followed by the parties prior to the dissolution "demonstrated minimal success during the parties' separation and could be even less successful as the parties' life circumstances change in upcoming years." It further noted

concern with the parties' ability to communicate,¹ and specifically mentioned the strain caused by David's relationship with his girlfriend Emily.

First, we believe the court's statement of reasons rejecting joint physical care appears to reflect a generalized disfavor of the very nature of such arrangements. Iowa Code § 598.41(5) (2005) (announcing the viability of joint physical care). In this regard, we note the following statement: "Continuing to move Danielle back and forth between her parents' households, either weekly, or biweekly for the next fifteen years is an impractical arrangement" We find that this reason fails to support the denial of David's request for joint physical care. The very nature of a joint physical care arrangement, rightly or wrongly, is one in which a child spends regular intervals of time with each parent, thus necessitating regular movements of the child between those two homes. As noted, our legislature has determined that a joint physical care arrangement, attendant with a regular movement between homes, is appropriate under certain circumstances.

The court also noted concern about the parties' inability to communicate. It found that their communication has been hindered by David's relationship with his girlfriend Emily "and that the parties have not yet learned to communicate directly with each other about their daughter without generating an argument." Upon our de novo review of the record, we agree that the parties' communication can and must be improved for Danielle's sake. However, we believe the record supports that the parties' problems are more appropriately viewed as springing

¹ While this concern was mentioned within the court's discussion of the propriety of joint physical care, it was fleshed out and relied upon more directly in its analysis of which party would provide Danielle's physical care.

from both sides, rather than solely the fault of David. In addition, when placed in the appropriate context of a contested dissolution of marriage action, these communication problems appear to be no more than an unfortunate, perhaps even anticipated, byproduct of the pending litigation. See *Ellis*, 705 N.W.2d at 103 (“However, when a marriage is being dissolved we would find excellent communication and cooperation to be the exception and certain failures in cooperation and communication not to be surprising.”).

For example, Jennifer faulted David for communicating through text messaging. David testified that he chose to use this manner of communication because they still argue and because “she gets off the subject and I get off the subject. It’s a mutual thing.” In reviewing the text messages placed in the record we note straightforward, if not restrained conversations, rather than inappropriately negative or destructive messages. To that end, using text messaging appears to be a practical means of communicating for two individuals who are involved in an understandably contentious divorce proceeding, but who realize they must still discuss issues concerning the well-being of their child. The district court also found that much of the parties’ communication problems were prompted by David’s girlfriend, Emily. All complaints on this topic were made by Jennifer, as David testified he was able to regularly communicate with Jennifer with regard to co-parenting without difficulty.

Finally, given the district court’s findings with regard to the legal custody determination which were quite complimentary toward both David and Jennifer’s, parenting abilities, and for which there is full support in the record, we find it difficult to reconcile the court’s subsequent rejection of David’s request for joint

physical care. Clearly both parents are loving and nurturing to Danielle and have proven their parenting capabilities. Their communication difficulties are understandable under the circumstances and the record does not reflect any resulting harm to Danielle. We can discern no compelling reason to deny David's request for joint physical care of Danielle. Although moving back and forth from one parent to the other in a joint-care arrangement has its drawbacks, Danielle has, and will, benefit greatly from the maximum possible contact with both parents. Under the facts presented in this case, joint physical care is in Danielle's best interest.

Disposition.

We modify the decree of dissolution to provide that the parties shall have joint physical care of Danielle. We modify the district court's child support order, which was based on Danielle's physical care being placed with Jennifer. From the issuance of procedendo and forward, the district court shall recalculate any child support award. The court shall also order an appropriate joint physical care arrangement, including provisions for transportation and for sharing holidays, birthdays, and vacations.

We therefore remand to the district court for such further proceedings as are necessary to establish a joint physical care schedule, child support, and to resolve any other issues that may arise as a result of our modification of its decree. Costs on appeal are taxed to Jennifer.

AFFIRMED AS MODIFIED; REMANDED WITH DIRECTIONS.