

**IN THE COURT OF APPEALS OF IOWA**

No. 0-436 / 09-1822  
Filed October 6, 2010

**JOSHUA ALLAN TELSCHAW,**  
Plaintiff-Appellee,

**vs.**

**JESSICA LYNN SPENCER,**  
**a/k/a JESSICA LYNN DAVIE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Webster County, Michael J. Moon,  
Judge.

Jessica Davie challenges the district court's order modifying the grant of  
physical care for the parties' son. **AFFIRMED.**

Marcy Lundberg of Marcy Lundberg Law Office, Fort Dodge, for appellant.  
Dorothy L. Dakin and Daniel J. Tungesvik of Kruse & Dakin, L.L.P.,  
Boone, for appellee.

Heard by Sackett, C.J., and Potterfield and Tabor, JJ.

## **TABOR, J.**

Jessica Davie challenges the district court's order modifying the grant of physical care for the parties' son. Because we agree with the district court's assessment that the father, Joshua Telschaw, has demonstrated his ability to provide superior care and minister more effectively to their son's well-being, we affirm the modification of physical care.

### ***I. Background Facts and Procedures***

Jessica gave birth to the parties' child in June 2006. Since birth the child has lived with his mother. Joshua exercised regular visitation and the parties resided together from December 2006 to June 2007.

In April 2008, the district court entered a consent decree concerning paternity, custody, and visitation. The decree granted the parties joint legal custody, and physical care to Jessica, subject to reasonable and liberal visitation for Joshua.

After the district court entered its order, the parties' romantic relationships took various turns. In April 2008, Jessica was engaged to Tyler Davie—a man whom she had known since high school. They ended their engagement in September 2009, at which time Jessica and Joshua dated briefly. Jessica and Tyler reunited in early January 2009. In February 2009, Jessica flew to Virginia and married Tyler.<sup>1</sup> Joshua is now dating Jamie Borsos, who works at the child's previous daycare.

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<sup>1</sup> Tyler did not have a meaningful relationship with the child before Tyler and Jessica married. Tyler testified that he saw the child in April of 2008 when he was home for ten

After the district court's April 2008 decree, Jessica and the parties' child relocated frequently. On August 1, 2008, they moved from West Des Moines to Fort Dodge where they lived with Tyler's sister and brother-in-law for one month. On September 1, 2008, they moved in with Jessica's father and stepmother in Fort Dodge, and lived there until the end of the year. On January 1, 2009, Jessica and the child moved to an apartment in Fort Dodge where they stayed for eleven weeks.

In March 2009, Jessica moved to Norfolk, Virginia, to be with her new husband, Tyler, who was serving in the military. They lived with Tyler and his friends for eight weeks in Virginia. In May 2009, Tyler, Jessica, and the child left Virginia and stayed for one week with friends in Pennsylvania and one week with Tyler's brother in Fort Dodge. On May 27, 2009, they moved to California, where they currently reside.

Jessica did not tell Joshua that she and the parties' child were moving before they left for Virginia and did not give Joshua an opportunity to say goodbye to his son. Rather, she called Joshua and informed him after they left the state. She explained on appeal that she was afraid of the impact Joshua's emotional reaction would have on the child.

The court heard conflicting testimony regarding the child's behavior and well-being after the multiple relocations. Joshua testified that the child has adopted some aggressive tendencies—like using the word “kill”—which he never did before. The child's current daycare provider, Sandra Shidner, however,

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days after deployment, and again in January 2009 for one day. The next time he saw the child was February 2009, at his wedding to Jessica.

testified that the child does not engage in aggressive behavior nor use violent language. Joshua also alluded to physical aggression in the family's home when he reported that the child told him, "Tyler had hit mommy" and "Tyler had pushed mommy." In her testimony, Jessica suggested that he was describing pillow fights in which she and Tyler often engaged.

In regards to the child's care, Julie Olsen, a licensed social worker, noted that his speech was delayed and below the level of his peers. She was concerned with Jessica's failure to continue the speech therapy the child participated in while living in West Des Moines. Sandra, however, testified that his verbal abilities are "appropriate for his age" and that he is developing normally. The record also was in conflict on the issue of whether Jessica kept the child's immunizations current. One of four progress notes from his pediatrician indicated, by a check box, that his immunizations were not up to date. Jessica testified that she was told he was covered until age four.

In addition, Joshua testified that the child's hygiene "can be very poor" when he is in Jessica's care while Sandra discounted this concern—"[h]e's always got clean clothes on, his face has been washed, his hands are clean . . . and he's ready to go for the day." She testified that the child is happy to leave daycare with either Jessica or Tyler when they come to pick him up.

Jessica works at a Wells Fargo bank in California, where Tyler is now stationed. Joshua works for a motor supply store in Fort Dodge. The extended families of both Jessica and Joshua live in Fort Dodge as well.

In March 2009, in conjunction with her move to Virginia, Jessica petitioned the court to modify Joshua's visitation with the child. She requested that Joshua's modified visitation include one week in both the spring and fall, time in December for a holiday, six weeks or more in the summer, additional time should Joshua travel to where Jessica and the child lived, and liberal telephone contact with the child. Joshua's answer asked the court to modify the parties' physical care arrangement to place the child with him. In the alternative, he asked to be awarded extended visitation.

The district court held a trial on the matter in September 2009. On November 18, 2009, the district court modified the parties' custody arrangement and entrusted Joshua with physical care of the parties' child. The court noted that between the two parents Joshua is more stable both as to his employment and residence, has more faithfully tended to the child's needs, and benefits from a strong support system of extended family in the Fort Dodge area. Jessica, on the other hand, "has shown bouts of instability and impulsivity" which are characterized by her numerous relocations and rather spontaneous marriage to Tyler—whom the child barely knew. The court also found that Jessica has failed to meet the child's physical needs by discontinuing his speech therapy and failing to keep his immunizations up to date. Jessica appeals.

## ***II. Standard of Review***

We review child custody and physical care disputes de novo. Iowa R. App. P. 6.907 (2009). Although we may find facts anew, we defer to the district court's assessment of witness credibility. *In re Marriage of Udelhofen*, 444

N.W.2d 473, 474 (Iowa 1989). As a first-hand observer of witness demeanor, the district court judge has a distinct advantage over our appellate reliance on a cold transcript. *Id.* Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(o).

### ***III. Modification Principles***

Our objective in a physical care determination is to place the child in the environment most likely to advance his mental and physical health and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). To determine the best interests of the child, we employ a contextualized approach and weigh all relevant conditions affecting physical care. *In re Marriage of Thielges*, 623 N.W.2d 232, 237–38 (Iowa Ct. App. 2000).

Once a physical care arrangement is in place, the party seeking to modify it bears a heightened burden; we will disturb the arrangement only for the most cogent reasons. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). The party seeking the modification must demonstrate two conditions exist. First, the party must establish a substantial change in material circumstances that is more or less permanent and affects the child's welfare. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Moving a child more than 150 miles from the child's residence at the time custody was granted may amount to a substantial change in circumstances sufficient to warrant a modification. Iowa Code § 598.21D (2009). Second, the party seeking to modify physical care must demonstrate that he or she can provide superior care and minister not equally, but more effectively, to the child's needs. *In re*

*Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The question is not which home is better, but whether that parent can offer the child superior care. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa 1997).

#### **IV. Analysis**

The parties agree that Jessica's cross-country move with the child qualifies as a substantial change in material circumstances requiring modification of the physical care and visitation arrangement. The fighting issue is whether Joshua established that he can offer superior care and better minister to the child's needs.

The district court's ruling contrasted Joshua's stable situation in Fort Dodge with Jessica's impulsive choices and frequent moves. The court was critical of Jessica's decision to "thrust" the child into a relationship "with a father figure whom the child does not know" while "depriving Joshua of a continuing relationship" with his son. The court concluded that Joshua was more faithful in tending to the child's needs.

Jessica disputes the district court's conclusion that Joshua demonstrated he would be the superior caregiver. Jessica's witnesses testified that she is a good mother and that she looks out for their son's well-being. She points out that the child has lived with her all of his life and that his stability can be nurtured as much by leaving him with Jessica—the person who has been his primary parent figure—as it can by "requiring [him] to live in a neighborhood" from which Jessica moved. *See In re Marriage of Vrban*, 359 N.W.2d 420, 425 (Iowa 1984).

Jessica undoubtedly loves her son and wants the chance to care for him. But it was not merely the child's change in "neighborhood" that concerned the district court and cast doubt on Jessica's ability to provide the kind of stability that would foster his well-being. Rather, the court expressed concern about Jessica's multiple relocations in a short period of time, her failure to inform Joshua of her intentions to relocate with the child prior to their move, her lack of an extended-family support system in California, her rather impulsive marriage to Tyler, the negligible relationship cultivated between the child and Tyler before the marriage, the child's reports of potentially assaultive behavior by Tyler against Jessica, and Jessica's failure to continue recommended speech therapy for the child and to keep his immunizations up to date.

Although conflicting testimony exists on some of these points, we are not inclined to reverse the district court's decision to modify physical care. As stated, we give deference to the district court's findings on credibility and the weight of the evidence presented because the district court "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." *Vrban*, 359 N.W.2d at 423 (citation omitted). Although the district court did not specifically state that Joshua or his witnesses were more believable, the court's credibility assessments are inherent in the decision made. See *Second Injury Fund v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990) (finding credibility determinations to inhere in the ruling). The court's findings of fact and ultimate physical care assignment demonstrate that it found Joshua's evidence more credible and we give weight to this determination. See *In re Marriage of*

*Rosenfeld*, 524 N.W.2d 212, 216 (Iowa Ct. App. 1994) (affirming the district court's transfer of physical care and stating: "[W]ith the concern exhibited by the trial judge who listened to all the testimony and viewed the parties, we give considerable weight to the credibility assessments made by the trial court").

In addition to the district court's credibility determinations, several undisputed factors support the district court's modification. First, Jessica admits she did not inform Joshua that she was moving with the child to Virginia until after they had left. "We consider [the mother's] failure to communicate to [the father] this significant change in the child[ ]'s [life] adverse to her position." *Whalen*, 569 N.W.2d at 629. We are not persuaded by Jessica's excuse that Joshua would have been overly emotional about the departure and thereby the child would have been adversely affected.

Moreover, the multitude of relocations also illuminates the priority that Jessica has placed on her respective relationships with her son and Tyler. See *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003) (explaining that when a parent seeks to establish a home with another adult, "the manner [in which] he or she has established [the relationship] is an indication of where that parent's priority for his or her children is in his or her life"). Uprooting her child to move several times, from the east coast to the west coast—sometimes living in crowded, temporary quarters with persons who were strangers to the child—and then hastily thrusting him into a parent-child relationship with Tyler, a man whom he barely knew and who had no previous parenting experience, demonstrates either a lack of understanding or a disregard for her child's welfare. Either way,

her course of conduct suggests that Jessica placed a higher priority on her relationship with Tyler than she did on fostering the child's best interests.

Second, although the nature of the conduct is disputed, the parties do not deny some sort of physical conduct occurred between Jessica and Tyler that concerned the child. Joshua insinuates that Tyler may be physically aggressive toward Jessica while Jessica and Tyler suggest that these encounters are innocuous pillow fights. As the district court explained, “[w]hether [the child] is describing a pillow fight or some assaultive behavior, it is inappropriate. It is clear that [the child] does not understand what the behavior is and is reacting [negatively] as a result of witnessing those episodes.”

Third, the strong support system of extended family, both Joshua's and Jessica's family, who reside in Fort Dodge, weigh in favor of Joshua as the physical care custodian. *Dale*, 555 N.W.2d at 246 (explaining that the court gave weight to the fact that the father “has the support of his family” in deciding to modify the physical care arrangement and place the child with the father). The evidence reflects that family members not only assist Joshua with the child when their help is needed, but also that they have developed strong bonds with the child. Joshua's family gathers on a regular basis to celebrate family birthdays, holidays, and other special occasions. Joshua has demonstrated that he will foster the child's relationships with his maternal side as well by allowing him to enjoy visits with Jessica's relatives while in Joshua's care. Moreover, the parties do not dispute that Joshua is a good father who is attentive to the child's needs and who has provided a safe, stable environment for the child.

We do not question the sincerity of Jessica's concern for the child's well-being. But based on the evidence presented at trial, we believe Joshua has carried his burden to show by a preponderance of the evidence that he has the ability to be the superior caregiver for their young son at this point in time. Accordingly, we concur with the district court's expression of cogent reasons for transferring physical care from Jessica to Joshua.

**V. Appellate Attorney Fees**

Joshua asks us to require Jessica to pay his appellate attorney fees. We enjoy broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In exercising this discretion, we consider several factors: the financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Neither party to this appeal has a far superior ability to pay the attorney fees. Both sides presented cogent, reasonable arguments for their respective positions on appeal. We decline to award Joshua appellate attorney fees. Costs of this appeal are taxed one-half to each party.

**AFFIRMED.**