IN THE COURT OF APPEALS OF IOWA

No. 0-522 / 10-0503
Filed October 20, 2010

MATTHEW A. HOFFMAN,
Petitioner-Appellee,

vs.

KATIE MUFF,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Katie Muff appeals the district court's decree which provided for a prospective, automatic modification of child custody. **AFFIRMED AS MODIFIED.**

Reed Reitz and Maura Sailer of Reimer, Lohman & Reitz, Denison, for appellant.

Karen Taylor of Taylor Law Offices, Des Moines, for appellee.

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

TABOR, J.

This appeal requires us to determine whether Iowa law allows a prospective, automatic modification of child custody arrangements. Katie Muff and Matthew Hoffman had a daughter together in June 2008. Both Katie and Matt lived in Ankeny until spring 2009 when Katie moved to Dunlap in conjunction with her new job. In January 2010, each party sought physical care of their daughter, in part, because of the distance between the parties' residences. The district court granted Katie and Matt joint legal custody and shared physical care of their preschool-aged daughter. The decree contains a provision that automatically modifies this arrangement and places physical care with Matt if Katie lives more than forty miles from Ankeny when their daughter begins kindergarten. The decree also contains a provision that automatically modifies this arrangement and places temporary physical care with Katie if Matt moves from the Ankeny school district. Because we conclude these automatic, future modifications of physical care based on a single factor are contrary to Iowa law, we strike them from the decree.

I. Background Facts and Procedures

Katie and Matt met at Iowa State University and dated on and off throughout their college years. Katie obtained a degree in early childhood education and is certified to teach children from birth through third grade. She currently resides in Dunlap and works as a preschool teacher in Missouri Valley. Matt graduated with a degree in agronomy, resides in Ankeny, and works as a research assistant at Pioneer Hi-Bred International, Inc.

Katie and Matt had a daughter together in June of 2008. Both before and after their daughter's birth, the parties carried on a turbulent relationship. As an example of their intractable positions, the parties could not agree on the baby's last or even first name and, to this day, the parties each call the child by a different name.

After the birth, Katie, Matt, and their daughter moved into Katie's sister and brother-in-law's home temporarily. Katie contends that during the time they lived together, Matt did very little to help with their newborn, that he had a short-temper with their child, and that he did not contribute financially or in-kind to the operation of the household. Matt argues he helped with their baby as much as Katie would allow him, he never became angry toward their daughter, and he helped with chores around the house.

On November 15, 2008, Matt moved out and had little contact with the parties' daughter. Katie ended her relationship with Matt in early December and, shortly thereafter, Matt began calling, texting, and e-mailing Katie almost every day asking to see their child. Katie contends that Matt initiated these contacts in an attempt to see Katie while Matt maintains he genuinely desired to see their daughter. The district court found that after the parties separated, Katie took "tight and strict control" of their child, limited Matt's contact with her, and "insisted that any such contact be 'supervised.'"

The conflict between the parties culminated on Christmas day 2008. The parties arranged for their daughter to spend a few hours with Matt and his family at his parents' home. Katie and her sister, Stephanie, brought the child to the

Christmas gathering. Upon arriving, Matt took Katie aside and asked her to sign papers granting him specific visitation rights. He told Katie that if she refused to sign the documents, she would not see their daughter for at least a couple of weeks—until there was a court hearing. Katie refused to sign the documents. Matt's family asked Katie and her sister to leave but they would not do so without the child. Stephanie then called law enforcement. Once an officer arrived, Katie and Stephanie argued that Matt was not legally the child's father and the officer said that the child had to go with Katie.

On March 3, 2009, the district court entered an order granting the parties temporary joint physical care of their minor child. In April of 2009, Katie accepted a job as a preschool teacher in Missouri Valley and moved to Dunlap in conjunction with her new job. Katie grew up in Dunlap and has family living in that area. Katie testified that she accepted the position because she "wanted to [consistently] provide some stability for [her] daughter." She explained that prior to this opportunity, while she lived in Ankeny, she did not have steady, dependable employment. She worked as a substitute teacher—which did not have a guaranteed or reliable schedule—rather, it "varied from day to day," and she supplemented her income by working extra hours at a tanning salon. Matt contends that Katie moved to Dunlap to interfere with his relationship with their daughter and to be closer to her new boyfriend. He argues that "her job was just a cover-up" for the real reasons she moved.

Since the temporary hearing, and even after Katie moved, the parties continued the joint physical care arrangement created under the order on

temporary matters. Matt has seen their daughter on a regular basis—at the scheduled times and even additional times. He points out that he has also attended several parenting classes.

The district court held a trial on this matter in January 2010. On February 18, 2010, the district court granted the parties joint legal custody and shared physical care of their daughter. The decree contains a self-executing provision that automatically modifies this arrangement and places physical care with Matt if Katie continues to live more than forty miles away from Ankeny when their daughter starts kindergarten. A second self-executing provision places temporary physical care with Katie if Matt moves from the Ankeny school district. Katie appeals the portion of the decree that automatically modifies the physical care arrangement in the future and urges us to strike that provision, arguing that it is contrary to Iowa law. She argues in the alternative that this court should modify the decree and automatically grant her physical care on the future date because she can minister more effectively to the long-range interests of the child, has an extensive background in child care, and will foster the child's relationship with Matt.

II. Standard of Review

Our review of the district court's decision is de novo. Iowa R. App. P. 6.907 (2010). Although we give weight to the trial court's findings, we are not bound by them. *In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa Ct. App. 1996). In child custody and physical care disputes, our paramount concern is the

best interests of the child. Iowa R. App. P. 6.904(3)(*o*); *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

III. Analysis

A. Principles of Physical Care Determinations

"'[P]hysical care' involves 'the right and responsibility to maintain a home for the minor child and provide for routine care of the child.'" *Hansen*, 733 N.W.2d at 690 (citation omitted). Where a court awards joint physical care, "'both parents have rights to and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, [and] providing care for the child.'" *Id.* at 691 (citation omitted).

Our paramount concern in fashioning physical care arrangements is the best interests of the child, "not . . . perceived fairness to the *spouses*." *Id.* at 695. "The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *Id.* To determine the best interests of the child, we employ a contextualized approach "where no one criterion is determinative." *Id.* at 697 ("[O]ur case law requires a multi-factored test."). To this end, "[w]e *strongly* disapprove . . . of custody provisions . . . that predetermine what future circumstances will warrant a future modification" because such provisions "seem to provide that one event alone will mandate a change of physical care," which is "an erroneous notion." *In re Marriage of Thielges*, 623 N.W.2d 232, 237–38 (Iowa Ct. App. 2000). Rather, "[a]ny such change of circumstances must be weighed with all the other relevant conditions affecting physical care." *Id.* at 238.

Moreover, 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, by a preponderance of the evidence, a substantial change in material circumstances that is more or less permanent and that affects the child's welfare. *Thielges*, 623 N.W.2d at 235; *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). 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). "If both parents are found to be equally competent to minister to the child[ ], custody should not be changed." *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). "The significance of an award of physical care should not be minimized. Children are immediately, directly, and deeply affected by the kind and quality of home that is made for them." *Frederici*, 338 N.W.2d at 160–61.

B. Applying Principles to Self-Executing Provisions

Here, the district court granted the parties joint legal custody and shared physical care of their daughter. We consider provisions appearing in paragraphs I and J of the district court's decree. The first provides, in pertinent part: "If at the time [the child] begins kindergarten Katie resides more than forty (40) miles from Ankeny, Iowa, then the custodial arrangement shall be modified and Matt shall

have primary physical care of [the child]." The second provision states, in pertinent part:

> If Matt moves from the Ankeny school district at any time when the parties are exercising shared physical care under the terms of this decree, then, as of the time of Matt's move, Katie shall have primary physical care . . . until such time as the parties can agree on and the court approves a modified custodial and visitation arrangement . . . .

We strike paragraphs I and J because they abrogate a contextualized analysis of facts pertinent to the physical care determination and impermissibly elevate the parties' locations on a future date to the sole dispositive factor. Because we strike the language automatically modifying the physical care arrangement, we do not reach the second issue.

C. Contextualized Analysis

We strike the automatic modification language set out above because doing so allows the district court—if called upon to do so at a future time when it has more up-to-date information about the parties—to engage in the multi-factored analysis required to make physical care determinations and preserves an equal burden of proof for both parties upon reassessing the physical care arrangement.

The district court's order providing for a future, automatic modification of the physical care arrangement does not take into account all "relevant conditions affecting physical care"—which a court must consider when making physical care determinations. *See Thielges*, 623 N.W.2d at 238. Rather, it provides that one of two events mandates a change of physical care—either Katie's maintenance of her residence more than forty miles from Ankeny on the date her child starts

kindergarten or Matt's move from the Ankeny school district. We have expressly cautioned against such provisions stating both that "[w]e *strongly* disapprove . . . of custody provisions . . . that predetermine what future circumstances will warrant a future modification" and that designating one event as the trigger for changing physical care is an "erroneous notion." *Id.* at 237–38.

Provisions like the ones at issue ignore the fact that many things can change in people's lives over the course of three years which could make them more or less suitable as the physical caregiver, and which must be analyzed to protect the child's best interests. These include important considerations—beyond the respective parties' places of residence—that are central to determining which environment will promote the child's best interests; such things cannot be determined three years in advance nor encapsulated within a single designated triggering event. We cannot accurately predict who these parties will become over the next few years, what their relationship with one another will be, how their relative situations will change, and how these considerations will impact their daughter's best interests. The Vermont Supreme Court captured these concerns in the following exposition:

> [T]here is no way of knowing who these parties will be in a few years—particularly the child—or what the nature of their relationships with each other will be at the time the child enters kindergarten. Mother and father could choose to relocate, change careers, enter into romantic relationships, or even have more children. All of these changes would properly contribute to a best interests calculus undertaken at the time the child is school-aged . . . . The best interests determination cannot be made in the absence of all the necessary facts. What those facts may be when the child enters kindergarten are matters of speculation. "Such speculation is not a substitute for complete analysis of all existing circumstances."

Knutsen v. Cegalis, 989 A.2d 1010, 1014–15 (Vt. 2009) (citation omitted).

In light of our "*strong[ ]* disapprov[al]" of provisions which predetermine one future event that will mandate a change in physical care and the concerns articulated above, we strike the language that automatically modifies physical care because it does not allow the court to analyze the relevant conditions affecting physical care and impermissibly elevates one event to determinative importance in the best interest analysis. *See Thielges*, 623 N.W.2d at 237–38. Moreover, we disapprove automatic, prospective modifications like the ones here because we recognize that "[a] court should not try to predict the future for families, nor should it try to limit or control their actions by such provisions." *Id.* at 237.

D. Burdens of Proof

Additionally, by transferring physical care to Matt, the automatic modification provision in paragraph I of the decree has the effect of elevating Katie's burden of proof, to Matt's advantage, if she seeks physical care of their daughter in three years. A parent who seeks to transfer physical care from the other parent bears a heavy burden to make a two-prong showing. *See Dale*, 555 N.W.2d at 245.

First, Katie would be charged with demonstrating a substantial change in material circumstances that is more or less permanent and that affects the child's welfare. *Walton*, 577 N.W.2d at 870. Second, she would need to demonstrate that she can provide superior care and minister not equally, but more effectively, to their daughter's needs. *Frederici*, 338 N.W.2d at 158. Matt, as the physical

care custodian, would benefit from the principle that once custody is fixed, we disturb it for only the most cogent reasons. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994). This principle translates into a presumption favorable to him: "If both parents are found to be equally competent to minister to the child[ ], custody should not be changed." *Id.* at 213. We do not agree that Katie should bear the heavier burden if she seeks physical care of the parties' daughter when school becomes imminent simply because she maintained a residence forty miles from Ankeny. By striking the language that automatically granted Matt physical care, the parties are placed on a more equal footing because Katie will not be charged with overcoming the favorable presumption toward the custodial parent, and both parents will share the same burden if they seek physical care when their daughter begins kindergarten.

E. Persuasive Authority

Our conclusion is further supported by the weight of persuasive authority. "An overwhelming majority of courts that have considered the question take the view that automatic change provisions in custody orders are impermissible." *Knutsen*, 989 A.2d at 1014 (surveying case law from numerous jurisdictions and explaining "we were able to find only two courts that have upheld such provisions under direct attack"). And, as the Vermont Supreme Court points out, "[c]ourts that reject automatic custody change provisions do so regardless of whether the event that triggers the change is certain to occur" or merely speculative. *Id.* at 1016 (noting that courts strike down automatic modifications of child custody when they are "premised on events that will occur on a date certain, including . . .

the commencement of a certain school year"). Here, whether Katie will live more than forty miles away from Ankeny on the date that the parties' daughter begins kindergarten is speculative—we will not know until that future date where Katie lives. The same is true of Matt's future residence. Their daughter starting school, on the other hand, is an event that is virtually certain to occur. Neither characterization—a speculative or a certain triggering event—changes the outcome in this case. *See id.*

F. Relocations

It bears noting that we recognize a number of valid reasons why one parent may relocate to another city, which includes relocating to the place where the parent grew up, to an area where the parent's relatives reside, and to get a "fresh start." *See Thielges*, 623 N.W.2d at 238. Moreover, we do not impose, as an absolute prerequisite to such a move, that the relocating party prove that she or he "looked hard to find a permanent . . . job" in the city where the other parent resides as both Matt and the district court seem to suggest.

IV. Appellate Attorneys Fees

Both parties apply for an award of appellate attorney fees. An award of attorney fees is not a matter of right, but rests within this court's discretion. *Markey v. Carney*, 705 N.W.2d 13, 26 (Iowa 2005). In making our determination, we consider "the needs of 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 trial court's decision on appeal. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389

(Iowa Ct. App. 1997). In light of Matt's greater ability to pay, we award Katie appellate attorney fees in the amount of $2000.

Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.