

IN THE COURT OF APPEALS OF IOWA

No. 0-741 / 10-0248
Filed January 20, 2011

IN RE THE MARRIAGE OF ADEL F. MAKAR AND HANAA H. MAKAR

Upon the Petition of

ADEL F. MAKAR,
Petitioner-Appellee/Cross-Appellant,

And Concerning

HANAA H. MAKAR,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

A mother appeals the district court's modification order that altered the parties' joint physical care arrangement and entrusted the father with physical care of their two minor children. The father cross-appeals, arguing the evidence demonstrates a cost to him each pay period for the children's health insurance and contends that cost should be taken into consideration when calculating the mother's child support obligation. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark A. Young, Mason City, for appellant.

Jacqueline R. Conway, Mason City, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Hanaa Makar appeals the district court order modifying a shared physical care arrangement and entrusting her former husband Adel Makar with physical care of their two children, S.M. and N.M.. She argues Adel failed to demonstrate a substantial change in material circumstances since the dissolution decree and further contends the record lacks substantial evidence to support several factual findings relied upon by the district court in support of its decision to modify. Because we conclude Adel demonstrated a substantial change in material circumstances and that he is able to provide the children with better care, we affirm the district court's modification.

Adel cross-appeals, arguing the evidence shows that he incurs costs each pay period for the children's health insurance which was not included in the child support calculation. Because the district court did not consider those costs when calculating each parent's support obligation, we remand for a recalculation of the child support.

I. Background Facts and Proceedings

Hanaa and Adel married in September 1987 and had four children together—A.M., M.M., S.M. and N.M..¹ Only the physical care of S.M. and N.M. is at issue in this case. Adel is a medical doctor and is employed at Mercy Hospital as a pediatric hospitalist earning approximately \$159,000 annually. Hanaa is employed as a supervisor at Charlie Brown Day Care and earns approximately \$30,200 per year. She receives alimony of \$12,000 annually.

¹ A.M. is an adult attending Wartburg College and the parties agreed at the time of the dissolution that another daughter, M.M., would be in Adel's physical care.

The parties entered into a stipulation of separate maintenance in October 2006, in which they agreed to joint legal custody and shared physical care of their three minor children. In April 2007, Adel filed a petition seeking to dissolve the parties' marriage. In January 2008, the court entered a dissolution decree. The decree incorporated the parties' partial stipulation, in which they agreed that Adel would have physical care of M.M. and both parties would share physical care of S.M. and N.M.

After the divorce in 2008, Adel sought counseling for N.M. and S.M. with Dr. Natalie Alsop, a psychologist at Mercy Medical Center. Adel believed the counseling was needed because N.M. refused to follow the shared care schedule and disclosed she had safety concerns, S.M.'s grades deteriorated, and both children expressed unhappiness with the shared care arrangement and a desire that it be changed. During counseling, N.M. disclosed she experienced severe anxiety. Dr. Alsop testified N.M.'s anxiety was worse at Hanaa's home, that N.M. did not feel comfortable discussing this issue with her mother, and that they developed a plan where N.M. would call either her father or older sister if she became anxious. N.M. progressed and had no further counseling after November 2008. Dr. Alsop said both children indicated they had very good relationships with their father but experienced conflict in their relationships with their mother. She testified that Adel is the more stable parent and the children are more emotionally bonded with him.

Adel testified that he chose Dr. Alsop because she is the only child psychologist with a doctorate degree in northern Iowa and because he was

seeking help for the children so they could improve the shared care arrangement. Hanaa points out that Dr. Alsop and Adel previously worked together at the pediatric clinic and that they continue to work in the same hospital. She contends “Adel attempted to ‘poison the well’ with respect to Hanaa’s parenting when seeking counseling for the children.” Adel alleges he advised Hanaa the children were seeing Dr. Alsop. Hanaa denied having knowledge of the sessions until after they had begun, when S.M. invited her to attend a session with him.

Adel testified he had concerns regarding the shared care arrangement’s effect on S.M.. S.M., who has Attention Deficit/Hyperactivity Disorder (ADHD), sometimes does not take his medication while staying at Hanaa’s home. His grades dropped since the parties instituted the shared care arrangement, and Hanaa did not enforce homework when he was in her care. Although the court heard somewhat contradictory evidence regarding S.M.’s academics, Hanaa acknowledged both that S.M.’s grades had declined and that she had taken remedial action to help S.M.’s grades improve. Hanaa attributed her son’s poor grades to spending time with a classmate who was “on drugs.” Hanaa testified she helped S.M. improve his grades by instructing him not to talk with that child anymore and by ensuring he completed his homework. Both Adel and S.M. testified that Adel addressed these academic concerns and helped S.M. improve his grades by speaking with S.M.’s teachers; using a web-based service which allowed Adel to access his son’s grades and assignments; and checking with S.M. to ensure he studied for tests and completed homework—even calling at Hanaa’s to make sure S.M. had studied.

Adel explained he provides the children with routine at his home while Hanaa provides a relaxed, unstructured environment; S.M. testified he appreciates the structure provided at Adel's home. Additionally, Adel indicated Hanaa is reluctant to spend money which often causes the children to negotiate with her for necessities. Hanaa testified she spends adequately for the children, citing the fact she helps their oldest daughter with college tuition and expenses, her medical college admissions test and courses; and helped pay for her older daughter's trip to New York, among other expenses.

Adel indicated both N.M. and S.M. expressed a strong preference that Adel be their primary care provider and stated he believed the children will have a better relationship with Hanaa if he has physical care. Hanaa pointed out that although S.M. testified he preferred to live primarily with one parent, he expressed no preference regarding which parent that would be.

In February 2009, Adel petitioned the court to modify the parties' physical care arrangement to place S.M. and N.M. in his primary physical care, alleging the following substantial changes of circumstances: N.M. refused to follow the shared care arrangement; both children expressed a preference to live with Adel; S.M.'s grades deteriorated because he was not completing schoolwork while in Hanaa's care; and the children's psychologist believed it would be in their best interests to be in Adel's physical care. Hanaa's answer contended Adel "coerced and bullied" N.M. into leaving Hanaa's care and failed to support the relationship between mother and daughter. She also alleged that S.M. did not wish to reside

with Adel and that Adel “attempted to coerce and bully him into stating that he does not wish to continue to reside” with Hanaa.

The district court held a trial on the matter in October 2009.² On January 14, 2010, the district court modified the parties’ arrangement and approved Adel’s request for physical care of the children. The court found a substantial change in circumstances had occurred and the children’s best interests required that one parent, Adel, have physical care. The court explained:

Although everyone surely contemplated that joint physical care would work well for the children, that has not proven to be the case. Neither [N.M.] nor [S.M.] has adjusted well to the arrangement. [N.M.] has been unwilling to spend equal time with her mother [S.M.’s] grades are slipping in school and it is fair to conclude that stress from this situation is the cause. Additionally, Adel and Hanaa have proven themselves unable to communicate with one another to the extent required for a successful joint physical care arrangement. Based on the foregoing the court concludes the children’s best interest require that one parent have primary physical care. For the reasons discussed below Adel is the preferable choice.

The court went on to explain that our courts disfavor split custody of siblings and that here, “the only feasible way to keep the children together is to have them living primarily with Adel” because N.M. is “clearly not comfortable living in Hanaa’s home” and given her “emotional state” it would be unwise to force her to live where she is uncomfortable. The court also believed Adel possessed a superior ability to monitor and assist the children with their schoolwork, and that they preferred and benefited from the more structured environment he provides. The court concluded these considerations support the modification because, “[g]iven [the children’s] feelings it is logical to conclude that

² Due to the unavailability of a witness, the district court did not complete the trial until December 15, 2009.

the children will be more content living with Adel which will help foster appropriate physical, mental, and social development.” Additionally, the court expressed concern that Hanaa would not spend adequately for the children’s necessities.

The court further modified the parties’ arrangement to provide that Hanaa pay child support to Adel in the amount of \$606 per month from February 2010 through May 2010. At that time, her obligation would decrease to \$524 per month until S.M. reaches age eighteen or graduates from high school, at which time her support payments would again decrease to \$370 per month. The court declined to order a medical payment, concluding the children were covered by Adel’s health insurance at no cost to him.

Hanaa appeals, arguing Adel failed to demonstrate a substantial change in material circumstances since the dissolution decree. She further contends the record lacks substantial evidence to support several factual findings relied upon by the district court in support of modification. Her specific factual contentions are as follows: S.M. was performing well in school before trial, contrary to the court’s conclusion he was struggling; N.M.’s issues with the shared care schedule had improved; the bond N.M. shares with her older sisters does not support modification because both are attending college away from home; safety and parenting concerns existed in Adel’s home and the fact they were not addressed evinces bias in counseling; and Hanaa is willing to work with Adel on communication issues while Adel is not willing to reciprocate. She asks us to reverse the district court and to reinstate shared physical care or, in the

alternative, to remand the matter to the district court “for changes in the parenting plan that the court may deem appropriate.”

Adel resists and cross-appeals, arguing the evidence demonstrates that his family insurance plan is more costly than an individual plan, and the difference in cost should be considered when calculating Hanaa’s child support obligation.

II. Scope and Standard of Review

We review child custody and physical care disputes de novo. Iowa R. App. P. 6.907. 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). The district court judge has a distinct advantage in assessing witness credibility because he or she can observe each witness’s demeanor while we must rely on a cold transcript. *Id.* Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(o).

III. Analysis

A. Modification

When making physical care determinations, we seek to place children in the environment most likely to advance their mental and physical health and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). Our prime concern in fashioning physical care arrangements is the best interests of the children. *Id.* at 690. To determine the children’s best interests, we 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 established, the party seeking to modify it bears a heightened burden and we will modify the arrangement only for the most cogent reasons. See *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). Generally, the party requesting modification must make two showings: (1) a substantial change in material circumstances that is more or less permanent and affects the children’s welfare; and (2) he or she is able to provide superior care and minister more effectively to the children’s needs. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Where the existing custody arrangement provides for shared physical care, as is the case here, the court already has deemed both parents to be suitable custodians. See *Melchiori v. Kooi*, 644 N.W.2d 365, 368-69 (Iowa Ct. App. 2002). Under this shared-care scenario, where the applying party has proved a material and substantial change in circumstances, the parties are on equal footing and bear the same burden as the parties in an initial custody determination; the question is which parent can render “better” care. *Id.* at 369. In addition to assessing the parties’ respective parenting abilities, courts should consider whether the shared physical care arrangement remains in the children’s best interests. See *id.* “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.

We conclude the record supports both a substantial change in material circumstances affecting the children’s welfare and, although both parents are

suitable caretakers, we agree with the district court that Adel has demonstrated he can render “better” care and minister more effectively to the children’s needs. We also note the original shared physical care arrangement arose from an agreement reached by the parties. Accordingly, the district court heard evidence on the issue of physical care for the first time when deciding Adel’s petition for modification. We agree with the district court’s determination.

We have previously found changed circumstances where “the shared custody provisions agreed to by the parties and incorporated into their decree did not evolve as envisioned by either of the parties or the court.” *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). It seems a fundamental understanding of the agreement here was that both children would spend equal amounts of time with each parent while remaining physically, mentally, and emotionally healthy. It is clear that the shared care arrangement in this case has not evolved as either of the parties or the court envisioned. Rather, it has generated more discord within the family and has created stress to the detriment of the children, neither of whom has adjusted well to the shared physical care schedule. We also recognize the parents’ inability to communicate with one another since the divorce has exacerbated many of the problems. *See Melchiori*, 644 N.W.2d at 367-68 (indicating a breakdown in the parents’ cooperation and communication concerning a shared physical care arrangement may constitute a substantial change in circumstances).

Spending equal time in the home of each parent, as envisioned by the agreement, has posed problems for both N.M. and S.M. N.M. has consistently

declined to follow the shared care schedule and spends the majority of overnights scheduled to be at Hanaa's home instead at Adel's home. Both parents have acquiesced to N.M.'s choice to stay with her father and, although Hanaa raised concerns that Adel pressured N.M. to stay at his home and manipulated the children, we agree with the district court that the record does not support her assertion. Although S.M. has followed the schedule, it has caused him substantial stress and he has stated a strong preference to live primarily in one home. In fact, both children express a strong preference that they reside primarily with one parent—N.M. prefers to be with Adel and S.M. declined to state a preference in his testimony. While we consider the children's expressed preferences, we give them less weight in a modification action than we would in the original custody proceeding. *Thielges*, 623 N.W.2d at 239 (stating, "[w]hen a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining child custody rights").

Moreover, the parties' divergent parenting styles have created discord in the children's lives, particularly S.M.'s, and the evidence demonstrates that transferring from a structured routine at Adel's home to a "lax" environment at Hanaa's home proved difficult for him. Adel's home is described as having more routine, rules, and a familiar daily schedule for the children, while Hanaa allows the children more freedom to do what they would like. Although the parties presented somewhat conflicting evidence regarding S.M.'s academic performance, both parties—as well as S.M.—acknowledged his grades had

declined. S.M. attributed much of the problem to the lack of structure at Hanaa's home and to not completing homework or studying while in Hanaa's care. He testified his grades improved largely because of his father's efforts in helping him. Testimony also indicated the more relaxed environment at Hanaa's created difficulties for S.M. in managing his ADHD. For example, he testified that he often forgot to take his medicine for ADHD while at Hanaa's home.

The record indicates not only that transferring between the two environments has proved difficult for the children, but also that the children prefer the more structured environment at their father's home, and that the structured routine helps them excel. S.M. testified he completes his homework at his father's where there is scheduled time for studies, that his father routinely ensures S.M. completes schoolwork—even when he is at Hanaa's—and that his father makes sure S.M. consistently takes his medication for ADHD, which is imperative for his concentration and ability to do well at school.

Moreover, N.M.'s severe anxiety, which developed after the divorce, coupled with her reluctance to discuss these concerns with her mother and that they worsen when she is at her mother's home also contribute to the substantial change in circumstances. N.M.'s perspective that she is safer and more comfortable at her father's home because she can discuss her anxiety with him support the district court's conclusion that placing physical care with Adel is in N.M.'s best interests. We also recognize, as did the district court, that under these circumstances, it appears "the only feasible way to keep the children together is to have them living primarily with Adel" because N.M. is "clearly not

comfortable living in Hanaa's home" and given her "emotional state" it would be unwise to force her to live where she is uncomfortable. See *In re Marriage of Fynaardt*, 545 N.W.2d 890, 893 (Iowa Ct. App. 1996) (indicating "[o]ur courts disfavor split custody of siblings").

We also agree with the district court's conclusion that Adel is better suited to provide the children's care. The record reflects that Adel has been more active in monitoring and assisting the children with their schoolwork, his more structured environment is beneficial to both, S.M. is better able to manage his ADHD while in his father's care, and N.M. is comfortable communicating with her father about her anxieties. We agree with the district court's conclusion that Adel has demonstrated a substantial change in circumstances and, "[g]iven [the children's] feelings it is logical to conclude that the children will be more content if living with Adel which will help foster appropriate physical, mental, and social development." Giving weight to the district court's findings, particularly on the issue of credibility, we affirm the modification.

B. Child Support

"The purpose of the child support guidelines is to provide for the best interests of the children by recognizing the duty of both parents to provide adequate support for their children in proportion to their respective incomes." *In re Marriage of Beecher*, 582 N.W.2d 510, 513 (Iowa 1998). When determining the child support obligation of the noncustodial parent, the guidelines must be applied absent special circumstances. *In re Marriage of Fox*, 559 N.W.2d 26, 29 (Iowa 1997).

Adel contends the district court incorrectly concluded the children were covered by health insurance at no cost to him when he in fact pays \$154.19 per month for the children's health insurance. He asserts Iowa Court rule 9.5(7) of the child support guidelines requires the court to deduct the premiums he pays for the children's health insurance from his gross monthly income and argues the district court improperly failed to deduct the premiums when calculating his net monthly income. Although we disagree with Adel's method of computation and conclude his premium payments are not deductible from his gross monthly income, we nevertheless recognize the evidence demonstrates Adel incurs monthly costs for the children's health insurance. Under the guidelines, he is entitled to have that cost taken into account when the court calculates each parent's support obligation. At oral argument, Hanaa's attorney did not contest that the amount Adel paid for the children's health insurance should be considered in the child support calculation.

The child support worksheets for calculating net monthly income do not provide a deduction from gross monthly income for health insurance premiums, but only for cash monthly medical support. However, the worksheet entitled "Calculation of the Guideline Amount of Support" (Support Worksheet) requires the court to denote a list of figures including each parent's net monthly income, each parent's proportional share of income, and the cost of the children's health insurance premiums, among others. On line E, under the heading, "III. Calculation of the Guideline Amount of Support," where the court was to enter

the cost of the children's health insurance premiums, the district court entered \$0.

We remand for recalculation of the parties' child support obligations consistent with our ruling concerning the health insurance costs.

Costs on appeal are taxed one half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.