IN THE COURT OF APPEALS OF IOWA

No. 0-752 / 10-0615
Filed November 10, 2010

IN RE THE MARRIAGE OF SARAH RAE SCHILLING AND MARK JOSEPH SCHILLING

Upon the Petition of

SARAH RAE SCHILLING,
Petitioner-Appellant,

And Concerning

MARK JOSEPH SCHILLING,
Respondent-Appellee.

Appeal from the Iowa District Court for Delaware County, Monica L. Ackley, Judge.

A mother appeals the district court's refusal to modify the physical care of her four-year-old son. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Emily Reiners and Whitney R. Jacque of O'Connor & Thomas, Dubuque, for appellee.

Considered Sackett, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

A mother appeals the district court's refusal to modify the physical care of her four-year-old son. The January 2009 decree ending the marriage of Mark and Sarah[1] Schilling granted the parents joint legal custody and shared physical care of their son. Six months later, Sarah sought to modify the decree to end the shared care arrangement and obtain physical care. She premised the request on her relocation to start a new job and difficulty in communicating with Mark. Because Sarah fails to show a substantial and material change in circumstances, we affirm the district court.

I. Background Facts and Proceedings

Sarah and Mark Schilling married in 2002 and had a son in 2005. During the marriage, they lived in Greeley, Iowa. Sarah moved out of the marital home in 2007. Mark started dating Melissa Hampton several months later. Mark and Melissa were living together when the dissolution decree issued on January 21, 2009. They now live in Edgewood. Sarah started dating Dan Leonard in January 2009. Sarah and Dan were living together in Independence at the time of the modification hearing in January 2010. Edgewood and Independence are approximately forty miles apart.

Under the stipulation incorporated into the dissolution decree, the parties have "joint legal and physical custody" of their son. The decree provided Mark custody every other weekend, every week from Tuesday at 5 p.m. to Thursday at

[1] The dissolution decree restored Sarah's last name to Odell.

5 p.m., and alternating holidays. The parties were to split transportation for all visitations.

On July 31, 2009, Sarah applied to modify the decree. She alleged the existence of a substantial and material change in circumstances and listed four conditions: (1) she moved to Independence, increasing the distance between her home and Mark's residence; (2) she worked in Cedar Rapids, rendering shared care unworkable; (3) Mark refused to split transportation for all exchanges; and (4) Mark's parents provided the majority of care for the child when he was in Mark's custody. Mark filed an answer, denying Sarah's allegations and asserting a counterclaim for physical care. Mark also alleged a substantial and material change in circumstances, citing, among other things, a breakdown in communication between the parties.

The district court heard evidence on the requests for modification on January 6 and 8, 2010. On February 22, 2010, the district court issued an order finding insufficient grounds to modify the joint physical care arrangement. The court did modify the visitation schedule to accommodate the distances between the parties' residences. Only Sarah appeals.

II. Legal Standards

We exercise de novo review in actions to modify child custody or physical care. Iowa R. App. P. 6.907; *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). Because we must base our decision on the particular circumstances presented by the parties before us, prior cases offer little precedential value. *Id.*

We give weight to the district court's factual findings especially on credibility determinations, but are not bound by them. *Id.*

III. No Material and Substantial Change in Circumstances.

To modify a custodial provision in a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the child's best interests require the requested modification. *In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983). The changed circumstances must not have been contemplated by the court when the decree was entered; must be more or less permanent, not temporary; and must relate to the child's welfare. *Id.*

The district court rejected the notion that Sarah's move, her new job of only a few months, and her relationship with a new paramour combined for sufficient grounds to modify her son's physical care arrangement. Sarah's relocation to Independence added about twenty minutes to the trip between her home and Mark's residence. Sarah failed to show that the small increase in drive time seriously impacted their son's well-being. *See In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa Ct. App. 1992) (finding no necessity for modification where a move to another city did not substantially affect children's best interests). The district court modified the visitation schedule to accommodate the extra distance.

To be considered material and substantial, a change must be more or less permanent. *Frederici*, 338 N.W.2d at 158. Sarah testified that she already was looking for other employment closer to her home in Independence. Considering

the flux in her job prospects, the district court was right to question the permanency of Sarah's additional commute to Cedar Rapids.

Sarah argues on appeal that each parent's new paramour contributes to a finding of changed circumstances. We disagree. Mark already had established a relationship with Melissa by the time of the dissolution decree. Accordingly, Melissa's involvement in the child's life was within the contemplation of the district court fixing the original custody terms. The district court found that both Melissa and Dan, Sarah's boyfriend, enjoyed a good relationship with the child. Nothing about the parents' relationships with their new partners points to a substantial and material change in circumstances that would impact the child's welfare in a manner requiring physical care modification.

On appeal, Sarah urges that her inability to communicate effectively with Mark requires repeal of the joint physical care arrangement. A breakdown in the parents' cooperation and communication concerning a shared physical care arrangement may constitute a substantial change in circumstances. *Melchiori,* 644 N.W.2d at 368. In *Melchiori*, our court recognized discord between parents that disrupts a child's life may warrant modification of the decree to designate a primary caregiver. *Id*.

This record does not portray a hopeless deadlock in parental communications. Mark and Sarah talk on the telephone almost every day concerning the care of their son. Although there was some discord regarding their son starting preschool in Independence, the parents have since adopted a spirit of cooperation about his attendance there. They each testified that they

would make an effort to communicate with the other parent if they were granted physical care. We are optimistic that they will foster positive communications regarding their son under a continued shared care arrangement. By all accounts, their son is a happy, well-adjusted child with many adults who care about him and endeavor to have a positive influence on his life. While Mark asserted in his counterclaim that there was a breakdown in communication, his testimony at the modification hearing and his appellate briefing indicate that he now believes the parties are able to cooperate in the shared physical care arrangement. We concur with the district court that Sarah has failed to demonstrate a substantial and material change in circumstances.

Because we decide Sarah has not proven a material and substantial change of circumstances, we do not address whether the record shows Sarah would be the better primary caretaker if the shared care arrangement were ended.

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

AFFIRMED.