

IN THE COURT OF APPEALS OF IOWA

No. 0-913 / 10-0909
Filed February 9, 2011

**IN RE THE MARRIAGE OF PATRICK C. NICHOLSON AND STACEY
GENGENBACHER**

Upon the Petition of

PATRICK C. NICHOLSON,
Petitioner-Appellant,

And Concerning

STACEY GENGENBACHER,
Respondent-Appellee.

Appeal from the Iowa District Court for Des Moines County, John G. Linn,
Judge.

Patrick Nicholson appeals from the district court order denying his motion
to modify the custody provisions of the decree dissolving his marriage to Stacey
Gengenbacher. **AFFIRMED.**

Mark D. Fisher of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar
Rapids, for appellant.

Marlis J. Robberts of Robberts & Kirkman, L.L.L.P., Burlington, for
appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

EISENHAUER, J.

Patrick Nicholson appeals from the district court order denying his motion to modify the custody provisions of the decree dissolving his marriage to Stacey Gengenbacher. He contends a substantial change in circumstance warrants modifying the decree to grant him physical care of their child. He also contends the court erred in failing to incorporate a “first opportunity to care provision” into the visitation provision of the decree. Finally, he contends the court abused its discretion in awarding Stacey \$9000 in trial attorney fees. We affirm.

I. Background Facts and Proceedings. The facts of this case are largely undisputed. What differs is the parties’ belief as to what those facts show. There is no disagreement as to the following: Patrick and Stacey met online in January 2004. They began a relationship and moved in together in June 2004. In April 2005, Stacey gave birth to their only child, Padrac. Stacey has two teenage children from prior relationships. On July 26, 2006, Patrick and Stacey signed a common-law marriage affidavit. However, the parties’ relationship deteriorated and Patrick filed for dissolution in March 2007. Following a trial in March 2008, the district court on June 12, 2008 entered its decree dissolving the marriage. The decree granted Stacey physical care of Padrac with the following visitation granted to Patrick: from 4 p.m. Sunday until Patrick left for work Tuesday morning, and Wednesday, Thursday, and Friday mornings from the time Stacey left for work until Patrick went to work.

Shortly after the decree was entered, Patrick began documenting what he claims were signs Padrac was being abused in Stacey’s care. He took over two

hundred photographs of Padrac to document what he believed to be injuries. He also documented the clothing Padrac wore when Stacey dropped him off for visitation to keep track of how often he wore a particular article of clothing. Patrick had a video surveillance system installed around his house and videotaped each custody exchange. Patrick reported Stacey to the Department of Human Services (DHS) for the alleged abuse to Padrac and contacted law enforcement regarding these allegations. None of the investigations that followed revealed any abuse.

In August 2008, Patrick had a change in his work schedule. He began working Saturday through Wednesday from 5:30 a.m. until 1:30 p.m., rendering the visitation provisions of the dissolution decree unworkable.

On March 31, 2009, Patrick filed a petition to modify the dissolution decree. He alleged the change in his work schedule made the visitation schedule unfeasible. He also alleged Stacey refused to support his relationship with Padrac and had abused Padrac and provided him with inadequate care. Patrick sought modification of the physical care, visitation, transportation, child support, and medical expense provisions of the decree. He requested Padrac be placed in his care. Stacey conceded the change in Patrick's work schedule warranted modification of the visitation schedule. She denied any other change in circumstances and requested Padrac remain in her care.

Trial was held in January 2010. On March 9, 2010, the district court entered its ruling on the request for modification. The court modified the

visitation schedule to allow for visitation on each Monday and Tuesday from 2 p.m. until 4:30 p.m., and from 2 p.m. Wednesday until 4:30 p.m. Friday.

The court found Patrick had failed to show a substantial change in circumstances warranting modification of the custody provisions of the decree. Of the forty-seven of the photographs Patrick introduced into evidence to document the alleged abuse the court found only five were “marginally noteworthy, but not indicative of abuse.” It found: “Stacey offered reasonable explanations for the source of these scrapes, bruises, and blemishes. Padrac is an active, playful youngster who ‘rough-houses’ with his older brothers, cousins, and friends.” It then concluded:

Resolution of this case comes down to judging the quality, credibility, and accuracy of the evidence. Simply put, the Court rejects Patrick’s claims that Stacey is an unfit parent and that she or her sons are physically abusing Padrac. Patrick has a history of making false claims against Stacey. This started during April of 2007, when Patrick filed the Petition for Dissolution. Consistently, Patrick’s allegations to police, DHS workers, and physicians have all been unconfirmed, unfounded, and for that matter, untrue. Patrick seems to operate under the belief that if he makes numerous and repeated allegations against Stacey, one of them might someday turn out to be true. This is simply not the case. Patrick is unable to prove that Stacey is an unfit parent because the truth of the matter is that Stacey is a fit parent. Patrick has not proved a substantial change of circumstances has occurred. Stacey continues to have a superior claim to minister to Padrac’s needs more effectively than Patrick. The Court concludes Patrick’s request to be awarded physical of Padrac shall be denied. Patrick’s Petition for Modification of physical care shall be dismissed.

The court awarded Stacey \$9000 of attorney fees.

Patrick filed a timely motion to enlarge or amend, seeking modification of the decree to include a “first opportunity to care” provision. In her response,

Stacey asked the court to deny the modification, stating her fear the provision would only generate more litigation from Patrick. The court denied the request, citing “the high level of conflict” between the parties and the likelihood that granting the request would lead to more conflict.

II. Scope and Standard of Review. We review the record de novo in proceedings to modify the custodial provisions of a dissolution decree. *In re Marriage of Pendergast*, 565 N.W.2d 354, 356 (Iowa Ct. App. 1997). We give weight to the findings of the trial court, although they are not binding. *Id.* We give particular weight to the court’s credibility findings given its opportunity to observe the demeanor of the witnesses. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Our primary consideration is the best interests of the child. *Id.*

III. Modification of Custody. Patrick contends the court erred in denying his motion to modify custody. He argues a substantial change of circumstances exists warranting a change in custody. He also argues he has shown a superior ability to care for the child.

A modification of child custody is appropriate only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the child. *Id.*

Patrick claims a substantial change in circumstances exists warranting modification because Stacey has “frequently and repeatedly” allowed Padrac to

receive physical injuries while in her care. As evidence, he refers to the photographs he took documenting the “abuse” and the child’s statement that his mother spanked him on at least one occasion because he was bad. The child also allegedly told Patrick his half-brother grabbed him and tried to shove him into a closet on one occasion. Patrick also claims Stacey is neglectful of the child, dropping Padrac off at his home with “frequently undressed or infected” wounds and “requiring him to wear the same underwear and socks over 56 times in a seven month period” while in Patrick’s care. He cites the fact she frequently leaves Padrac in the care of babysitters as further evidence of her neglect. Finally, he claims Stacey’s demonstrated animosity toward him was grounds for modification.

Like the district court and the DHS, law enforcement, and medical providers who investigated Patrick’s allegations, we find Patrick’s claims of abuse and neglect to be unfounded. In the time between dissolution and the modification hearing, Patrick engaged in a bizarre documentation of every exchange of custody and subjected the child to over two hundred photographs to document what he characterized as abuse. All credible evidence shows the various “injuries” were the result of regular activity for a child of Padrac’s age. There is not a scintilla of evidence to support the allegation Stacey has abused or neglected Padrac. Because Patrick has failed to prove a change of circumstance warranting modification of the custody provisions of the dissolution decree, we affirm the district court’s denial of the petition to modify custody.

IV. Visitation. The district court found a substantial change in circumstance warranted modification of the visitation provisions of the dissolution decree and modified visitation accordingly. However, Patrick complains he should be allowed more visitation. He requests visitation be modified to 2 p.m. until 7 p.m. every Monday and Tuesday, from 2 p.m. Wednesday until 2 p.m. Thursday, and every other weekend from 5 p.m. Friday until 7 p.m. Sunday. He also asks for six uninterrupted weeks of visitation per year.

Patrick also contends the court erred in denying his request to modify the visitation provisions to include a “right of first refusal provision.” This would require Stacey to allow Patrick the right to care for Padrac whenever she is unable to.

In establishing visitation rights, our governing consideration is the best interest of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation is in a child's best interest as it maximizes physical and emotional contact with both parents. See Iowa Code § 598.41(1)(a) (2009).

The visitation proposed by Patrick would be akin to joint physical care. Such a schedule is not workable in light of the conflict between the parties, or more accurately, the conflict caused by Patrick. The visitation schedule set forth by the district court allows appropriate contact with both parents and is in the child’s best interest. Accordingly, we affirm.

V. Trial Attorney Fees. Patrick finally contends the district court abused its discretion in awarding Stacey \$9000 in trial attorney fees.

An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Awards of attorney fees must be fair and reasonable and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994).

We find no abuse of discretion under the circumstances. Patrick documented every visitation exchange, as well as every scratch and bruise to Padrac in the short period between the entry of the dissolution decree and the filing of his petition for modification. He reported Stacey to the DHS twice and took Padrac to two different physicians for alleged abuse. Despite having none of the alleged abuse confirmed, Patrick filed this modification action on the grounds Padrac was being abused. Stacey incurred \$9221.25 in attorney fees litigating the action. Although there were legitimate grounds for seeking modification of the visitation based on Patrick's change in work hours, this comprised a small portion of the proceedings. The bulk of the litigation was unnecessary and created a financial hardship for Stacey. Considering Patrick's role in creating the expense and his superior ability to pay, we affirm the district court's award of \$9000 of Stacey's attorney fees.

VI. Appellate Attorney Fees. Stacey requests an award of her appellate attorney fees.

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We are to 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 district court's decision on appeal. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

Stacey was forced to defend the trial court's decision and was successful in her defense. We award Stacey \$1500 in appellate attorney fees.

AFFIRMED.