IN THE COURT OF APPEALS OF IOWA

No. 0-987 / 10-1079
Filed March 21, 2011

**IN RE THE MARRIAGE OF LYNAE OHM
AND SCOTT OHM**

**Upon the Petition of
LYNAE OHM, n/k/a LYNAE ROSENBAUM,**
Petitioner-Appellee,

**And Concerning
SCOTT OHM,**
Respondent-Appellant.

Appeal from the Iowa District Court for Cass County, Richard H. Davidson, Judge.

Scott Ohm appeals from the district court's order modifying the custody and support provisions of the parties' dissolution decree. **AFFIRMED.**

Jenna L. Green and Andrew B. Howie of Hudson, Mullaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Martin Fisher and Trent Groetken of Fisher, Fisher & Groetken, P.C., Adair, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Mansfield, J., takes no part.

DANILSON, J.

Scott Ohm appeals from the district court's order modifying the custody and support provisions of the parties' 2007 dissolution decree. He challenges the district court's decision to modify a joint physical care arrangement and place physical care of their sons born in 1999 and 2003 with Lynae Rosenbaum. Scott also disputes the amount of income imputed to him in the calculation of his child support obligation. Because Scott withheld critical information concerning the children from Lynae, and his availability to serve as the children's caretaker has been significantly curtailed due to job demands, it was appropriate for the district court to modify physical care. We also conclude the evidence supports the amount of income imputed to Scott. We affirm.

I. Background Facts and Proceedings.

The parties' marriage was dissolved in May 2007. At that time the district court approved the parties' stipulation where they agreed they would share physical placement of the children and "[t]he parties anticipate that each party will be with the children one-half of the time as the parties can otherwise agree." Scott was to pay $500 per month in child support, provide medical support, and ensure coverage of the children according to Iowa Code chapter 252E (2007).

Scott filed this petition for modification of the child and medical support and visitation provisions of the decree in October 2009. Lynae answered and counterclaimed, contending there had been a substantial and material change in circumstances and physical care of the boys should be placed with her.

At the modification trial the evidence showed both parties had remarried. Scott married Angela in December 2009. Angela has two children from prior

marriages. Angela has physical custody of her daughter, age eight and she has every other weekend visitation with her son, D.E., age fifteen. D.E. has been adjudicated delinquent due to sexual misconduct with his male step-siblings in his father's home and completed a treatment program. During a visit at Scott's home after D.E.'s release from treatment, D.E. was permitted to babysit the parties' sons. On another occasion, D.E. showered with one of the parties' sons. To Lynae's dismay, Scott did not voluntarily share the circumstances of D.E.'s adjudication, babysitting, or showering incident with her.

Scott owns a trucking company, Ohm Trucking. With respect to the parties' custody arrangement Scott stated,

> It started out when we first got divorced that I was a truck driver then also, and when I got home on Wednesday or Thursday, I would pick up the boys and keep them until I left Saturday or Sunday, sometimes Monday morning. And while I was gone, she would have them, and then that changed when I came off the road for a while to every two days and every other weekend.

At the time of trial, the boys continued to alternate homes every two days. However, at the time of trial Scott drove a semi-trailer truck primarily on out-of-state trips, and described his current schedule as follows:

> Right now, I am gone and home basically every other weekend. I do come in sometimes throughout the week for a day or two. And in the spring and fall, I take off roughly a month each time, maybe a month and a half due to the farmwork.

When the parties' children are at Scott's home while he is on the road, Angela cares for them. Parental communication between Scott and Lynae consists of e-mail. Scott admitted that Angela does most of the communicating with Lynae. Scott asked the court to modify the physical care arrangement to alternating

seven-day periods. He and Angela both express dissatisfaction with the current schedule.

Scott testified his trucking company is suffering due to the economic downturn. He owns six semi tractors and five refrigerated trailers. However, he "parked" the trailers and now leases his "trucks to Jacobsen Transportation in Des Moines, and we pull their trailers now." He testified he employs two drivers in addition to himself. Angela is also employed by the trucking company. Scott explained he leases farmland from his parents and has farm income "that covers a lot of expense on the trucks." "[W]e currently owe more than they're [the trucking equipment] worth on everything." He stated Angela "is entitled to half the farm income." He has approximately $400,000 in revolving lines of credit, which he testified were secured by the "grain we harvest and the equipment we own." He owns two rental properties, one of which is vacant. Scott had not yet filed a 2009 income tax return at the time of trial. He did, however, submit a preliminary draft to the court, which listed net farm income of $111,857 and a trucking business loss of $87,085. According to the draft return, the business paid wages in the amount of $150,977 and claimed substantial depreciation. Scott submitted a child support worksheet based upon both parties earning a minimum wage.

Scott has also not always timely paid his child support obligation and has not provided health insurance for the children as required by the decree. He did inquire about purchasing insurance through the state's Hawk-I program but stated he was turned down because the children were covered under Title XIX.

Lynae has married Jason Rosenbaum and they have two children together: a son, age four years, and a daughter, age thirteen months. Lynae works as a server at a local restaurant earning wages and tips. She is not currently working forty hours per week. She asked the court to modify joint physical care and award her physical care of the parties' two boys and set child support. Her child support worksheet used an annual income for Scott in the amount of $188,752.

The district court did modify the decree, citing the following as changes of circumstances since the 2007 decree was entered:

> a. Due in part to the financial strain of Ohm Trucking, LLC, Scott is having to spend more time driving and away from home.
>
> b. The children are three years older, and the shared placement arrangement wherein the parties alternate the children every two days is not working, especially during the school year.
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> c. While Scott and Lynae do communicate to a certain degree, their communication is not at a level required by those who have shared placement.
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> d. Scott and Angela's desire to keep the issues surrounding D.E.'s Juvenile proceeding confidential was not sufficient reason to keep the facts from Lynae. Lynae should have been informed immediately to allow her an opportunity to be involved in decision making concerning her children.
>
> e. Scott's work schedule is no longer conducive to the shared placement arrangement agreed to by the parties.
>
> f. Scott's income from Ohm Trucking has decreased.

The district court awarded "Lynae primary physical care and Scott reasonable and liberal visitation," without further specification. The court declined to use either parties' child support worksheet, finding neither credible. The court wrote:

> While it is difficult to determine Scott's annual income, it is clear that he is capable of earning more than minimum wage. Indeed, he could drive a truck for another employer and make more than minimum wage. The Iowa Wage Survey published by Iowa

> Workforce Development shows the mean wage for a truck driver in region thirteen is $15.93, assuming a 40 hour week would result in annual earnings of $33,134.00. Ohm Trucking paid $150,977 in wages in 2009. In all likelihood Scott pays his drivers more than the mean wage for the region. In addition, Scott's farm income has been substantial the past few years.
>
> Under the circumstances that include an insolvent trucking company and a draft tax return, the Court elects to impute income to both parties for purposes of calculating child support and then review the matter in a year.

The court imputed income to Scott in the annual amount of $33,134 and net monthly income of $2162.44. The court imputed to Lynae an annual earning capacity of $15,080[1] and a net monthly income of $1131.22. The court ordered Scott to pay child support in the amount of $739.93 per month and medical support in the amount of $138.06 per month.

Scott now appeals, contending there are not sufficient grounds for modifying the joint physical care arrangement. He also contends the court erred in its child support determination because it considered evidence not submitted by the parties. He asks that we remand for recalculation of child support.

II. Scope and Standard of Review.

We review the modification of a dissolution decree de novo. Iowa R. App. P. 6.907; *In re Marriage of McCurnin,* 681 N.W.2d 322, 327 (Iowa 2004). We give weight to the district court's fact findings, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.904(3)(*g*); *McCurnin,* 681 N.W.2d at 327.

[1] This is the same amount Scott used on his worksheet as Lynae's annual income.

III. Modification of Joint Custody.

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) the requesting parent 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 joint physical care, as is the case here,[2] 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 joint physical

[2] We note the district court actually referred to its physical care arrangement as "shared" rather than "joint" physical care. Although the terms are synonymous, we will refer to the arrangement in this opinion as "joint physical care," as set forth in the Iowa Code. *See* Iowa Code § 598.1(4) (2009) ("Joint physical care" means an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child . . . .").

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 joint 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 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). In this action, a fundamental understanding of the agreement was that "each party will be with the children one-half of the time." Scott acknowledges that because of his work schedule circumstances have changed sufficient to change their care schedule. By his own testimony, Scott is only home every other weekend. We conclude it is clear that the joint physical care arrangement in this case has not evolved as either of the parties or the court envisioned. Additionally, the current arrangement (that is, switching homes every two days) is difficult for the children, as well as the parents.

The record also reflects that Lynae has been actively engaged in the children's care and education. When one of the children expressed a desire to talk to a counselor, Lynae arranged for that counseling. Scott did not support

that decision. Scott is home only every other weekend and claims to parent by headset. He testified that in his home Angela is the day-to-day caregiver, the principal contact for schools, and person who communicates with Lynae about parenting issues. Scott has kept information from Lynae that would allow her to fully participate in the safety, care, and education of her children.[3] In registering the children for school, contact information for Lynae, the children's joint legal and physical custodian, was omitted. When Lynae discovered the omission and corrected it, Scott responded with anger and informed the school that he was the person who was to be contacted.[4]

Causing more concern, however, are the circumstances surrounding Angela's fifteen-year-old son. Despite D.E.'s admitted conduct, lengthy placement outside the home, and treatment, Scott insists the conduct did not occur. Nor does he appear to understand Lynae's legitimate concern or her right to have information that would allow her to make informed parental decisions. Deborah Yeager, child protective worker, testified Scott and Angela only reluctantly agreed to a safety plan (which the Ohms prefer to call a "privacy plan"). We are not convinced Scott will abide by the plan as he testified "those were [DHS]'s suggestions."

In any physical care arrangement, but particularly a shared care arrangement, critical information to a child's well-being, including risks to the

[3] "Rights and responsibilities as joint legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.41(5).

[4] His claim is based upon his interpretation of an IRS ruling having to do with tax exemptions.

child's physical and mental health, should be communicated and shared with the other parent. Any parent would expect nothing less, nor do we.

Scott correctly observes that the district court did not specifically identify Lynae as the "better parent." However, upon our de novo review we agree with the district court that a substantial change of circumstances has occurred since the entry of the decree, and further conclude that Lynae is the better parent.

IV. Child Support.

Scott's previous child support obligation of $500 per month was based upon joint physical care. The change of physical care constitutes a substantial change of circumstances warranting a recalculation of child support. *Melchiori*, 644 N.W.2d at 370 ("Child support is always subject to review if there is a change of circumstances.").

Parents have a legal obligation to support their children, and this obligation should be apportioned in accordance with the means available. *In re Marriage of Smith,* 501 N.W.2d 558, 560 (Iowa Ct. App. 1993). "Before applying the child support guidelines there needs to be a determination of the net monthly income of the custodial and noncustodial parent at the time of the hearing." *In re Marriage of Kupfershchmidt*, 705 N.W.2d 327, 332 (Iowa Ct. App. 2005). In determining a party's child support obligation, the court must first determine the party's currently monthly net income from the most reliable evidence presented. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 51 (Iowa 1999).

Net monthly income means gross monthly income less allowable deductions. *See* Iowa Ct. R. 9.5. "To determine gross income, the court shall not impute income under rule 9.11 except "[p]ursuant to an agreement of the

parties" or "[u]pon request of a party, and a written determination is made by the court under rule 9.11."

Scott does not argue the court was in error to impute income to him.[5] Rather, his complaint is that the court imputed too much income and considered evidence outside the record to reach its conclusion. Even if we assume that the court should not have considered the "Iowa Wage Survey" published by Iowa Workforce Development, the evidence presented, meager as it was, provides support for the trial court's finding of Scott's imputed income.

The trial court found Scott did not present a credible child support worksheet because Scott was "in all likelihood" capable of earning more than minimum wage and imputed income of $33,134. Based on the wages paid by the trucking company of $150,977,[6] and Scott's testimony that the company employed two other drivers in addition to himself, one can only assume that Scott was capable of earning more than the minimum wage he claimed. The trial court's imputed income to Scott of $33,134.00 was within the permissible range of the evidence. Thus we deny Scott's request that we reverse and remand for a recalculation of his child support based upon Scott earning minimum wage.

[5] Because both parties' worksheets used imputed income, we believe the court properly imputed income under either rule 9.5 alternative.

[6] We have no evidence of the manner in which the company wages was distributed. Even if we assume all the wages paid by Ohm Trucking went to the two other drivers, this would indicate Scott was capable of earning wages of more than $75,000. If wages were paid to three drivers, one-third of the $150,977 would equal more than $50,000 per driver. Even if Angela was paid an equal sum for her services, one-fourth of $150,977 is in excess of the court's imputed income for Scott. Scott's claim that we should calculate his child support based upon him earning minimum wage is rejected.

V. Appellate Attorney Fees.

Lynae seeks an award of 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). When determining whether to award such fees, we look to 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. *See McKee v. Dicus*, 785 N.W.2d 733, 740 (Iowa Ct. App. 2010). We award appellate attorney fees to Lynae in the amount of $1500.

Costs of this appeal are taxed to Scott.

VI. Conclusion.

There has been a substantial change in material circumstances affecting the children's welfare. Upon our de novo review, we agree with the district court the parties' children would be better served in Lynae's physical care. We also conclude the evidence supports the amount of income imputed to Scott.

AFFIRMED.