IN THE COURT OF APPEALS OF IOWA

No. 1-063 / 10-1369
Filed April 27, 2011

JOHN PAUL LYNOTT,
Plaintiff-Appellant,

vs.

PATRICIA ANN ROSALES,
Defendant-Appellee.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

A father appeals from the district court's ruling that modified the previously ordered joint legal and physical custody of the parties' child and granted the mother physical care and sole legal custody. **AFFIRMED AS MODIFIED.**

Michele M. Lewon and Bradford Kollars of Kollars & Lewon, P.L.C., Sioux City, for appellant.

Elizabeth A. Rosenbaum, Sioux City, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

John and Patricia are the parents of Jillian, who was age five at the time of the district court's ruling on appeal. John and Patricia were never married.

John is an insurance agent with AFLAC and has been with the company since 1999. He has a flexible work schedule and is able to be home with Jillian almost all of the time when she resides with him. By all accounts, John is a very active parent and has a strong bond with Jillian.

Patricia is a retail banking officer with Wells Fargo and has been with the company for six years. She has two older children from a previous marriage. On May 12, 2010, she married Bernie LeCates, whom she had been dating since the spring of 2008. Bernie lives in Vermillion, South Dakota, about forty miles from Sioux City where both parties currently live, and Patricia planned to move to live with Bernie if the court allowed her. The record establishes that Patricia is an active mother and that she is bonded with Jillian.

On August 25, 2006, Judge Gary Wenell filed an order after trial granting Patricia and John joint legal custody and joint physical care of Jillian. Following the court's 2006 order, the parties initially got along well and were able to communicate as necessary to provide for Jillian's care. However, beginning in 2008, the parties' ability to communicate began to deteriorate.

Patricia testified that in January 2008, John told Patricia the Barbie toothpaste she allowed Jillian to use was killing Jillian on a day-to-day basis. Patricia discussed this concern with Jillian's dentist at her next check-up, and the dentist supplied a note for Patricia detailing current fluoride recommendations.

On March 14, 2008, an email was sent from Patricia's work email address to John stating, "Your email address has been blocked for any future correspondence with this recipient." Patricia testified her employer had to intervene because John's frequent phone calls and emails were disruptive to her at work. John described this as something "her employer did to everybody that she was supposed to not be talking to." John continued to email Patricia at this email address through at least December of 2008.

Patricia testified she hired an attorney to limit John's calls and emails. On April 23, 2008, Patricia's attorney sent John a letter informing him that his repeated calls and emails to Patricia constituted harassment. The letter further stated Patricia would only accept one phone call per week, during which time she would allow John to talk to Jillian on the phone. John testified Patricia still would not allow Jillian to talk to him during this scheduled time, so he hired an attorney to help him resolve the issue. The parties ultimately agreed to allow this call once per week.

John testified that in April of 2008, Jillian told him she sometimes slept in the same bed as her mother and her mother's boyfriend. John stated this concerned him, so he took Jillian to Light a Child's Life at Mercy Medical Center. That entity referred him to outpatient care at Mercy. John testified he did not take Jillian there out of concern for sexual abuse. The medical report dated April 24, 2008, states Jillian was presented to the emergency room because of her "father having concerns about whether she might be being inappropriately touched by his divorced wife's new live-in boyfriend." The exam revealed no

signs of physical injury. Mercy contacted the Iowa Department of Human Services (DHS) as a result of this.

On May 8, 2008, John took Jillian to counseling to address this situation. The session indicated there was no immediate problem. John did not tell Patricia he was taking Jillian to any appointments related to potential sexual abuse. The record suggests John took Jillian to a total of two or three counseling sessions in spite of the fact that both the physical examination at Mercy and the initial counseling session indicated there was no immediate problem.

On March 3, 2009, Patricia took Jillian to the doctor for her regular checkup. At this visit, Patricia requested a lead test. Patricia testified she requested this test after John accused her of having an unsafe home and stated he would not be surprised if Jillian had lead poisoning from the peeling paint on Patricia's house.

In April 2009, John had Jillian baptized in his Catholic church. John had previously emailed Patricia asking if she would like to choose one of Jillian's godparents, and Patricia had responded positively. However, Patricia testified at trial that John never informed her of the date of the baptism, so she did not attend. Patricia testified she found an invitation to the baptism in Jillian's bag after the baptism.

What the parties describe as their "landmark dispute" began in August of 2009, at which time, according to John's testimony, Jillian began having serious coughing spells. One of John's neighbors testified to seeing Jillian coughing so hard she believed Jillian was going to throw up.

On August 21, 2009, John took Jillian to her pediatrician, Doctor Patrick Beck, who prescribed her Zyrtec for allergies. On September 10, 2009, John took Jillian back to the doctor because of her persistent coughing. She saw Beck's partner, who believed Jillian had cough variant asthma. Accordingly, he prescribed Albuterol, Prednisone, and Singulair. On September 18, 2009, John took Jillian to see Dr. Beck a third time with the same problems, expressing concern that Patricia was not giving Jillian her medication. She was prescribed Pulmicort, Albuterol, Singulair, and Zyrtec.

Patricia testified that Jillian did not cough while in her care. Accordingly, on October 7, 2009, Patricia took Jillian to see Dr. Beck, expressing concern about putting Jillian on strong, unnecessary medications. Per Dr. Beck's request, Patricia brought a note from Jillian's daycare providers regarding what symptoms they saw. The daycare providers reported Jillian had not been coughing. Dr. Beck told Patricia to stop giving Jillian the asthma medications—Pulmicort and Albuterol.

On October 19, 2009, John again brought Jillian to see Dr. Beck. This appointment was scheduled during Patricia's time with Jillian. Dr. Beck's notes stated, "Mother showed up concerned about an appointment with the father and wanted to be a part of it and the father did not want her to be a part of the discussion." Dr. Beck asked Patricia to allow John a chance to talk with him one-on-one since he had talked to Patricia at Jillian's previous appointment.

John presented a video of Jillian coughing as well as video of conversations with individuals at the daycare stating that Jillian coughs when she is outside. John also produced what Dr. Beck described as "multiple files" for

him to look at "concerning lesions that [Jillian] has obtained while staying with her mother." Dr. Beck informed John that the main reason for the visit was to examine Jillian's coughing and her need for medication. Dr. Beck concluded Jillian had cough variant asthma and placed her on Pulmicort regularly and Albuterol as needed. He noted these medications should not be stopped and started on a day-to-day basis. He also noted, "Both parents have been notified that we will not fight any legal battles in our office . . . . Unfortunately Jillian is caught in the middle of this . . . and [it] could cause some emotional distress in the future."

On November 3, 2009, John filed a petition for modification asserting a substantial and material change of circumstances warranted placement of Jillian in his sole custody and physical care. His petition included allegations that Patricia was not properly supervising Jillian, resulting in numerous injuries and profound health problems, and that Patricia intentionally disregarded medical directives and prescription requirements. Patricia counterclaimed, alleging the parties should be awarded joint custody and she should be awarded physical care of Jillian.

On November 4, 2009, John filed an application for order for rule to show cause, alleging Patricia "failed to comply with the [2006] order by not following the medical directives and prescription requirements for the minor child."

On November 16, 2009, Patricia took Jillian to Dr. Thor Swanson for a second opinion. She informed him Jillian had not been coughing, and he suggested Pulmicort not be used and Albuterol used only as needed.

On December 1, 2009, John reported to DHS that Patricia was not administering Jillian's medications as prescribed. On December 30, 2009, this incident was founded and placed on the child abuse registry for failure to provide adequate health care.

On January 21, 2010, Patricia filed an application for order allowing neutral medical opinion. The district court considered this motion and John's application for order for rule to show cause along with several other motions. The court found John had not proven Patricia was in contempt and dismissed John's motion. The court granted Patricia's application for order allowing neutral medical opinion.

On February 16, 2010, both parties attended Jillian's appointment with an allergy and asthma specialist, Dr. Christopher Tumpkin. Dr. Tumpkin noted that until Jillian is older and "can do a more complicated testing a true diagnosis will probably be on hold for now." He recommended the parents stop the daily use of Pulmicort "to see what her symptoms do." He recommended the use of Albuterol for a repetitive cough.

Patricia took Dr. Tumpkin's conclusions to DHS, and on March 5, 2010, DHS found the previous child abuse report should not have been confirmed and removed it from the child abuse registry. On March 17, 2010, John appealed this determination, writing to DHS, "Clearly a preponderance of the evidence suggests indifference on the part of Patricia Rosales in her denial of care to Jillian. Note: In some of the most severe crimes the perpetrator displays indifference." John testified he appealed this decision to ensure such an incident would not occur in the future.

On April 6, 2010, John filed a motion for leave to amend his petition to request only a modification of the child's visitation schedule so that the child would spend one-half of her time with each parent. Patricia asked that his motion to amend be denied if it would disrupt the trial date of May 19, 2010. The court granted the motion to amend John's requested relief to joint physical care and joint legal custody. At trial on May 19, 2010, and in a pretrial stipulation submitted the day of trial, Patricia changed her requested relief to ask that she be awarded sole legal custody and physical care of Jillian.

Pursuant to Iowa Code section 598.41(2)(b) (2009), the district court made detailed findings that joint legal custody was not in the child's best interests and awarded sole legal custody to Patricia. Pursuant to Iowa Code section 598.41(5)(a), the court relied on the same findings to award Patricia physical care of the child. The court left in place liberal weekend and weekday parenting time for John. The district court awarded child support and ordered John to pay $7500 of Patricia's attorney fees.

John appeals, arguing the district court erred in: (1) the procedure it used in conducting the trial; (2) awarding Patricia sole legal custody of Jillian; (3) awarding Patricia physical care of Jillian; (4) refusing to modify the visitation schedule; (5) computing child support; and (6) awarding attorney fees.

II. Standard of Review

We review the district court's ruling de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50–51 (Iowa 1999). In doing so, we give weight

to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. *Id*. at 51.

III. Trial Procedure

John argues the district court erred in the following respects in conducting trial: (1) limiting testimony to one day; (2) making a predisposition that four of John's witnesses would not be helpful in deciding the issues; (3) substantially limiting John's testimony regarding treatment of Jillian's cough; and (4) refusing to admit several rebuttal exhibits as evidence.

Because John did not object to any of these issues at trial, we find none of them are preserved on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("[I]ssues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Further, we have considered these issues and find them to be without merit. *See* Iowa R. Evid. 5.403 (allowing district court to exclude relevant evidence if its probative value is substantially outweighed by considerations of waste of time or needless presentation of cumulative evidence); *In re Marriage of Ihle*, 577 N.W.2d 64, 67 (Iowa Ct. App. 1998) ("It is generally recognized that matters relating to the course and conduct of a trial, not regulated by statute or rule, are within the discretion of the trial judge.").

IV. Modification of Original Ruling

Once a physical care or custody 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. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). 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 minister more effectively to the children's needs. *Id.* The changed circumstances must not have been contemplated by the court when it established the arrangement. *Id.*

Legal custody involves decision making affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction. Iowa Code § 598.1(5). If the court does not grant joint custody,

> the court shall cite clear and convincing evidence, pursuant to the factors in [Iowa Code section 598.41(3)] that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed.

Id. § 508.41(2)(b).

Physical care involves "the right and responsibility to maintain a home for the minor child and provide for the routine care of the child." *Id.* § 598.1(7).

A. Legal Custody

We consider first the award of sole legal custody to Patricia. If that decision is supported by the requisite findings and substantial evidence, joint physical care cannot be awarded. *See id.* § 598.41(5)(a) (providing for joint physical care "[i]f joint legal custody is awarded to both parents"). John argues the district court erred in modifying the legal custody arrangement of the 2006 order.

First, we determine Patricia showed a substantial change in material circumstances affecting Jillian's welfare. When there has been a failure of communication and cooperation between parents under a joint legal custody

arrangement, a modification of custody status is appropriate. *In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996). The record evidences a complete lack of communication and cooperation between the parties on fundamental decisions for their daughter, such as medical treatment, which did not exist at the time of the original decree in 2006. Both parties assert the other parent scheduled doctor appointments for Jillian without notification. The parties' disputes necessitated the involvement of Jillian's pediatrician, Jillian's dentist, DHS, and Jillian's daycare providers. John made allegations of sexual improprieties and reported Patricia to DHS for alleged denial of care to Jillian. John and Patricia's lack of ability to communicate goes well beyond the "usual acrimony that accompanies a divorce." *See In re Marriage of Ertmann*, 376 N.W.2d 918, 920 (Iowa Ct. App. 1985) (finding the parties' lack of communication and the usual acrimony accompanying a divorce are not significant enough to justify a denial of joint custody). The record establishes a substantial, permanent change in that the parties became unable to cooperate in a manner that would allow them to make decisions as joint custodians.

Next, we consider whether Patricia met her burden of showing she could minister more effectively to the child's well-being. In making this determination, we consider the factors enumerated in Iowa Code section 598.41(3) and the best interests of the child. Contrary to John's assertions, we find the district court also considered these factors in reaching its conclusion that awarding sole legal custody to Patricia was in Jillian's best interests. The district court specifically cited Iowa Code section 598.41(3), and its lengthy analysis reflects careful consideration of each factor.

While we agree with John that not every factor weighs in favor of Patricia, we find that the most relevant factors support the district court's finding that Patricia can provide superior care to Jillian. Though we do not doubt John's devotion to Jillian, we agree with the district court that his "posturing for future court cases" has added stress and anxiety to Jillian's life. Dr. Beck noted that Jillian's position in the middle of her parents' fights "could cause some emotional distress in the future." The district court found this "inability to communicate effectively appears to be primarily an area John needs to improve on." The district court noted that John's documentation

> crossed the line of a good, caring and loving parent to someone who is obsessed[1] . . . where it appears the primary purpose is to show his superior level of interest and parenting skills as opposed to being a joint custodian and parent.

We defer to the district court's credibility assessments and conclude the district court's factual findings were fully supported by the record. We note that our decision on de novo review to affirm the award of sole legal custody to Patricia is not an attempt to punish John, but rather our effort to provide for Jillian's best interests. The district court left in place the liberal parenting time schedule for John, considering Jillian's school attendance and balancing John's strengths as an involved and active father against his weaknesses as a joint custodial parent.

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[1] At trial, John admitted several exhibits demonstrating extensive documentation of activities John and Jillian participated in, Jillian's medical care appointments, and photographic and written documentation of "injuries" sustained while in Patricia's care.

B. Physical Care

Because we affirm the district court's award of sole legal custody to Patricia, the district court could not have continued joint physical care as requested by John. *See* Iowa Code § 598.41(5)(a). However, we will briefly address this issue.

The substantial change in circumstances discussed above is sufficient to justify modification of the parties' physical care arrangement. *See Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002) (finding "[d]iscord between parents that has a disruptive effect on children's lives" may warrant modification of the physical care arrangement to designate a physical caregiver if it will result in superior care). The parties' disputes, including disputes on minor issues such as toothpaste, consistently reached a level that necessitated intervention from a third party. We agree with the district court that the parties' discord reached such a level that designation of a physical caregiver would result in superior care for Jillian.

Where the existing physical care arrangement provided for joint physical care, as is the case here, the court already has deemed both parents to be suitable custodians. *See id.* at 368. Under this joint physical 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 physical care determination; the question is which parent can render "better" care. *Id*. at 369. In assessing this issue, we look not only at Patricia's parenting ability, but also at the fact that the current joint physical care arrangement is no longer in Jillian's best interest now that she is in school. *See*

id. at 365. When these two factors are weighed together, we find Patricia has met her burden of proof. *See id.*

For the reasons discussed above, we find Patricia has shown she can provide better care for Jillian. In making this determination, we have considered the relevant factors and Jillian's best interests. *See In re Marriage of Hansen*, 733 N.W.2d 683, 697–700 (Iowa 2007); *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). We further note the district court properly weighed the relevant factors and, contrary to John's assertions, did not unduly rely upon an unpublished court of appeals opinion.

V. Modification of Visitation Schedule

John asserts the district court erred in declining to modify Jillian's visitation schedule to provide for maximum contact with John once Jillian began preschool. Pursuant to the court's 2006 order, Jillian resided with John from 5:00 p.m. every Wednesday until 5:00 p.m. every Saturday and with Patricia the remainder of the time. The court ordered that once Jillian commenced school,[2] she should reside with John on alternating weekends starting at 6:00 p.m. on Friday until Monday morning when he would take her to school and also every Wednesday from 6:00 p.m. until Thursday morning when he would take her to school. John was also awarded additional holiday time and time in the summer. In making this finding, the court stated in 2006,

> During the next three or four years, facts may develop suggesting one parent or the other is either more interested in or more capable of providing the child's primary physical care. The parties or the court may then change either the days of residence or the award of physical care.

[2] Jillian was scheduled to begin kindergarten in the fall of 2010.

In order to modify the visitation provisions of an order, a party must establish by a preponderance of the evidence there has been a material change in circumstances since the decree and the requested modification is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000). However, the burden in a modification of visitation rights is different from the burden in a child custody change. *See In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985). Generally, a much less extensive change of circumstances needs to be shown to modify a visitation schedule than a custody provision. *Id.*

In John's amended petition, he asserted the change of circumstances was his demonstrated "ability and capabilities of providing for the child's education, health and welfare" so as to warrant a change of visitation. He argues on appeal that the visitation schedule set forth in the original order for his parenting time once Jillian begins school does not provide him with an opportunity for maximum and continuing contact with Jillian. *See In re Marriage of Leyda*, 355 N.W.2d 862, 867 (Iowa 1984) (recognizing a child's need to maintain meaningful relations with both parents). He further argues that the distance between his home and Vermillion, South Dakota where Patricia may live with her new husband will not deter him from exercising maximum parenting time with Jillian.

We conclude John has not shown a change in Jillian's visitation schedule would be in Jillian's best interests. As Jillian is now school-aged, we find that her interests in stability outweigh John's desire to spend more time with her.[3]

[3] John argues that at a minimum, the visitation schedule should be modified to allow him to commence his visits immediately after Jillian is released from school, rather than at

Accordingly, we affirm the district court's denial of John's request for modification of visitation.

VI. Child Support

John asserts, and Patricia agrees, that the district court erred in failing to give John an extraordinary visitation credit of fifteen percent in calculating his child support. We agree and reduce John's child support obligation by fifteen percent to $760 per month.

VII. Trial Attorney Fees

John argues the district court erred in ordering him to pay $7500 of Patricia's attorney fees. An award of attorney fees is not a matter of right, but rests within the court's sound discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We reverse the district court's award of attorney fees only if we find an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). We find no abuse of discretion in the district court's award of trial attorney fees.

VIII. Appellate Attorney Fees

Both parties request an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the appellate court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). 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

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6:00 p.m. since Jillian is in an after-school program in the interim. At trial, Patricia testified she would be agreeable to John exercising visitation immediately after school. In light of the parties' agreement, we modify the visitation provisions to permit John to pick up Jillian when she is released from school to commence his visits.

defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We award appellate attorney fees to Patricia in the amount of $1000.

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

AFFIRMED AS MODIFIED.