

**IN THE COURT OF APPEALS OF IOWA**

No. 1-402 / 11-0025  
Filed June 15, 2011

**IN RE THE MARRIAGE OF AMY LYNN WILKINS  
AND CHRISTOPHER DUANE WILKINS**

**Upon the Petition of  
AMY LYNN WILKINS,**  
Petitioner-Appellee,

**And Concerning  
CHRISTOPHER DUANE WILKINS,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Adams County, David L. Christensen, Judge.

Respondent appeals the district court decision modifying the parties' dissolution decree to place the children in petitioner's physical care. **AFFIRMED.**

Nicole S. Facio of Newbrough Law Firm, L.L.P., Ames, for appellant.

Catherine K. Levine, Des Moines, and Andrew J. Knuth, Atlantic, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**HUITINK, S.J.****I. Background Facts & Proceedings.**

Christopher and Amy Wilkins were previously married. They have one child, who was born in 2006. A dissolution decree, based on the parties' stipulation, was issued on March 9, 2009. Under the terms of decree, the parties had joint legal and physical care of the child.<sup>1</sup> Christopher was ordered to pay child support of \$167 per month.

Shortly after the dissolution decree was filed, the parties' child was diagnosed with autism. Amy, who is employed working with disabled adults and children, researched applied behavioral analysis (ABA) therapy for autistic children, and both parents agreed to this approach. Amy hired people to work with the child using ABA therapy and was reimbursed by Medicaid. The workers came to the homes of both Amy and Christopher, depending on where the child was on any given day.

Amy is employed by Midwest Opportunities and earns about \$18,000 annually. She is attending classes in a pre-nursing program. Amy lives in Corning, Iowa, with her mother. Amy also receives assistance from her father and step-mother, who live nearby and are licensed foster care providers who have experience with autistic children. Amy is in good health.

Christopher is employed as a part-time mail carrier by the United States Postal Service, and he earns about \$36,000 per year. He also lives in Corning

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<sup>1</sup> The decree did not include a schedule for switching care of the child, but the parties agreed that one parent would have the child on Mondays, the other parent on Tuesdays and Wednesdays, the first parent on Thursdays, and the parents would alternate weekends.

and has family that lives in the area. Christopher is married to Lyndsey, and they have a child together. Christopher has been charged with domestic abuse assault based on an incident involving Lyndsey. A no-contact order was entered in the criminal case, and he and Lyndsey have separated. Christopher was taking medication for anxiety.

On March 1, 2010, Christopher filed a petition to modify the dissolution decree, asking to have the child placed in his physical care. He alleged Amy failed to properly supervise the child or provide adequate care for him. He also alleged Amy's home was filthy and unsafe for the child. Amy responded by asking the court to set a specific schedule for exchanging the child. During the modification hearing, Amy asked to have the child placed in her physical care.

The district court determined there had been a substantial change in circumstances. Both parents agreed the present joint physical care arrangement was not in the child's best interests. The court concluded, "Amy can at present better meet [the child's] needs as a child diagnosed with autism by providing a more stable home environment for [the child]." The court modified the decree to place the child in Amy's physical care. The court set out a minimum visitation schedule for Christopher. He was ordered to pay child support of \$535 per month. Christopher appeals the district court's decision.

## **II. Standard of Review.**

In equity cases our review is de novo. Iowa R. App. P. 6.907. We examine the entire record and adjudicate the parties' rights anew on the issues properly presented on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 564 (Iowa 1999). In equity cases, we give weight to the fact findings of the district

court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

### **III. Physical Care.**

Christopher contends the district court should have placed the child in his physical care. He claims he can better meet the child's needs and his home is a better environment to support the child's long-term growth and development. He argued Amy did not provide enough supervision of the child. He also claimed her messy home was detrimental to the child because due to his autism he could become distracted and overwhelmed by his surroundings.

A party seeking to modify physical care must first show a substantial change in circumstances since the entry of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party must show that because of the change in circumstances, continued enforcement of the decree would result in positive wrong or injustice. *Maher*, 596 N.W.2d at 565. The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

Where parents have had joint physical care, they have both been found suitable to be primary care parents. See *Melchiori v. Kooi*, 644 N.W.2d 365, 368-69 (Iowa Ct. App. 2002). In this circumstance, where the party seeking modification has shown a material and substantial change in circumstances, the parties are on an equal footing and bear the same burden as parties in an initial custody determination. *Id.* at 369. Our objective is to place the child in an environment likely to promote a healthy physical, mental, and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

The parties agree there has been a substantial change in circumstances. After the dissolution decree, the parties' child was diagnosed with autism. The current joint physical care situation, which involves switching his care every few days, is not in his best interests. The child needs a greater degree of stability.

On our de novo review, we agree with the district court's conclusion that the child should be placed in Amy's physical care. We adopt the court's finding that there was no evidence the clutter in Amy's home put the child at any serious risk. Christopher had complained to the Iowa Department of Human Services, and the resulting investigation was unfounded. Amy has demonstrated more stability in her home situation than Christopher. Furthermore, she has been very involved in exploring treatment options for the child and has diligently tried to meet his needs. We affirm the modification of the decree to award Amy physical care of the child.

#### **IV. Visitation.**

In the alternative, Christopher asserts the visitation schedule is too restrictive and he asks for additional visitation time with the child. Under the minimum schedule in the modification decree, Christopher will receive alternating weekends, alternating holidays, one-half of Christmas break, and one-half or alternating years for spring break, and three weeks in the summer. Christopher additionally asks for one overnight per week, returning the child on Monday instead of Sunday on his weekends, and all of summer break, except for three weeks to Amy.

Our primary consideration in determining visitation rights is the best interests of the child. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct.

App. 1992). Generally, liberal visitation rights are in a child's best interests. *In re Marriage of Drury*, 475 N.W.2d 668, 670 (Iowa Ct. App. 1991). The district court adopted the visitation schedule proposed by Christopher for Amy if he received physical care of the child. Additionally, the schedule is a minimum schedule, and the parties are free to agree additional visitation times.

We determine the visitation schedule will "assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . ." See Iowa Code § 598.41(1)(a) (2009). We affirm the visitation schedule set forth in the modification decree.

#### **V. Appellate Attorney Fees.**

Amy seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 767 (Iowa 1997). On a request for appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We determine Christopher should pay \$1000 toward Amy's appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Christopher.

**AFFIRMED.**