IN THE COURT OF APPEALS OF IOWA

No. 1-896 / 11-0017
Filed January 19, 2012

IN RE THE MARRIAGE OF
WAYNE CHARLES BENHART
AND KEETAH TA BENHART

Upon the Petition of
WAYNE CHARLES BENHART,
Petitioner-Appellee,

And Concerning
KEETAH TA BENHART,
Respondent-Appellant.

Appeal from the Iowa District Court for Henry County, Mary Ann Brown, Judge.

A mother appeals a district court order denying her petition to modify the physical care provision of a dissolution decree and appeals the ruling on discovery sanctions against the child's father. **AFFIRMED.**

Timothy B. Liechty of Bell, Ort & Liechty, New London, for appellant.

Scott E. Schroeder of Schroeder Law Office, Burlington, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

Keetah Benhart appeals a district court order denying her petition to modify the physical care provision of a dissolution decree.

I. Background Facts and Proceedings

Keetah and Wayne Benhart married in 1995 and divorced in 2004. In a stipulated decree adopted by the district court, the parents agreed to joint legal custody of their three children and agreed that Wayne would provide physical care.

Shortly before the decree was finalized, Keetah moved to Illinois. Wayne later moved to Florida and the three children, along with Keetah's daughter from a prior relationship, remained in Mount Pleasant, Iowa, with Wayne's parents. Keetah's extended family also lived in Mount Pleasant and helped care for the children through the remainder of the school year. The three children then moved to Florida[1] and Wayne's mother went with them to assist in their care.

Meanwhile, Wayne remarried a woman named Jessica. Following the marriage, Wayne asked Keetah if she would like to have the children live with her for a year. Keetah agreed, and the children moved to Illinois for the 2008/2009 academic year and to Mount Pleasant for the summer. At that point, Keetah asked Wayne if the children could remain with her. Wayne refused.

Keetah filed a petition to modify physical care. After considering the evidence, the district court denied the petition. This appeal followed.

[1] Keetah's daughter remained in Iowa and lived with Keetah's brother and his wife for a period of time before moving to Illinois to live with Keetah.

II. Analysis

To change a custodial provision of a dissolution decree, the applying party is generally required to show (1) a material and substantial change in circumstances not contemplated by the decree that is essentially permanent, and (2) an ability to provide superior care. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Our review is de novo. Iowa R. App. P. 6.907.

A. Substantial Change in Circumstances

Keetah points to a number of circumstances that, in her view, amount to a substantial change of circumstances. She does not mention Wayne's relocation to Florida. *See* Iowa Code § 598.21D (2009) ("If a parent awarded joint legal custody and physical care . . . is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation a substantial change in circumstances."). That relocation amounts to a substantial change of circumstances, satisfying the first prong of her modification application. *See, e.g.*, *In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa Ct. App. 1998) (finding noncustodial parent established a change in circumstances under this statute where the custodial parent moved out of state with the parties' child). We turn to the question of whether Keetah showed superior caretaking ability. *See id.*

B. Superior Care

Keetah cites several circumstances that she contends establish her superior caretaking ability.

1. Wayne's work schedule. Keetah argues, "Wayne is not entrenched as the custodial parent and cannot personally meet the everyday needs at the level of Keetah." She points to his hectic work schedule and extensive travel. *See In re Marriage of Ford*, 563 N.W.2d 629, 633 (Iowa 1997) (noting "absence from the home is a factor that may be taken into consideration in custody determinations").

Keetah is correct that Wayne did not work an eight-to-five job. He was an independent consultant for aerospace companies and traveled frequently, even at the time of the modification trial, when he stated his hours were more regular.

While he was away, Wayne's mother and his new wife, Jessica, helped care for the children. In 2008, Wayne began experiencing marital problems. Around the same time, his mother left. It was at this juncture that Wayne sent the children to live with Keetah. The children returned to his care only after he and Jessica reconciled, lending credence to Keetah's assertion that Wayne required assistance to care for the children. Nonetheless, there is no question that Wayne was able to manage his work schedule and his parental obligations with that assistance.

Notably, Keetah also availed herself of family assistance, relying on her brother to care for her daughter and her parents to assist in the care of her children. Based on this record, we conclude Wayne's work schedule did not militate in favor of modification.

2. Domestic abuse. Keetah next contends Wayne and Jessica had a volatile relationship characterized by two incidents of domestic violence. A history of domestic abuse is one of several factors a court may consider in

determining which parent should have physical care of a child. *See* Iowa Code § 598.41(3)(j); *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997).

The record reflects that Jessica was arrested and charged with assault, although that charge was later dismissed at Wayne's request. We are not convinced this incident amounted to a "history of domestic abuse" that would have warranted a change in the physical care arrangement. Notably, Keetah also was arrested following an argument with Wayne, a fact that cuts against her present contention.

3. Jessica's relationship with the children. Keetah also argues that Jessica mistreated the children. She offered a series of text messages from her daughter regarding a scratch Jessica inflicted on the parties' son.

A poor or contentious relationship with a stepparent may support a modification of physical care. *See In re Marriage of Junkins*, 240 N.W.2d 667, 668–69 (Iowa 1976); *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215–16 (Iowa Ct. App. 1994).

Wayne himself admitted Jessica was "hot-tempered" and further admitted that she scratched his son while trying to discipline him. Wayne also conceded he believed in and used corporal punishment. These admissions give us the most pause. However, Florida's human services agency investigated certain abuse allegations and found them unfounded. Accordingly, given the heavy burden for modifying custody, we conclude this evidence was insufficient to warrant a change in the physical care arrangement. *See Rosenfeld*, 524 N.W.2d at 213–14 ("The burden for a party petitioning for a change in a dissolution is

heavy because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children." (citation omitted)).

4. Wayne's interference with Keetah's relationship with the children. Keetah also asserts that Wayne failed to support her relationship with the children. *See* Iowa Code § 598.41(1)(c); *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). It is true that Wayne did not initially inform Keetah of his new address or telephone number in Florida. But Keetah obtained that information from a family member and was able to see the children during the summers of 2005 and 2007, even staying with Wayne in his Florida home for two weeks. And, as noted, Wayne asked her to care for the children in 2008 and 2009.

Nonetheless, this factor, like the previous one, raises concerns about Wayne's parenting, as Wayne also obstructed Keetah's access to the children's medical and school records and interfered with the children's ability to communicate with her. Were this an initial custody determination, the combination of these two factors might support an award of physical care to Keetah. Because we are faced with a modification petition and a different burden of proof, we conclude this factor does not mandate a change in the physical care arrangement.

5. Wayne's financial irresponsibility. Keetah finally argues Wayne was financially irresponsible. The record partially supports this assertion.

When Wayne was employed, he earned significant sums of money, which he freely spent. When he was unemployed, he made use of public assistance

such as free school lunches and Medicaid. At the time of the modification hearing, he testified his employer provided health insurance but he had yet to add his children to the policy. However, contrary to Keetah's assertion, Wayne did not ignore the children's medical needs. While she may be correct that he could have done more, we are not persuaded that his choice of expenditures warranted a change of physical care.

In the end, Wayne's parenting weaknesses must be weighed with Keetah's parenting abilities to determine whether she is the superior caretaker.

6. Keetah's parenting. As noted, Keetah moved to Illinois during the divorce proceedings. Her contact with the children was initially sporadic—a factor she blamed on post-partum depression, despite the fact that years had elapsed since the birth of her last child. Though Keetah faulted Wayne for his many moves while the children were in his care, she moved just as much, if not more. Like Wayne, she also relied on family members to assist in the care of her children, living with her parents and her brother during part of the year that she exercised physical care.

As for Keetah's ability to manage the children, the record reflects that she prematurely returned one of the children to Florida during the time that she had physical care, because she was not able to handle his behaviors. And, she elected to have her daughter from a prior relationship live with the child's father because the child was failing her classes and engaging in unprotected sex. Notably, that daughter became pregnant while in her care, at the age of fifteen. Finally, as the district court found,

> The way the children performed academically when they were in Keetah's home is similar to how they perform when they are in Wayne's home. Any problems that the children have appear to carry over from one home to the other.

As Keetah did not establish she was the superior caretaker, the district court acted equitably in denying Keetah's request to modify the physical care arrangement. *See In re Marriage of Thielges*, 623 N.W.2d 232, 238 (Iowa Ct. App. 2000) ("At most, the record shows [the parents] are both fallible human beings who can provide the same level of care for their children. [The father] has not met his heavy burden of proof; we will not place the children in his physical care."); *Rosenfeld*, 524 N.W.2d at 213 ("If both parents are found to be equally competent to minister to the children, custody should not be changed.").

C. Discovery Sanction

Keetah also raises a discovery issue on appeal. Prior to trial, she sent Wayne requests for information. Wayne was not forthcoming with his responses, prompting Keetah to file a motion to compel, which was granted. At the beginning of the modification trial, the district court also granted Keetah's motion for sanctions. The court found the record should be held open for the documents and awarded Keetah attorney fees of $6446.

On appeal, Keetah argues the more appropriate sanction "would be to lower the heavy burden placed upon modification actions and treat this action as an original determination." Keetah cites no authority for this proposition. *See* Iowa R. App. P. 6.903(2)(*g*)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). Additionally, she did not ask for this relief in the district court proceedings, instead advocating for either a default judgment

in her favor or a finding by the court that the children's "medical needs, that the school needs haven't been met." *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). For these reasons, we decline to consider her new request for relief.

As for the sanctions the court ordered, we discern no abuse of discretion. *In re Marriage of Williams*, 595 N.W.2d 126, 129 (Iowa 1999) ("A district court's order imposing discovery sanctions will not be disturbed unless the court abused its discretion."). The court required the production of the withheld information and specifically noted that Keetah would not have incurred extra attorney fees had Wayne "voluntarily answered the discovery questions" and "not tried to hide basic information about his finances." Accordingly, we affirm the sanctions ruling.

AFFIRMED.