

IN THE COURT OF APPEALS OF IOWA

No. 2-037 / 11-1300
Filed March 28, 2012

Upon the Petition of
PATRICK ERLBACHER,
Petitioner-Appellee,

And Concerning
NICOLE HODGES,
Respondent-Appellant.

Appeal from the Iowa District Court for Crawford County, Jeffrey A. Neary,
Judge.

A mother appeals a district court's modification order granting physical
care of the parties' child to the father. **AFFIRMED.**

Julie G. Mayhall of Green, Siemann & Greteman, P.L.C., Carroll, for
appellant.

Julie A. Schumacher of Mundt, Franck & Schumacher, Denison, for
appellee.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Nicole Hodges appeals the district court's order modifying the parties' child custody order and granting Patrick "Pat" Erlbacher physical care of the parties' daughter. Nicole contends the district court should have awarded her physical care. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

Nicole and Pat are the parents of Cassidy, born in 2005. They were never married. On March 7, 2007, following a trial concerning custody of Cassidy, the district court entered an order granting the parties joint legal custody with shared physical care. The order provided the parties would alternate care of Cassidy each week. Additionally, the order stated the visitation schedule would need to be modified when Cassidy reached school age.

The parties are now married to other persons. Nicole and her husband reside in Carroll, Iowa, and they have a son who was three years old as of trial with whom Cassidy is close. Pat and his wife live in Persia, Iowa.

In January 2011, Pat filed his application for modification of the decree in anticipation of Cassidy beginning school, noting the parties resided in two different school districts. The drive between their homes was about an hour and a half, and both parties agreed shared care was no longer an option. Pat requested Cassidy be placed in his physical care with Nicole to receive liberal visitation. Nicole requested Cassidy be placed in her physical care.

Following the June 2011 trial, the district court entered its order granting Pat's application to modify the decree. The court specifically found the parties were both "mature, well-intentioned, and responsible adults and parents," and the

court felt “it could select either parent as the primary caretaker of [Cassidy] and do so feeling completely confident with the selections.” However, when the court compared the parties, the court found “the balance tip[ped] ever so slightly in favor of awarding the physical care of [Cassidy] to Pat.” The court explained:

In the balance of competing interests as to where it is in the best interests of [Cassidy] to reside, the court must necessarily look at all circumstances. Pat does not smoke nor does his wife, he works for his parents and has greater flexibility when it comes to leaving work for reasons related to [Cassidy] and he has taken steps to integrate [Cassidy] into his family’s faith tradition. He also expresses and acts supportive of Nicole’s relationship with [Cassidy]. By comparison, Nicole continues to smoke, does not have the same ability and flexibility with work that Pat has as it is not Nicole’s family which owns the business. Nicole appears supportive of Pat’s relationship with [Cassidy] but less so than Pat is of Nicole’s. This latter observation was made at trial.

The court also noted “Nicole indicated that Pat is controlling and this trait was also noted by [the Judge who heard their initial custody trial] in the 2007 [order].” However, the court found in this instance it “did not see this controlling attitude or behavior in Pat.” The court awarded Pat primary physical care¹ of Cassidy and ordered Nicole to pay child support.

Nicole now appeals.² She argues she should have been granted primary physical care of Cassidy because she is the better parent and Cassidy and her half-sibling should not be separated.

¹ “Primary physical care” is not defined in Iowa Code chapter 598; nevertheless, we recognize the term is commonly used by parties, their counsel, and the courts.

² We note an all too frequently observed error: failure to place a witness’s name at the top of each appendix page where that witness’s testimony appears. See Iowa R. App. P. 6.905(7)(c). With the eventual implementation of appellate electronic filing, the appendix may well go the way of the dinosaur. But until then, compliance with the current rule makes navigating an appendix much easier.

II. Scope and Standards of Review.

We review custody orders de novo. Iowa R. App. P. 6.907. However, the district court had the advantage of listening to and observing the parties and witnesses. See *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Vrbanc*, 359 N.W.2d 420, 423 (Iowa 1984) (“A trial court deciding dissolution cases ‘is greatly helped in making a wise decision about the parties by listening to them and watching them in person.’ In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.” (internal citations omitted)). Thus, the trial judge is in the best position to assess witnesses’ interest in the trial, their motive, candor, bias, and prejudice. Consequently, we give weight to the factual 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); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(o).

III. Discussion.

A. Physical Care.

Typically, when an original custody order is modified, the party seeking modification must prove a material and substantial change in circumstances. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). When the modification would mean one parent receives physical care, that parent must also demonstrate an ability to minister more effectively to the child’s well-being. *Id.*

Since the entry of the original custody order in 2007, the parents have shared equally the physical care of the child. However, the parties agree, due to their distance and the child's upcoming enrollment in school, joint physical care is no longer workable. Therefore, there has been a substantial change in circumstances necessitating modification of the original decree. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996) (stating the "particular circumstances surrounding a change in residence may ultimately support a change in" physical care).

Consequently, we address this as an initial custody determination where the issue is which parent can render better care. *See Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). In making this physical care decision, the district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2011), as well as other nonexclusive factors enumerated in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *In re Marriage of Hansen*, 733 N.W.2d 683, 699 (Iowa 2007).

We also note that although there is a preference³ that siblings, including half-siblings and step-siblings, *see In re Marriage of Quirk–Edwards*, 509 N.W.2d

³ Nicole, citing *Winter*, 223 N.W.2d at 166, erroneously asserts in her brief "[t]here is a *presumption* that siblings should not be separated." (Emphasis added.) That siblings should usually not be separated is a general principle applicable to custody

476, 480 (Iowa 1993), should not be separated, that rule is not ironclad. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). “[C]ircumstances may arise which demonstrate that separation may better promote the long-range interests of children.” *Id.* Among those circumstances are a parent’s willingness to promote meaningful contact between the child and the other parent. *Id.* at 399.

The evidence at trial demonstrated both Nicole and Pat are good parents who love their well-adjusted child. Both parents have been very involved since her birth. Both have played a significant role in her education and activities. Both have responded appropriately to Cassidy’s medical needs. Both parents have extended families that live in the area of their respective residences and these extended families are close to Cassidy. Faced with a close question, the district court found the balance tipped ever so slightly in Pat’s favor. In reaching this conclusion, the district court weighed certain circumstances as set forth earlier in this opinion. But, the district court’s findings are silent as to the issue of separating Cassidy from her half-brother.

We certainly recognize that our state has expressed a strong interest in not separating siblings, including half-siblings. Nonetheless, there may be a totality of circumstances that override this interest. While the district court made no specific finding on this issue, we do consider it upon our *de novo* review of the record. We also find this to be a close and difficult decision, but we agree with the district court’s conclusion. Here, the court had the opportunity to observe the witnesses and hear their testimony. The court made a credibility finding, and it

issues. *Winter*, 223 N.W.2d at 166 (quoting *In re Marriage of Brown*, 219 N.W.2d 683, 687-88 (Iowa 1974)). Thus the district court did not need to rebut a presumption.

found Pat was more willing to promote meaningful contact between Cassidy and Nicole, a finding that supports separation of Cassidy and her half-sibling. Upon our de novo review, we find no reason to disturb the finding.

There is no doubt both parents love Cassidy and can provide equally for her care, as they have been doing for a number of years. Given the objective of a physical care determination, to place the child in the environment most likely to bring her to healthy physical, mental, and social maturity, we agree the scales tip ever so slightly in favor of awarding Cassidy's physical care to Pat. Accordingly, we affirm the district court's order modifying the parties' child custody order and granting Pat physical care of the parties' daughter.

B. Appellate Attorney Fees.

Nicole requests an award of appellate attorney fees. We have broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In exercising this discretion, we consider several factors: the financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* We decline to award appellate attorney fees in this case. Costs are assessed to Nicole.

AFFIRMED.