

IN THE COURT OF APPEALS OF IOWA

No. 2-039 / 11-1502
Filed March 28, 2012

**IN RE THE MARRIAGE OF SARAH C.
NEUBAUER AND JASON M. NEUBAUER**

**Upon the Petition of
SARAH C. NEUBAUER,
n/k/a SARAH C. CAMPBELL**
Petitioner-Appellant,

**And Concerning
JASON M. NEUBAUER,**
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Kurt J. Stoebe,
Judge.

Sarah Campbell appeals the district court's decree modifying the physical
care provisions of her dissolution decree. **AFFIRMED.**

Lawrence B. Cutler of Craig, Smith & Cutler, L.L.P., Eldora, for appellant.

Daniel J. Tungesvik of Kruse & Dakin, L.L.P., Boone, for appellee.

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

POTTERFIELD, J.**I. Background Facts and Proceedings**

The marriage of Sarah Campbell, f/k/a Sarah Neubauer, and Jason Neubauer was dissolved on October 12, 2004. Sarah and Jason stipulated that they would share joint legal custody of their three children and that Sarah would receive physical care of the children.

In 2006, Sarah moved to California. Sarah filed a petition to modify the dissolution decree, requesting the court modify Jason's visitation schedule in recognition of her relocation. Jason filed a resistance to the application and a counterclaim seeking physical care of the children. On November 30, 2006, the district court granted Sarah's application, modifying the visitation schedule under the original decree, and denied Jason's counterclaim for physical care. Jason was awarded a seven-day visit during the Christmas holiday and a six-week visit during the summer.

On July 13, 2010, Jason filed an application to modify the shared care provisions of the decree, asserting a substantial change in circumstances had occurred and requesting the court to award him physical care of the parties' three children. After a trial on September 14, 2011, the district court agreed there had been a substantial change in circumstances that warranted a change of physical care and placed the parties' three children—Samara, age fourteen at the time of trial, and Cameron and Jayden, both age nine—in the physical care of Jason.

Jason was thirty-seven years old at the time of the trial on his application to modify. He owned an acreage outside of Iowa Falls where he lived with his wife, January, whom he married in 2009. Jason and January had a four-year-old

son and a two-year-old daughter. Jason worked at Iowa Prestressed Concrete approximately sixty hours per week earning sixteen dollars per hour. However, he testified that his employer had agreed to allow him to work only forty hours per week if he was granted physical care of the children. January primarily cared for her two children, but she also worked fifteen hours per week at Presbyterian Village. It is undisputed that the three children at issue have a close bond with Jason, January, and their two younger half-siblings.

Sarah was thirty-five at the time of trial. She owned a home in Riverside, California, where she lived with the children and her boyfriend, Sean. Sean worked as a site coordinator for an after-school program for middle school students. In September 2010, Sarah got a new job working full time as an auditor for Stanford University Medical Center. She also had a second job auditing records for Tripler Army Medical Center, which required between zero and twenty-four hours of work per week. She testified that she worked from home and that both jobs had hours that allowed her more flexibility than her previous job. Sarah's income tax return shows that her total income in 2010 was \$97,308. Sarah filed for bankruptcy in 2010.

Jason and Sarah followed the schedule for care of the children provided in the court's 2006 decree without issue until 2010. At some point during the children's summer visit in 2010, Samara told Jason she wanted to stay with him and did not want to return to California. Jason filed an application for temporary custody, anticipating Samara would not return home. Jason testified that in the days leading up to Samara's scheduled return home, she became so upset she made herself sick. When Jason took the children to the airport at the end of their

summer visit, Samara refused to board the plane back to California. Jason, January, and the flight attendants were unable to get Samara to board the plane, so she remained in Iowa while the boys returned to California. Jason enrolled Samara in school in Iowa, which she attended for several weeks. Shortly after Samara was supposed to return home, Sarah filed an application for rule to show cause, stating Jason had refused to return Samara to her physical care. The district court overruled both Jason's application for temporary custody and Sarah's application for rule to show cause and ordered that Samara return to California, which she did.

As a result of Samara's statements that she did not want to return to California, in July 2010 Jason took all three children to meet individually with Brian Nedoba, an independent social worker. Nedoba testified that all three children verbalized that "there was a sense of family . . . a sense of connectiveness and continuity and a sense of relationship that was missing in California." Nedoba met with Samara five times in 2010. He testified that he diagnosed Samara with depression, with the primary issue being Samara's desire to live with her father. He stated Samara was anxious about having to return to California and felt that her home in California was dysfunctional. Nedoba testified Samara felt she had to be the caretaker for her two younger brothers and the boys corroborated Samara's statements in this regard. Because of her obligations for her siblings, Samara expressed concerns that she was allowed very little freedom in California. Samara also told Nedoba she did not have support to help her with school in California. Nedoba testified he met with Samara again in July 2011, and her desire to remain in Iowa was consistent.

He testified Samara would be devastated if physical care were not modified. Nedoba noted he did not feel the children had been coached or influenced by their father or stepmother.

Nedoba recommended that Samara continue to see a counselor in California, a recommendation that was passed on to Sarah. At the time of the hearing on Sarah's application for rule to show cause, Sarah testified she had already arranged for Samara to attend counseling in California. However, Sarah testified at the modification hearing that she contacted three counselors who were unwilling to meet with Samara because of the ongoing physical care litigation. Sarah also testified Samara had told her she was uncomfortable meeting with the counselor and did not want to see a counselor. Because of this, Samara did not attend counseling in California.

While in Iowa, the children also met with Doug Cook, who was appointed as a guardian ad litem in this case in August 2011. Cook testified he spoke with the children at length and the children's statements regarding their life in California revolved around three major concerns: (1) financial/medical concerns; (2) educational concerns; and (3) concerns regarding a lack of freedom. Cook testified that all three children indicated a desire to stay in Iowa with their father, but he felt the boys did not really have a concept of what the change would entail. Cook testified the children stated they did not feel their mother was available to parent them because she was working a second job. All three children indicated Samara was the caretaker for the younger two boys. Cook further testified the children expressed concerns about being "trapped in the home and not allowed to do anything" in California, whereas in Iowa they were

allowed to participate in many activities. Cook said he believed the children loved their mom but simply did not believe their mother had the time to parent them. Cook recommended that physical care of the children be placed with Jason.

Approximately two weeks before trial, Cook emailed Sarah and Jason his impressions after talking with the children. These impressions largely favored Jason. The week before trial Sarah informed Jason she would not bring the children to Iowa for the trial as planned because they were emotionally upset by the proceedings and should not miss school. Jason offered to pay for the cost of transporting the children to the trial, but Sarah refused to bring the children. This surprised Cook, who had intended to talk to the children again before the trial. Cook testified he spoke with Samara on the phone the night before trial and she had changed her position and wanted to stay in California.

Jason alleged substantial changes occurred in three major areas of the children's lives necessitating a modification of the court's physical care order. First, Jason asserted the children's educational performance had declined and Sarah was not taking the necessary steps to address their educational difficulties. The record establishes, and the parties do not dispute, that all three of the children had problems in school. Jason argues this was a change in circumstances, but Sarah testified the children had always had problems in school.

At the time of trial, Samara was a high school freshman and the boys were in fourth grade. Sarah testified school had always been a problem for Cameron and Jayden and she "knew right off the bat that they were going to have . . .

some special needs” in school. Sarah testified that when she relocated to California, Samara’s new school determined it would be best if Samara retook third grade. The boys were put in a special class because the school felt they needed another year of preschool but did not want to hold the boys back because of their age. The children attended this school for two years and then changed schools. Samara’s new school, the school she attended at the time of trial, tested Samara and determined she could skip fifth grade, so Samara started in sixth grade.

Based on the boys’ performance in school, both boys were given an individualized education program (IEP). Sarah testified the IEP teams were working to get the boys “on track.” In 2009, the boys each underwent a speech and language assessment after their teachers became concerned about their performance. Based on the results of the test, it was recommended that the IEP teams consider the need for speech/language intervention. Sarah testified the boys received speech and reading assistance at school. She also testified that beginning in 2010, she met with the IEP teams in October, February, and May of each year to discuss the boys’ progress. The boys’ report cards show that for the 2010–2011 school year, the boys were below basic, the lowest mark possible, in most categories.

Samara was also struggling academically at the time of trial, receiving primarily Cs and Ds on her report card. In a standardized test, Samara scored at a below basic level in math. In seventh grade, Samara participated in an after-school program called Prime Time that involved tutoring. In eighth grade, Samara quit Prime Time, which Sarah testified was primarily a social outlet, and

started getting one-on-one tutoring from a teacher after school. Sarah stated that at the time of trial, Samara was involved in a “link group,” in which juniors and seniors “help[ed] freshmen out with their first year of high school.” Samara was also enrolled in a class called Pathways to Success, a class Samara’s counselor suggested after Sarah expressed concerns about Samara’s progress in school. According to Sarah, Pathways to Success is designed to help students succeed throughout the year and included tutoring and help with study habits.

In addition to the help the children received at school, Sarah testified that during the 2010–2011 school year she took the children to a workshop series for help with reading. Sarah also testified that because she worked from home, she was available to help the children with their homework after school.

Jason testified he realized in the summer of 2010 that the children were lagging in their education when he and his wife noticed the boys could not read. Jason emailed Sarah in July 2010 requesting the children’s grades, but he testified Sarah never sent the grades. Jason and January also testified the school’s website frequently did not work when they tried to use it to access the children’s educational information.

Jason testified that once he realized the children were struggling in school, he and January decided to take the children to Sylvan Learning Center. In August 2010, the children were tested at Sylvan. Jason testified the results showed that Samara was reading at an age equivalent of eight years and six months, in the sixth percentile, though she was thirteen years old at the time she took the test. Jayden was reading at an age equivalent of six years and three months, the ninth percentile, though he was eight years and six months old.

Cameron was reading at an age equivalent of five years and nine months, the sixth percentile, though he was also eight years and six months old. Following this testing, Jason testified he and January took the boys to a reading program at the library and began reading more at home. He testified they also worked with the boys using sight words to improve their reading skills. In addition, he testified he and January spent hours helping Samara with her homework while she was enrolled in school in Iowa. Jason testified that if he obtained physical care of the children, he planned to continue to work with Sylvan to help the children with their educations. He also planned to obtain help for the children through the school.

Jason's second major area of concern was the children's medical care. Jason testified he took Samara to the dentist in December 2010 and was told Samara needed a root canal. Because Samara was returning to California shortly, Jason talked to Sarah, who said she had arranged to have the root canal performed in California. However, when Samara returned to Jason's care in the summer of 2011, the root canal still had not been performed.

Sarah testified she took Samara to get the root canal, but there was no active insurance covering the nearly \$800 procedure. Pursuant to the parties' dissolution decree, Jason was required to provide insurance for the children. Additionally, Sarah testified she took Samara to the orthodontist in December 2010 and learned Samara needed braces. Sarah testified the treatment plan for the braces was \$4500, and when she gave the orthodontist her insurance card, the orthodontist said there was no covering insurance. Sarah stated she could not afford to pay for the root canal or braces in cash. Jason testified, however,

that he had set aside \$3500 for Samara's braces and had told Sarah about this money, but Sarah still had not taken Samara to get the braces.

The record establishes that sometime in March 2011, Jason lost his job and was without insurance. However, he received new insurance in April and mailed insurance cards to Sarah. Sarah testified she contacted Samara's dentist and orthodontist with this new insurance information, but both said there was no coverage under that insurance.

Additionally, Jason testified Sarah failed to get the children glasses when they were needed. Jason took the children to the eye doctor and both Samara and Jayden needed glasses.

Jason's third area of concern was the children's home environment. Jason asserted the children should have received more adult supervision and Samara should not have been required to care for her younger brothers. Jason's assertions in this regard were supported by the children's statements to both Nedoba and Cook that Samara served as a caretaker for the younger children and that their mother did not seem to have time to parent and support them.

On September 9, 2011, Sarah filed a motion to allow two witnesses to offer telephonic testimony at the trial on September 14. On September 12, 2011, Sarah filed a supplemental motion to allow Sean to offer telephonic testimony at trial and also to quash a subpoena issued to the children by Jason. At the pretrial conference, the district court denied both of Sarah's motions to allow telephonic testimony and granted her motion to quash the subpoena.

After trial, the district court granted Jason's application to modify, awarding Jason physical care of all three children. In reaching this conclusion, the court

found Sarah's credibility to be weak, finding "[T]he more important her assertions, the less credible they are." Among other things, the district court discussed four specific instances in which Sarah had admitted to lying at an earlier proceeding. In one instance, Sarah lied about having set up counseling for Samara; in another she lied about having discounted the benefits of counseling. In a third instance, Sarah denied telling Jason to "take the kids, knock your socks off," which she later admitted she had said. In the fourth example given by the district court, Sarah testified at an earlier proceeding that she did not threaten Samara that she would be sent to foster care if Samara said she did not want to live in California. Sarah later admitted to having made this statement to Samara. The district court concluded, "[Sarah] has repeatedly demonstrated that she will say anything necessary to retain custody and then will do whatever she deems the most convenient."

Sarah now appeals, asserting the district court erred in: (1) modifying the physical care provisions of the parties' dissolution decree and (2) denying her motions to allow telephonic testimony. Jason requests appellate attorney fees.

II. Scope 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. Physical Care

Sarah asserts the district court erred in modifying the physical care provision of the parties' dissolution decree. Sarah argues she has been the children's physical care provider for over seven years, has displayed extensive participation in the children's education, and could best provide stability in the children's lives.

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 has an ability to provide superior care. *Id.* The changed circumstances must not have been contemplated by the court when it established the arrangement. *Id.*

A. Substantial Change in Circumstances

We determine Jason showed a substantial change in material circumstances in that the record shows Sarah was not actively caring for her children's educational, physical, and mental health needs.

The children were failing to improve in the educational environment in California, and the boys were beginning to notice they were falling behind their classmates. The children need an attentive parent to assist them with their studies, and the record shows Sarah was not providing this assistance. All three children expressed concern that their mother did not have time to parent or

support them. Though Sarah presented a different story at trial, explaining how she was available to help the children the moment they came home from school, we find her testimony is weakened by the district court's credibility findings and her admitted previous dishonesty to the court. The children, especially the boys, are failing to advance educationally. The record shows Sarah is not providing the individualized attention the children need to progress.

Sarah also failed to adequately provide for the children's medical needs. Sarah asserts she did not provide for Samara's dental needs because there was no insurance coverage and she could not afford the out-of-pocket expense. However, the record shows Jason's insurance was cancelled for only a few weeks in March 2011, not in December 2010 or January 2011 when Sarah claims to have contacted Samara's dentist and orthodontist. Further, if insurance did not cover the dental expenses, Sarah should have made an alternate plan to pay for the work to be done rather than disregarding Samara's medical needs. The need for the root canal caused an infection and was a medical need Sarah should have cared for when it arose. Sarah also should have cared for the children's optical needs.

Sarah also failed to provide for Samara's mental health needs by failing to arrange for Samara to meet with a counselor in California. The record is clear that Sarah knew it had been suggested that it would be best for Samara to continue counseling in California. Sarah even agreed and said, falsely, that she already had an appointment set up. Though Sarah testified Samara was uncomfortable at counseling, January testified she did not believe the children were uncomfortable, and the record shows Samara took the advice of her

counselor on at least one occasion and followed up on actions he suggested she take.

Not only did Sarah fail to follow through with counseling for Samara, but she also attempted to manipulate Samara, exploiting her vulnerability, by telling her that if she told the judge she wanted to live with her dad, she would go to foster care. Further, Sarah failed to recognize that Samara felt as though she was the caretaker of her younger siblings, a concern which all three children verbalized to multiple individuals. After speaking with Samara, Nedoba opined that her duties as a caretaker, along with her mother's failure to allocate time to care for the children, left Samara feeling depressed and possibly unwanted. It is clear Sarah failed to recognize the emotional toll the physical care arrangement was taking on the children.

Sarah's inability or unwillingness to prioritize the children's educational, medical, and mental health needs was a substantial change in material circumstances that affected the children's welfare.

B. Superior Care

We also find Jason has shown he is able to render superior care. Unlike Sarah, Jason has shown a commitment to provide for the children's educational, medical, and mental health needs. Once Jason became aware the children were struggling in school, he took them to Sylvan Learning Center and began working with the children on educational materials. He and January testified that during the few weeks Samara was attending school in Iowa, they provided one-on-one help to her on multiple occasions. Jason has consistently cared for the children's medical needs, making regular dentist appointments and buying them glasses

when needed. In addition, Jason set aside money for Samara's braces. Jason has also identified the emotional difficulties the children, especially Samara, are having. When Samara first discussed living in Iowa, Jason arranged for the children to meet with a counselor. In addition, Jason is supportive of the children's feelings and provides a more stable and balanced home environment where the children feel wanted and cared for. The record shows Jason renders superior care to the children.

IV. Telephonic Testimony

Sarah next asserts the district court erred by denying her motions to allow the telephonic testimony of three witnesses who resided in California. We review the district court's evidentiary ruling for an abuse of discretion. *In re Estate of Rutter*, 633 N.W.2d 740, 745 (Iowa 2001). An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law. *Id.*

Sarah asserts the district court abused its discretion when it failed to allow telephonic testimony of three of her witnesses. Sarah acknowledges the public policy concerns against allowing telephonic testimony, namely: (1) limited opportunities in cross-examination; (2) the trial court's inability to view the demeanor of the witnesses and observe responses; and (3) the inability to verify whether other individuals are present with the witness. However, Sarah asserts

those concerns are outweighed by the prejudice to her case in not being able to present her witnesses.¹

In actions at law, the case must be tried upon oral evidence taken in open court. See Iowa Code § 624.1. The phrase “open court” requires testimony in person, not by telephone. See *Rutter*, 633 N.W.2d at 746. This requirement is relaxed in equitable actions, where the court may take evidence by deposition. See Iowa Code § 624.3. The legislature has also authorized telephonic testimony in specified situations, but there is no general rule allowing telephonic testimony in equitable proceedings. *Rutter*, 633 N.W.2d at 746. Telephonic testimony is permitted by the legislature in child custody proceedings subject to the Uniform Child-Custody Jurisdiction and Enforcement Act, Iowa Code chapter 598B. *Id.* Iowa Code section 598B.111 provides: “A court of this state may permit an individual residing in another state to be deposed or to testify by telephone . . . before a designated court or at another location in that state.”

Though we find section 598B.111, in which the legislature authorized the receipt of telephonic testimony, is implicated in this situation, that section merely permits, not requires, the district court to allow telephonic testimony. See *Schultz v. Bd. of Adjustment*, 258 Iowa 804, 810, 139 N.W.2d 448, 451–452 (1966) (stating “may” normally connotes permissive rather than mandatory action); see also Iowa Code § 4.1(30)(a), (c) (in construing statutes the word “shall” imposes a duty and the word “may” confers a power). We cannot find the district court

¹ We note that if Sarah felt Iowa was an inconvenient forum given the length of time she and the children had lived in California and their extensive connections in California, she could have raised the issue before the court and sought to move the proceedings to California. See Iowa Code § 598B.207 (2009) (stating the issue of inconvenient forum may be raised upon motion of a party). She did not do so.

abused its discretion in deciding not to allow Sarah to present the telephonic testimony of three witnesses.

We first note that Sarah has failed to preserve error on this issue. Our case law provides that even where evidence should have been admitted, “without an offer of proof, there is nothing for us to review.” See *In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa Ct. App. 1998) (noting that although the appellant correctly identified that in an equity proceeding he should not have been precluded from introducing evidence, without an offer of proof there was nothing for the appellate court to review). An offer of proof is necessary to preserve error in the exclusion of evidence. *In re Marriage of Daniels*, 568 N.W.2d 51, 55 n.2 (Iowa Ct. App. 1997). The record does not show any information as to who these witnesses are or what the nature of their testimony would have been. See Iowa R. Evid. 5.103(a)(2) (clarifying that an offer of proof is unnecessary when the substance of the evidence was apparent from the context within which the questions were asked). Because Sarah did not make an offer of proof as to the substance of the testimony of these witnesses, we find this issue was not properly preserved for our review.

Nevertheless, we find that even had error been properly preserved, Sarah cannot succeed on her claim that the district court abused its discretion in declining to allow telephonic testimony. Less than a week before trial Sarah filed motions to allow the telephonic testimony of John Garcia and Kurtis Madison. Sarah also requested the court to allow her live-in boyfriend to testify telephonically. We anticipate these three witnesses would have corroborated Sarah’s testimony in some regard. We find this type of witness to be less

compelling than independent witnesses, especially given the children's statements to the guardian ad litem and counselor and other evidence that could not be disputed, such as the children's grade reports. We are not able to find these witnesses were critical to Sarah's case and note that the most compelling evidence against Sarah was her failure to meet the children's educational and medical needs.

Further, the court noted that Sarah's credibility was weak. In a prior hearing in front of the same judge, Jason offered as evidence recordings of Sarah making statements that she denied making in court. Given Sarah's history of dishonesty, it is understandable that the court would want to see Sarah's witnesses in person to best evaluate their credibility and to allow them to be fully cross-examined.

We find no abuse of discretion in the court's ruling denying Sarah's motions to allow telephonic testimony.

V. Appellate Attorney Fees

This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Based on the parties' relative incomes, we conclude Sarah should pay \$1000 of Jason's appellate attorney fees.

AFFIRMED.