

IN THE COURT OF APPEALS OF IOWA

No. 2-236 / 11-1357
Filed May 23, 2012

ADAM ALBERT,
Plaintiff-Appellee,

vs.

CARISSA MEADOWS,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge.

Carissa Meadows appeals from a ruling denying her petition to modify the parties' decree establishing custody, visitation, and support. **REVERSED AND REMANDED.**

Teresa O'Brien, Sioux City, for appellant.

Lori Ubbinga, South Sioux City, Nebraska, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Carissa Meadows appeals the district court's denial of her petition to modify custody, visitation, and support provisions of the parties' decree. Substantial changes since the entry of the decree support modification. Due to Adam Albert's persistent refusal to allow Meadows to exercise her rights as joint legal custodian, and his consistent effort to minimize her communication and diminish her relationship with the child, we reverse. Because we modify physical care, we remand for calculation of child support.

I. Background Facts and Proceedings.**A. Decree.**

The parties, Carissa Meadows and Adam Albert, are the biological parents of Blake, born in September 2004. During the first eight months of Blake's life, Adam was unemployed and the primary caretaker. After Adam resumed work, the parties shared care. Adam and Carissa separated when Blake was two years old.

In March 2007, Adam filed a petition to establish custody, visitation, and child support. Adam lived in Sioux City where he worked full-time for Nieman Construction. Carissa moved to Fremont, Nebraska, for her job with Kum & Go, shortly before the custody trial.

Both parties had demonstrated instability and poor decision making in the past. Each has a history of domestic abuse.

In an August 8, 2008 decree, the court awarded joint legal custody to the parties, finding the statutory presumption against joint legal custody due to the history of domestic violence was sufficiently rebutted. Both parties had

completed counseling, and the court found the incidents stemmed from relationship conflicts, which were unlikely to recur. At the time of the decree, neither party was restricting or hindering the other's relationship with the child.

In addition to the equal custodial rights and responsibilities under Iowa Code section 598.1(3),¹ the decree outlined specific rights and responsibilities, including:

1. To participate equally in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction;
2. To communicate with each other in regard to such decisions; in particular, the physical caretaker (including Carissa during her times of visitation) has a responsibility to share information about the need to make such decisions and to make the information available to the other parent prior to making such decision, specifically including information such as school conference slips, report cards, and medical appointments;
3. To support the other parent's relationship with the child;
4. To put away personal animosities and work together as mature adults with medical and school personnel to meet the child's needs;
5. To structure visitation flexibly, taking the child's educational and social activities into consideration;
6. To assure that transition between the parties' homes is without problems;
7. To communicate directly with each other concerning the child and not use (Blake) as a messenger and to keep each other advised at all times of their respective current residence/ mailing address, telephone/message numbers (home, work, and cell), the child's school, and the location of any place where the child will be spending any extended period of time of four days or more;
8. Each party shall have access to the child's school, medical, and dental records.

Adam was awarded physical care, though the court noted it was a "close and difficult decision." At the time, Carissa lived in Fremont, Nebraska, away from her own family and at least a one-hour drive from Adam's residence in

¹ All citations are to the 2011 Iowa Code unless otherwise noted.

Sioux City, where Adam and Blake had family support. Carissa's work schedule was also erratic.

B. Modification.

On October 30, 2009, Carissa filed a petition to modify the parties' decree, alleging material changes justified modification of custody, visitation, and child support. Carissa asserted Adam did not allow her to participate in joint parenting or decision making regarding education and medical concerns; did not support her relationship with Blake; did not allow her phone contact with Blake; did not allow extra visitation; and improperly put his then-girlfriend, Joslin, in a parenting role.

The matter went to trial on July 14, 2011. The following facts can be gleaned from the record:

About three weeks after entry of the decree, Carissa moved back to Onawa. Adam initially allowed Carissa to exercise visitation every weekend and two to three times per week. However, by late 2009, Adam started dating Joslin. Carissa and Joslin had an altercation. Carissa was convicted of assaulting Joslin and ordered to pay a fine. Thereafter, Adam and Joslin restricted Carissa's visitation to the minimum allowable under the decree.

Carissa alleges she has been denied her weekend visitation on numerous occasions. Adam denies withholding the minimum scheduled visitation from Carissa, with the exception of one weekend when Blake was too sick to travel. However, we find the record belies Adam's claim.

Adam changed his phone number and told Carissa he did not have a phone. Adam directed Carissa to contact him and Blake through Joslin and

mandated that she call only between 7 and 8 p.m. Joslin monitored Blake's telephone conversations with Carissa on speakerphone. Adam and Joslin have consistently refused Carissa telephone contact with Blake for many days, even weeks at a time, including Blake's birthday.

Adam refused to communicate with Carissa regarding selecting a preschool for Blake. Though she toured several schools and encouraged Adam to follow up with those facilities, Adam unilaterally enrolled Blake in a different school. He did not notify Carissa until after Blake's first day. The enrollment documentation did not list Carissa as a medical contact or even as a "significant other" in Blake's life. Instead, her name appeared as someone who was not allowed to pick up Blake from school. Carissa was forced to subpoena information from the preschool after Adam refused to provide it.

Michelle Miller, a former friend and roommate of Joslin's, testified she was present when Joslin told the preschool there was a restraining order against Carissa because she was a drug addict and alcoholic. Thus, when Carissa called the school to confirm that Blake had been enrolled, they refused to provide her with information regarding her son. No such restraining order had ever been issued. Later, Miller observed Joslin removing items from Blake's school cubby that had been provided by Carissa.²

² Miller also testified that she observed Joslin pulling Blake's hair and calling him names. She witnessed Joslin slapping Blake after he objected to Joslin calling Carissa by name rather than calling her his "mom." Miller also testified Adam and Joslin smoked marijuana in the basement of their house while Blake was upstairs.

Adam again failed to notify Carissa before enrolling Blake in kindergarten. He then told her an incorrect date for the first day of school, and Carissa missed this milestone.

Carissa contacted Adam repeatedly, requesting information regarding Blake's need for updated vaccinations. Carissa was also denied information regarding Blake's immunization record by his physician's clinic, where Adam's mother works.

Adam has also failed to share information about Blake's sporting events with Carissa. He would not agree to be present at Blake's school or extracurricular events if Carissa planned to attend. He denied Carissa permission to attend Blake's soccer game when it was not her visitation weekend and threatened she would be escorted out if she attempted to attend the game.

Further, Adam restricted Blake's interaction with Carissa's family. He refused to allow Blake to attend Carissa's family weddings and reunions if they did not fall within her mandatory minimum scheduled visitation. When Carissa's father had a heart attack, she asked if Blake could visit her father in the hospital. Adam ignored her request. Joslin took Blake to the hospital the following day.

Blake is negatively affected by his caretakers' behavior and attitudes. He reports that Joslin makes inappropriate comments about Carissa. Blake now believes Carissa is lying to him when she fails to pick him up after Adam denies her visitation.

As noted above, less than one month after the decree was entered, Carissa moved back to Onawa, Iowa, to live with her parents. Carissa has lived in the same home with her family since September 2008.

Carissa was convicted of operating while intoxicated in January 2009. She got her license back in September 2010. At the time of the modification trial, her probation period was near completion, and she had no subsequent offenses. There is no evidence Carissa's current use of alcohol has endangered the child.

Carissa has had several jobs since her return to Iowa. At the time of trial, however, Carissa was working for her parents' business about thirty-two hours per week. Carissa describes her employment as "permanent." She is also attending Briar Cliff College.

On August 8, 2011, the court entered its ruling denying modification. The court found that although there had been a substantial change in circumstances given Carissa's move back to Onawa and employment through her parents' business, placement with Adam would be more stable for the child. The court noted evidence that Carissa "continues to drink and party on a frequent basis." The court acknowledged Adam should do a better job of communicating with Carissa, but declined to address Adam's failures to comply with the decree.

Carissa now appeals. She seeks physical care of Blake and an award of child support, or in the alternative extraordinary visitation.

II. Scope and Standard of Review.

We conduct a de novo review of petitions for modification of custody and visitation. Iowa R. App. P. 6.907; *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). We give deference to the district court's factual findings, especially with regard to credibility determinations, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Discussion.

Generally, the party requesting modification must establish (1) a substantial change in material circumstances that is more or less permanent and affects the child's welfare and (2) the requesting parent is able to provide superior care and minister more effectively to the child's needs. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). When making physical care determinations, we seek to place children in the environment most likely to advance their mental and physical health and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). Our prime concern in fashioning physical care arrangements is the best interests of the children. *Id.* at 695. To determine children's best interests, we weigh all relevant conditions affecting physical care. *In re Marriage of Thielges*, 623 N.W.2d 232, 237–38 (Iowa Ct. App. 2000).

Once a physical care 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. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). Prior cases have little precedential value; our decision must be based on the particular circumstances of each case. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

In the alternative, Carissa contends that if physical care is not modified, a modification of visitation is warranted. To demonstrate a change of circumstances to support modification of visitation, the change may be "much less extensive" than that required to support a change in custody. *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985). This lower threshold is

supported by the principle that “the best interests of children are ordinarily fostered by a continuing association with the noncustodial parent.” *In re Marriage of Salmon*, 519 N.W.2d 94, 96 (Iowa Ct. App. 1994).

If custody is modified, Carissa also seeks a modification of child support. A material change in the financial or other circumstances of the parties must be demonstrated to justify modification of child support. *In re Marriage of Smith*, 501 N.W.2d 558, 560 (Iowa Ct. App. 1993).

A. Physical Care.

Parents awarded joint custody share a responsibility to communicate with each other and support each other’s relationship with the child. Iowa Code §598.41(5)(b) (stating joint legal custodians are entitled to “equal participation in decisions affecting the child’s legal status, medical care, education, extracurricular activities, and religious instruction”). Because the parent awarded physical care receives information from the child’s school and about extracurricular activities, that parent has a responsibility to share information with the other parent. *See In re Marriage of Fortelka*, 425 N.W.2d 671, 673 (Iowa Ct. App. 1988).

We recognize the importance of a child maintaining meaningful relationships and substantial contact with both parents. *See In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984). In fact, we are directed to “consider the denial by one parent of the child’s opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.” Iowa Code § 598.41(5)(c).

Adam acknowledged his duty to provide advance notice of events and to allow Carissa to participate equally in decision making. He also acknowledged he has failed to do so. He admitted he failed to return emails and answer calls, failed to respond to Carissa's inquiries regarding Blake's school placement, and made unilateral decisions enrolling Blake in preschool and kindergarten.

In fact, Adam has failed to comply with all eight of the enumerated rights and responsibilities of joint legal custodians outlined in the decree.³ He failed to allow Carissa to participate equally in decisions affecting medical care, education, extracurricular activities, and religious instruction. He refused to allow Carissa to take Blake for his vaccinations and denied her access to Blake's medical records at their family physician's office. He initially refused to discuss where to send Blake to school, and then unilaterally enrolled him in a preschool. Through enrollment procedures, he actively blocked Carissa's ability to communicate with the school and to participate in school events. Though Carissa wanted to get Blake baptized, Adam refused.

The decree specifically emphasizes the duty of the physical caretaker to communicate and share information with the other parent regarding these decisions. Adam not only failed to voluntarily initiate open communication, he intentionally prevented Carissa from obtaining information necessary for her participation in decision making, as legal custodian.

Adam did not support Carissa's relationship with the child. Instead, he worked to diminish it. He failed to put aside his personal animosity for Blake's

³ We note that if a person willfully violates an order or decree, Iowa Code section 598.23(2)(b) provides authority for modification of visitation or custody as an alternative action to punishment for contempt.

best interests. He was invariably inflexible with scheduled visitation, which resulted in Blake missing Carissa's important family events and at times seeing his mother only two days in a month.

Adam failed to make the transition for visitation problem free. After entry of the decree, Adam was unemployed for approximately one year. Notwithstanding his availability, he frequently sent Joslin to drop off Blake instead of doing it himself over Carissa's protests, and despite his knowledge of the conflict between the two women.

Adam failed to communicate directly with Carissa. Adam withheld his telephone number from Carissa for months at a time, forcing her to communicate only through Joslin, despite his awareness of their conflict. Even after Carissa obtained his telephone number, the record is replete with evidence of Adam's refusal to respond to text messages, calls, and emails. Adam denied telephone communication between Blake and Carissa for up to three weeks at a time, even though she complied with his directive to call Blake only between the hours of 7 and 8 p.m.

Adam intentionally hindered Carissa's access to Blake's school and medical records. Since late 2009, Adam has failed to foster meaningful contact between Blake and Carissa. His inflexibility and refusal to allow Carissa to participate in Blake's school and extracurricular activities demonstrates his inability to put his personal animosities aside for Blake's benefit. Adam's lack of cooperation and active hindering of Carissa's effort to maintain visitation and communication with Blake is contrary to the parties' custody and support decree and constitutes a substantial change in circumstances warranting a modification

of custody. See *In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa Ct. App. 1988).

While we acknowledge the trial court's concern about Carissa's use of alcohol, we find no evidence that Blake's safety has been at risk in her care.⁴ Adam admits that he too uses alcohol.

In addition to the negative changes in Adam's behavior since entry of the decree, Carissa's improved stability demonstrates a material and significant change. Carissa has stabilized her life. She is employed and completing coursework at Briar Cliff College. She presently resides with her parents and sister in a suitable home. She has paid her child support. She has exercised the visitation permitted. She has tried to stay in contact with Blake by telephone when Adam has permitted such calls. Carissa's concerns about Blake's daycare, school, and immunization shots all reflect a concern regarding Blake's wellbeing. She also had Blake attend counseling⁵ and sought to have him baptized. She has spent time with Blake at his school on a weekly basis. She has tried to obtain schedules of Blake's extracurricular activities so she might attend, but her efforts have generally been ignored by Adam. The record demonstrates that

⁴ We are not convinced the photographic evidence Adam introduced is a true depiction of Carissa's lifestyle or parenting abilities. Some of the pictures were over two years old, and multiple pictures were from the same date and location. In some of the pictures, though alcohol was present, she was not drinking. Carissa testified she does not drink every day, or to excess.

⁵ There is also a concern regarding Blake's behavior, observed by Carissa, which could best be described as sexual in nature. Though we do not know the precise circumstances from which this conduct has arisen, Blake described and demonstrated things he witnessed in his father's house. If nothing else, Carissa's inquiry into the matter and request for Blake to be sheltered from witnessing sexual activity reflects her concern for the child's best interests.

Carissa is best suited to maintain the important contact between the noncustodial parent and the child.

Both parties must find a way to rise above their dislike of each other. Adam alleges that Carissa put Blake in a time-out during a phone call because he accidentally called her Joslin. If this allegation is true, just as Adam and Joslin must cease disparaging Carissa, Carissa must not punish Blake for the natural result of the difficult position in which he finds himself. Blake should not be put into a position where he calls anyone “mom” except Carissa or anyone “dad” except Adam.⁶ As Blake’s parents, both Adam and Carissa continue a relationship—a working relationship to co-parent Blake and foster his best interests. To date, Adam has failed miserably in this regard.

B. Separation of Siblings.

Adam and Joslin married April 30, 2011. Sometime prior to the modification hearing in July, they had a child. There is a presumption that siblings should not be separated. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). However, if circumstances demonstrate that separation will promote the long-range interests of the children, departure from the presumption may be justified. *Id.* The presumption is intended to prevent depriving siblings who have grown up together of the benefit of a constant association with one another. *Id.* Our supreme court has also held this general principle should govern awards of physical care in cases of half-siblings as well as others. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). Given the

⁶ Adam contends Carissa has had at least five boyfriends since the decree was entered and she asks Blake to call them “Dad.” Although disconcerting, we note that Carissa was not given an opportunity at trial to confirm or refute this testimony.

infancy of Blake's half-brother, and the seriousness of the degree to which Adam and Joslin have eroded Carissa's contact and communication with Blake, compelling reasons exist to depart from the presumption against separating siblings.

C. Superior Care.

We believe Carissa has met her heavy burden to show a substantial change of circumstances, which are more or less permanent and relate to the Blake's best interests. We also conclude Carissa has shown the ability to offer superior care as Adam has shown an inability to allow Blake the maximum continuing physical and emotional contact with both of his parents. Carissa has stabilized her life to a degree that we are satisfied she will cooperate with Adam, nurture a meaningful relationship between Blake and both parents, and be mindful of Blake's best interests.

D. Visitation.

Pursuant to Iowa Code section 598.41(1)(a), the court shall order liberal visitation where appropriate to "assure the child the opportunity for maximum continuing physical and emotional contact with both parents." Liberal visitation is generally considered to be in the best interests of the child. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992).

Adam has failed to adhere to the spirit of the original decree, which emphasized that the parent not awarded physical care should be "entitled to visitation at all reasonable times and reasonable places as agreed to by the parties." In the event the parties could not agree, a specific schedule was outlined. However, the court emphasized that each party should avoid

scheduling activities which are likely to conflict with the other parent's visitation. The court further specified that "(e)ach parent shall have open telephonic access to the child at all reasonable times and for reasonable durations, without any third party interfering or eavesdropping."

The visitation provisions set forth in the original decree shall be reinstated, though Carissa will now have physical care, and the right to liberal visitation rests in Adam. For clarification, the summer visitation shall be exercised in weeklong increments not to exceed three weeks in length during the child's summer vacation. Weekends not included in summer visitation are subject to the regular schedule of alternate weekend visitation.

Because of our concern that the parties have thus far failed to put aside their personal animosities to Blake's detriment, the trial court may wish to give consideration to appointing a family mediator to meet with Carissa, Adam, and Joslin.

E. Child Support.

Significant changes have occurred since the parties last completed child support guidelines worksheets, including Adam's marriage to Joslin, the birth of their child, and now the modification of Blake's physical care. This matter is remanded to the district court for determination of a support award in accordance with the guidelines. In connection with the calculation of child support, the district court shall also determine who shall be responsible to maintain medical insurance and pay uncovered medical expenses for Blake in light of the modification of physical care.

IV. Conclusion.

Substantial changes since the entry of the decree warrant modification of the custody, visitation, and child support provisions of the parties' decree. We find Carissa is most able to effectively minister to the needs of the child with respect to nurturing a meaningful relationship with both parents, and she is awarded primary physical care of the minor child. Adam shall have the right to liberal visitation, as set forth above.

The matter is remanded to the trial court for calculation of child support in accordance with the guidelines, including the determination of which party should be responsible for maintaining medical insurance and payment of uncovered medical expenses in light of the modification of physical care.

REVERSED AND REMANDED.