

IN THE COURT OF APPEALS OF IOWA

No. 2-350 / 12-0052
Filed June 13, 2012

**IN RE THE MARRIAGE OF NOLAN E. EGGERS
AND NICHOLE EGGERS**

**Upon the Petition of
NOLAN EGGERS,**
Petitioner-Appellee,

**And Concerning
NICHOLE EGGERS,
n/k/a NICHOLE KAISER,**
Respondent-Appellant.

Appeal from the Iowa District Court for Clinton County, C.H. Pelton,
Judge.

A mother appeals the district court decision modifying the physical care
and visitation provisions of the parties' dissolution decree. **AFFIRMED AS
MODIFIED.**

Christopher J. Welch of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

J. David Zimmerman of J. David Zimmerman, P.C., Clinton, for appellee.

Considered by Doyle, P.J., Danilson, J., and Mahan, S.J.*

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

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

Nolan Eggers and Nichole Eggers, now known as Nichole Kaiser, were previously married. They have two children, Zackery (born in 1998) and Zoey (born in 2002). A dissolution decree was entered for the parties in June 2004 granting the parties joint legal custody of the children, with Nichole having physical care. Nolan was granted visitation on alternating weekends, alternating holidays, six weeks in the summer, and one-half of any school breaks. Nolan was ordered to pay child support for the two children.

After the dissolution, Nichole moved to Muscoda, Wisconsin. She married Ricky Kaiser. Nolan remained living in Clinton, Iowa. He married Amber Eggers. Muscoda is about 130 miles from Clinton. There was evidence it took about two and one-half hours to make the trip between the two residences.

In 2008, Zackery was having problems academically and behaviorally. The parties entered into a stipulation providing Nolan would have physical care of Zackery. They agreed to visitation on alternating weekends, alternating holidays, school breaks split evenly between the parties, and three weeks of summer visitation. The parties agreed to meet in Dubuque, Iowa, to exchange the children for visitation. The parties' stipulation was approved by the district court on July 1, 2008.

On July 11, 2011, Nolan filed an application seeking to modify the physical care provisions of the dissolution decree to grant him physical care of Zoey. Nichole responded by requesting a modification to give her physical care of Zackery. A modification hearing was held December 20, 2011.

At the time of the hearing Nolan was thirty-eight years old. He lived in Clinton, Iowa, where he had many extended family members. Nolan was a high school graduate, and had received advanced training in surface and air rescue triage in the Navy. He was employed by TMK Tubular and earned \$14.70 per hour. Amber did not work outside the home. Nolan did not have any health problems. Amber takes medication for diabetes and high blood pressure.

Nichole was thirty-three years old at the time of the hearing. She lived in Muscoda, Wisconsin. Nichole was also a high school graduate, and she had completed three years of college. Nichole had been in the Air Force for eighteen months, but was discharged for medical reasons. She has been diagnosed with post-traumatic stress disorder and fibromyalgia. Nichole received Veteran's disability of \$936 per month and Social Security disability of \$714 per month. She was married to Ricky, who was a disabled veteran, and had been diagnosed with post-traumatic stress disorder, explosive disorder, and spinal damage. Both Nichole and Ricky had been convicted of theft.

Evidence was presented at the hearing that Zoey had been having problems with absenteeism from school. She missed thirty-three days of school in kindergarten, thirty-six days in first grade, twenty-nine days in second grade, and seventeen days in third grade. Nichole testified these absences were because Zoey suffered from migraine headaches. Zoey was currently taking medication for her headaches, which had improved her condition and reduced the number of days she missed school. Her absenteeism had affected her performance in school.

Because of Zoey's excessive absenteeism from school, Wisconsin social services became involved with Nichole's family for a short period in 2008. There were concerns that Zoey, who was then only six, was getting herself ready for school and was sometimes wearing clothing that was not weather appropriate. Ricky testified that he began getting up earlier, before Zoey left for school in the morning. Due to Nichole's physical condition, there are some days when she is not able to get up.

The district court issued a decision on December 28, 2011. The court found there had been a substantial change in circumstances due to Zoey's academic and health problems. The court concluded the dissolution decree should be modified to place Zoey in Nolan's physical care. The court rejected Nichole's request to have Zackery placed in her physical care. The court granted Nichole visitation of three weeks in the summer, and one half of the children's school breaks. Nichole was ordered to pay child support of ten dollars per month. Nichole has appealed the decision of the district court.

II. Standard of Review.

In this equity action our review is de novo. Iowa R. App. P. 6.907. In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(g). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

III. Physical Care.

Nichole contends the district court should not have modified the parties' dissolution decree to grant Nolan physical care of Zoey. She also asserts the court should have granted her request to have both of the children placed in her care. She states that her mental and physical ailments are under control and she would be able to care for both of the children. She also states that she was able to meet Zoey's needs and that Zoey's absenteeism from school due to medical problems was improving. Nichole claims her post-traumatic stress disorder was not caused by her time in the military, but was caused by domestic abuse in her marriage to Nolan.¹ She states the court improperly failed to consider whether there was a history of domestic abuse.

A party seeking to modify a physical care provision in a dissolution decree must show there has been a substantial change in circumstances since the time of the decree, not contemplated by the court at the time the decree was entered, that makes it in the children's best interests to modify the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change in circumstances must be more or less permanent and relate to the welfare of the child. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). A party seeking a modification must also show an ability to minister more effectively to the children's well-being. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). "The heavy burden upon a party seeking to modify custody stems

¹ During the marriage Nolan received a deferred judgment on a charge of domestic abuse assault in 2001. He completed a batterer's education program.

from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.” *Frederici*, 338 N.W.2d at 158.

The district court did not find there had been a history of domestic abuse during the marriage. Nolan admitted he had received a deferred judgment for domestic abuse assault in 2001. There was no evidence presented of any other incidents. Nolan’s mother testified she was not aware of any other incidents of domestic abuse or violence since 2001, and she testified the incident then was out of character for Nolan. We conclude there is not sufficient evidence to establish a history of domestic violence. See *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

We determine the district court properly concluded there had been a substantial change in circumstances since the time of the last modification in 2008. Zoey’s medical problems with migraine headaches, with resulting absenteeism and academic problems, were a substantial change in circumstances directly related to the welfare of the child.

We also determine Nolan has shown he can administer more effectively to Zoey’s well-being. The evidence showed Zackery improved tremendously in his academic performance since he had been in Nolan and Amber’s care. Also, he did not have the behavioral problems he had in the past. We believe this shows Nolan can do an excellent job taking care of Zoey as well. We do not place any blame on Nichole for her mental and physical condition. The fact remains, however, that Zoey has had medical and academic problems while in her care. We concur in the district court’s decision modifying the decree to place Zoey in Nolan’s physical care.

IV. Visitation.

Nichole claims the district court should have granted her more visitation with the children. The modification decree provides that the parties “may agree to any reasonable terms of visitation.” The modification decree only specifically gives Nichole visitation for one full week each in June, July, and August, and visitation during one-half of Thanksgiving break, winter break, and spring break. Nichole asks to have the visitation schedule extended to give her a greater amount of time with the children.²

Section 598.41(1)(a) (2011) provides, that a court should award “liberal visitation rights where appropriate.” A court should also act to “assure the child the opportunity for the maximum continuing physical and emotional contact with both parents,” unless such contact results in direct physical harm or significant emotional harm to a child or parent. Iowa Code § 598.41(1)(a). When considering visitation rights, our primary consideration is the best interests of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation rights are in children’s best interests. *Id.*

We agree with Nichole’s contention that the district court did not grant her sufficient visitation time with the children. We determine Nichole should have the children for one weekend each month, preferably the first weekend of the month. Also, the parties should continue to exchange the children at their specified meeting spot in Dubuque, Iowa, as they have previously agreed. In all other respects, we affirm the visitation schedule as set forth by the district court in the

² In her modification petition, in the event Nolan was granted physical care of both children, Nichole requested visitation on the first weekend each month, all of Thanksgiving break, Christmas day, all of spring break, and three weeks in the summer.

modified decree. Furthermore, the children should be permitted to contact Nichole by telephone at any time they wish.

V. Testimony of Children.

During the modification hearing Nichole represented herself. She informed the court she would like to call Zackery and Zoey as witnesses. The court informed her she could call any witnesses she wanted, but stated he was not sure that was the wisest thing to do. The court stated, "If you insist, you can do it, of course." Nichole never called the children as witnesses. At the close of the hearing, the court asked her, "Any other proof?", and she responded in the negative.

On appeal, Nichole contends she became confused by the court's statements. She asserts she should have been permitted to call the children as witnesses, and it was improper for the court not to consider their feelings on the issue of physical care. It is clear from the record the court did not prohibit Nichole from calling the children as witnesses. Nichole did not call the children to testify. We note that Nichole testified as to the children's wishes.

VI. Representation by Husband.

As noted above, Nichole represented herself at the modification hearing. During her testimony on her own behalf she asked to have her husband, Ricky, question her. The court denied that request. The court asked Nichole several questions during her direct examination, and then she was cross-examined by Nolan's attorney.

Nichole asserts that under the terms of the 2008 modification Ricky was granted standing as a parent, and he should have been permitted to participate

in the 2011 modification proceedings. The 2008 modification adopted the parties' stipulation, which provided, "Ricky Kaiser shall have the rights and responsibilities associated with parenting a minor child, including but not limited to school and medical records, . . . and make decisions jointly with Nichole Kaiser as to Zoey's well-being."³ Whatever rights were given to Ricky in the 2008 modification, we do not believe he was a party in the 2011 modification proceeding. Nichole was the party to the action, she made the decision to represent herself, and we believe the district court properly denied her request to permit her husband to question her on direct examination.

VII. Attorney Fees.

Nolan seeks attorney fees for this appeal. 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.2 90, 94 (Iowa Ct. App. 2007). Considering these factors, we determine each party should pay his or her own attorney fees for this appeal.

We affirm the decision of the district court, except we have modified the visitation schedule. We determine the costs of this appeal should be assessed one-half to each party.

AFFIRMED AS MODIFIED.

³ A reciprocal provision in the stipulation gave Amber certain rights as to Zackery.