IN THE COURT OF APPEALS OF IOWA

No. 3-155 / 12-1706
Filed March 27, 2013

**IN RE THE MARRIAGE OF JENNY SUE BOLINGER
AND BRIAN LANCE BOLINGER**

**Upon the Petition of
JENNY SUE BOLINGER,**
Petitioner-Appellee / Cross-Appellant,

**And Concerning
BRIAN LANCE BOLINGER ,**
Respondent-Appellant / Cross-Appellee.

Appeal from the Iowa District Court for Union County, Richard B. Clogg, Judge.

Brian Bolinger appeals from the district court's ruling setting child support in an amount that deviates from the child support guidelines. Jenny Bolinger cross-appeals from the denial of her application to modify the custody provisions of the parties' dissolution decree. **AFFIRMED IN PART AND REMANDED.**

Julie C. Gray of Patterson Law Firm, L.L.P., Des Moines, for appellant.

Diana L. Rolands of Rolands Law Office, Osceola, for appellee.

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

POTTERFIELD, J.

In this action to modify the parties' dissolution decree, Brian Bolinger appeals from the district court's ruling setting child support in an amount that deviates from the child support guidelines. Jenny Bolinger cross-appeals from the denial of her application to modify the custody provisions and raises other issues. The district court did not err in failing to modify the physical care of the children. However, the court made inconsistent rulings in ordering equal parenting time, but deviating from the child support guidelines on the ground that the "parties' joint physical custody arrangement is not equal and results in the children residing with Jenny more than with Brian." We remand for recalculation of child support.

I. Background Facts and Proceedings.

In October 2005, the district court entered a dissolution decree incorporating the parties' stipulations as to child custody and support. The decree provided that Brian and Jenny "shall each share jointly the legal custody and physical care" of their two minor children. Brian was ordered to pay $137.50 per week to Jenny for child support.

On October 25, 2011, Jenny filed an application to modify the decree concerning support, visitation, and secondary education expenses. She alleged there had been a substantial change of circumstances in that "the parties agreed upon alteration of the shared physical care schedule which the parties have been following." Brian answered, seeking additional time with the children, and in a counterclaim, asserting that even though the parties' incomes had increased, the

child support originally ordered was higher than called for by application of the guidelines.

A hearing was held. One witness stated she had "never seen a more civil divorce than what Brian and Jenny had." Both parents were involved in their children's lives, shared similar parenting styles, communicated well together, and were flexible in the children's care. When the parties were first divorced, the children generally stayed overnight with Jenny and spent every other weekend with Brian. Brian would stop by to see the children after he got off work to "play or ride bikes or whatever" quite often. In 2009, their son began to spend additional evenings during the week with Brian one-on-one, on the advice of a counselor. Thereafter, the daughter, too, spent one evening each week with her father, one-on-one. The children have their own rooms at each parent's home. Brian drives the children to school three days per week.

Brian described the parenting schedule at the time of the hearing: Tuesday and Thursday nights, the son was with Brian. Wednesday night the daughter was with Brian. Every other Friday and Saturday, both children stayed with him overnight. Brian asked that the children be allowed to spend Sunday nights with him as well, but Jenny refused saying the children should be at "home in their own beds."

The district court stated the "current dispute involves whether the children should be allowed to spend Sunday overnight with Brian on the weekends they are at his home. Jenny wants them to come home Sunday evening. Brian wants them to sleep at his home until Monday morning." The court refused to modify the physical care provisions of the decree finding that Jenny had not met her

burden to prove a substantial change of circumstances to justify a change in the joint physical care provision of the decree. The court also ordered, "To the extent the parties cannot agree to a parenting time schedule, the following schedule will be implemented":

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Week 1	J	J	B/J	B/J	B	B	B
Week 2	B	J	B/J	B/J	B	J	J

The court explained:

> In accordance with the above schedule, Petitioner shall exercise parenting time with both children every Monday and every other Friday, Saturday, and Sunday. Respondent shall exercise parenting time with both children every Thursday and every other Friday, Saturday, and Sunday. Each Tuesday, Petitioner shall exercise parenting time with [the daughter] while Respondent exercise parenting times with [the son], and each Wednesday Petitioner shall exercise parenting time with [the son] while Respondent exercises parenting time with [the daughter], in order to allow individual time for each child with Petitioner and Respondent.[1]

Citing Iowa Code section 598.21C(2)(a) (2011), the court did modify the support provisions. The court found that pursuant to the child support guidelines, under a joint physical care scenario and using the offset approach, Brian would pay Jenny $355.40 per month for two children. The court deviated from that amount, however, stating:

> 4. Based on the parties' income and <u>equally</u> shared physical custody, the Child Support Guidelines call for Brian to pay Jenny $355.40 for two children and $249.89 for one child.
>
> 5. If child support is figured under the Guidelines with Jenny as the custodial parent and Brian being given credit for the actual days the parties split physical custody, the child support would be $875.48 for two children and $615.57 for one child.

[1] We assume the court's order of "parenting time" means overnight stays. If this assumption is incorrect, the district court has the opportunity to clarify on remand.

> 6. The court finds and concludes that the support order herein shall vary from the amount of child support which would result from application of the guidelines. In this case applying the guidelines would be unjust and inappropriate as determined under the criteria prescribed by Iowa Code section 598.21B. The parties' joint physical custody arrangement is not equal and results in the children residing with Jenny more than with Brian. Variation from the guidelines is required because substantial injustice would result from the guidelines. In addition, adjustment is necessary to provide for the needs of the children and do justice between the parties in light of the parties' joint physical custody arrangement.

(Emphasis in original).

II. Scope and Standard of Review.

Our review in equity cases is de novo. Iowa R. App. P. 6.907. We give weight to the trial court's findings, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Discussion.

A. *Brian's appeal*. On appeal, Brian contends the district court erred in deviating from the child support guidelines. Based on the record before us, we would agree. Here, the dissolution decree awarded the parties joint physical care.

> Therefore, both parents have an equal responsibility to maintain homes and provide routine care, with neither party having superior rights or responsibilities with respect to the children. *See* Iowa Code § 598.1(4). In Iowa, we use the offset method for calculating child support in cases involving joint physical care. *In re Seay*, 746 N.W.2d 833, 835 (Iowa 2008) (citing Iowa Ct. R. 9.14). "The rule reflects the difference between joint physical care and other parental arrangements." *Id.* The offset approach requires the court to calculate the amount each party would be required to pay if they were a noncustodial parent and then base the child support upon the difference between those two amounts. *Id.* at 834.

In re Marriage of McDermott, ___ N.W.2d ___, ___, 2013 WL 765316, at *10 (Iowa 2013).

In *McDermott*, the court reiterated that a court "may not deviate from the amount of the child support yielded by the guidelines 'without a written finding that the guidelines would be unjust or inappropriate under specific criteria.'" *Id.* (quoting *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991)).

The district court made a finding that the guidelines support would be unjust because "[t]he parties' joint physical custody arrangement is not equal and results in the children residing with Jenny more than with Brian." This finding is then contradicted by the court's order of equal parenting time.

B. *Jenny's cross-appeal*. However, on cross-appeal, Jenny argues the court erred in failing to modify the physical care provisions of the decree "to reflect the actual custodial arrangement." The custodial arrangement as ordered was joint physical care. Each parent shares parenting time, maintains a home, and provides routine daily care for the children. *See* Iowa Code § 598.1(4); *In re Marriage of Brown*, 778 N.W.2d 47, 51 (Iowa Ct. App. 2009). Joint physical care "does not require that the residential arrangements be determined with mathematical precision."[2] *Seay*, 746 N.W.2d at 836; *see In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007) ("Joint physical care anticipates that parents will have equal, *or roughly equal*, residential time with the child." (emphasis added)).

Courts are empowered to modify the custodial terms of a dissolution only when there has been a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered, which is

[2] Both parties testified that, in practice, their residential time with the children was not equal.

more or less permanent and relates to the welfare of the child. *See Brown*, 778 N.W.2d at 51. "The heavy burden upon a party seeking to modify custody stems from the principle that once custody has been fixed it should be disturbed for only the most cogent reasons." *Id.* at 52.

Upon our de novo review, we agree with the district court that Jenny has failed to meet her heavy burden to establish the existence of a substantial change of circumstances to warrant a change in the physical care.[3] We therefore affirm the district court's denial of the application to modify the physical care provisions of the decree.

However, "[t]he burden to change a visitation provision in a decree is substantially less than to modify custody." *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). This court has concluded that when joint physical care is granted, a change in the parenting schedule is more akin to a change in visitation than a change in custody and requires a lower standard of proof. *See Brown*, 778 N.W.2d at 52. Here, the decree did not contain any particular parenting or visitation schedule. Upon the parties' request, the district court entered a more specific ruling as to parenting time. Under the district court's ruling and order, the parties will be equally sharing residential time with the children. We affirm that modification of the parenting schedule.

C. Child support. Jenny contends the court erred in calculating child support because it did not include Brian's farm income. She also argues

[3] Jenny contends that Brian admitted a substantial change of circumstances existed to warrant a change of the custodial provisions of the decree. Brian did admit a change of circumstances, but contends the change "calls for an enhancement of the time [he] spends with the children."

the court should have ruled the child support was retroactively modified three months after the petition was served.

The court deviated from the child support guidelines based upon its finding that the "parties' joint physical custody arrangement is not equal and results in the children residing with Jenny more than with Brian." As noted above, this ruling is contradicted by the district court's ruling which appears to modify the parenting schedule to equal parenting time. Thus, if the district court's intention as to "parenting time" included overnight stays, its finding that a deviation is justified based on unequal parenting times is in error.

We therefore remand to the district court to recalculate child support, noting especially the supreme court's recent statements as to joint physical care, the child support guidelines, and the parents' responsibilities with respect to extracurricular expenses. *See McDermott*, 2013 WL 765316, at *12.

D. *Uncovered medical costs*. Jenny also complains that the district court erred in requiring all uncovered medical costs to be split equally between the parties. While we note that this was the relief Jenny sought at the hearing, in light of our remand and Iowa Child Support Guidelines rule 9.12(5),[4] we leave the issue to the district court.

E. *Trial attorney fees*. Jenny argues that the district court erred in denying her request for attorney fees. An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761,

[4] Rule 9.12(5) provides, in part, "Uncovered medical expenses in excess of $250 per child or a maximum of $800 per year for all children shall be paid by the parents in proportion to their respective net incomes."

765 (Iowa 1997). We find no abuse of discretion in the district court's denial of attorney fees in light of Jenny's lack of success on the merits.

B. *Appellate Attorney Fees*. Jenny requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App.1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We deny Jenny's request for appellate attorney fees.

Costs on appeal are taxed one-half to each party.

AFFIRMED IN PART AND REMANDED.