

IN THE COURT OF APPEALS OF IOWA

No. 3-995 / 12-1732
Filed November 20, 2013

Upon the Petition of
BARBARA BISHOP,
Petitioner-Appellee,

And Concerning
ERIC LEIGHTY,
Respondent-Appellant.

Appeal from the Iowa District Court for Clarke County, Darrell J. Goodhue,
Judge.

Eric Leighty appeals from the order modifying the child custody provisions
of a paternity decree. **AFFIRMED.**

Cathleen J. Siebrecht of Siebrecht Law Firm, Des Moines, for appellant.

Amanda M. DeMichelis of DeMichelis Law Firm, Chariton, for appellee.

Considered by Tabor, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.

Eric Leighty and Barbara Bishop are the parents of a minor child born in August 2008. A March 2010 paternity decree established a joint physical care arrangement. But following purported acrimony between the parties, Barbara petitioned to modify the custody provisions of the decree. She sought, and was granted, physical care.

On appeal, Eric contends Barbara failed to prove a substantial change in circumstance warrants modification of the decree. He also contends Barbara has failed to show she can provide the child with superior care. We review his claims de novo. Iowa R. Civ. P. 6.907.

When considering whether to modify the custody provisions of a paternity decree, we first address whether the record shows there has been a substantial change in circumstances since the time of the decree. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). In order to warrant modification, the change in circumstances must have occurred since the time of the decree, not been contemplated by the court when the decree was entered, be more or less permanent, and relate to the welfare of the child. *Id.*

We find Barbara has shown a substantial change in circumstances warranting modification of the joint physical care arrangement. While never ideal, the parties' ability to get along and communicate effectively about the child steadily decreased from the time of the decree's entry until Barbara petitioned for modification on January 25, 2012. The decree, which is the result of a joint agreement between the parties, envisioned a level of cooperation and communication that is not being achieved, as is partially evidenced by Eric's

refusal to return R.L. to Barbara's care on Christmas Day in 2011, in violation of the decree. Such conflict, as shown in the record of this case, provides a basis for modification of a joint shared care arrangement. See *In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996) (holding modification of a decree granting joint physical care is appropriate when the parties' actions indicate that they are no longer able to cooperate).

Having found a substantial change in circumstances warrants modification of the decree, we then address Eric's contention that Barbara failed to show she can render superior care. We note at the outset that where, as here, the existing custody arrangement provides for joint physical care, the court has already determined both parents are suitable custodians. See *Melchiori*, 644 N.W.2d at 368-69. Therefore, Barbara's burden is the same as it would be in an initial custody determination; the question is which parent can render "better" care. See *id.* at 369. On our de novo review, we find that parent is Barbara. There is no doubt both parents are capable caregivers. And we agree neither parent has been exemplary in their dealings with each other. However, the record shows Barbara is more likely to support Eric's relationship with the child than Eric is to support Barbara's relationship with the child. See Iowa Code § 598.41(3)(e) (2011). We therefore conclude placement with Barbara will better serve the child's long-term well-being. We find Barbara should be granted physical care.

Both parties request they be awarded appellate attorney fees. Such an award is not a matter of right, but rests within this court's discretion. See *In re Marriage of McDermott*, 827 N.W.2d 671, 687 (Iowa 2013). In determining whether to award appellate attorney fees, we consider the needs of the party

seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Because the parties are capable of paying their own attorney fees, we decline to make an award.

AFFIRMED.