

IN THE COURT OF APPEALS OF IOWA

No. 7-237 / 06-1183

Filed July 25, 2007

CASEY A. FOSTER, n/k/a CASEY MEYER,
Petitioner-Appellant,

vs.

HAROLD WATERMAN,
Respondent-Appellee.

Appeal from the Iowa District Court for Allamakee County, Monica L. Ackley, Judge.

Casey A. Foster appeals from an order modifying child custody.

REVERSED AND REMANDED.

David A. Morse and Kristine M. Dreckman of Rosenberg, Stowers & Morse, Des Moines, for appellants.

Laura J. Parrish Maki of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C., Decorah, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

Casey A. Foster (n/k/a Casey Meyer) appeals from an order modifying child custody. Casey contends the district court erred in finding Harold Waterman was able to provide the child with superior care. We reverse and remand.

BACKGROUND FACTS AND PROCEEDINGS

Anjela Chariss Michiko Foster-Waterman (Anjela) was born to Harold Waterman and Casey Foster on March 24, 2000. Harold and Casey were never married. A custody order was entered on March 12, 2001, granting Harold and Casey joint legal custody of Anjela. Physical care was placed with Casey and Harold was afforded liberal visitation. At the time, Harold resided in Prairie Du Chien, Wisconsin, while Casey resided in the Waukon, Iowa area. Harold and Casey cooperated reasonably well for the first four years of the original custody order. They kept each other informed of Anjela's well-being and development. They were both involved in Anjela's various activities.

Casey and Harold are both now married, Harold to Stephanie Waterman and Casey to Ken Meyer. Casey and Ken have one child, Brady, born of their marriage. Harold and Stephanie were expecting a child at the time of trial. Anjela gets along well with both families.

In June 2005, Casey and Ken decided to move to Greensburg, Indiana. They completed the move in July 2005. Harold filed a petition to modify the original decree and seek physical care of Anjela. The trial started on June 7, 2006. A final order was entered on June 30, 2006, placing physical care with Harold and granting visitation rights to Casey. The district court's decision was

mainly based on its findings that (1) the move disrupted Harold's regular visitation schedule, (2) Harold and Stephanie could offer a more stable and loving environment to meet Anjela's future needs, and (3) Casey was unsupportive and inconsiderate of Harold's relationship with Anjela. Casey appeals.

STANDARD OF REVIEW.

We review the district court's decision to change the custody of a minor child de novo. Iowa R. App. P. 6.4; *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). At the same time, we recognize the virtues inherent in listening and observing the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

MERITS.

When the issue involves a child's custody and visitation, our primary consideration is the best interest of the child. *In re Marriage of Wessel*, 520 N.W.2d 308, 309 (Iowa Ct. App. 1994). Once physical care of a child has been established by a final decree, it should not be disturbed unless the conditions since the decree was entered have so materially and substantially changed that the child's best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). In addition, the parent seeking a change in custody has a heavy burden to prove by preponderance of evidence that he or she has an ability to render superior care. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). If both parents are found

to be equally competent to minister to the child's needs, custody should not be changed. *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa Ct. App. 1992).

A parent's decision to move a child more than 150 miles from the child's primary residence may constitute a substantial change of circumstance. Iowa Code § 598.21(8A) (2005). In the present case, the move from Iowa to Indiana exceeds 150 miles. As a result, Anjela's visitation with Harold was dramatically reduced. She also moved away from the relatives, friends and community that she was familiar with. The district court found the move constituted a substantial change of circumstance. We agree. However, we are not convinced that Harold established his ability to provide superior care.

Home Environment. There is no doubt Harold and Stephanie are able to offer Anjela an adequate home. Harold and Stephanie are both employed and have stable income. They own a 1,600 square foot home where Anjela has her own bedroom.

On the other hand, Anjela also has a similarly stable and loving home environment in Indiana with Casey and Ken. Casey and Ken are both employed. Casey's flexible work schedule allows her to spend time with Anjela and take her to various activities. Furthermore, as a result of moving to Indiana, Ken, an over-the-road trucker, was able to spend more time with the family. Casey and Ken purchased a ranch home on a two-acre lot in Indiana. The home is less than two miles away from Casey's father and stepmother. Although Anjela shared a bedroom with Brady, Casey and Ken were planning to build an additional room when Anjela was older and needed privacy.

Health Care. Anjela is a healthy child overall. Casey took care of Anjela's medical needs since her birth. Although Anjela experienced some dental problems, we are not convinced that Casey's neglect of Anjela's dental hygiene caused them. After these problems were discovered, Casey willingly participated in Anjela's visits to the dentists. She changed Anjela's diet and designed an award system to help Anjela follow through with a stricter dental hygiene routine.

Educational Endeavors. Anjela is a very bright child. The record shows Casey made great efforts to promote Anjela's social, physical and intellectual development. She hired a professional family educator during Anjela's infant and toddler years and involved Anjela in various activities. She taught Anjela to read and count at an early age. After moving to Indiana, Casey continued to be actively involved in Anjela's schooling and extracurricular activities. During the one year living in Indiana, Anjela performed well at the new kindergarten and adjusted quickly to the new environment.

Harold attended some of the Anjela's activities. He also remained on Anjela's school mailing list and received copies of Anjela's report cards. He and Anjela share some common interests, such as playing guitar, and he assisted Anjela in her artistic endeavors.

Harold argues that Anjela is a child of one-fourth of Korean heritage and it is important for her to be allowed maximum involvement with her heritage. He contends that Anjela's paternal grandmother, Song, is a Korean and she can expose Anjela to Korean cultures. We recognize the importance of Angela's ethnic heritage. However, Casey is very supportive to Anjela's relationship with

Song and her interests in Korean cultures. At the time of trial, Casey was planning to enroll Anjela in martial arts instruction. She also rehearsed Korean language with Anjela. In addition, the areas where Casey and Harold live have approximately the same amount of diversity. We believe Anjela would have sufficient opportunities to be involved with her ethnic heritage under Casey's care.

Separation of Siblings. Under Iowa law, siblings should not be separated from one another without good and compelling reasons. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). This rule applies to half-siblings and full siblings. *See id.* Casey and Harold's son, Brady, and Anjela had lived together since Brady's birth in 2002. Casey testified that the two children were very close, and Anjela's absence from the home during visitation periods with Harold was noticeably difficult for Brady. It is already difficult for Anjela to be far away from one of her parents as the result of moving. We believe it is important that Anjela remains in the same household with Brady.

Promotion of Anjela's Relationship with the other Parent. Casey was supportive to Anjela's relationship with Harold while living in Iowa. She invited Harold to attend major events in Anjela's life, such as her christening, and also discussed smaller matters with Harold, such as cutting Anjela's hair and piercing her ears. She ensured Anjela was available for the major events in Harold's life, such as his wedding and loss of children.

However, after Casey moved to Indiana, Harold experienced some difficulty seeing and communicating with Anjela. They made phone calls and wrote letters, but Anjela sometimes seemed distracted or not talkative. Harold

testified to his concerns that Casey was restricting Anjela's freedom to talk to him. Casey denied that she interrupted Anjela's phone calls with Harold. She claimed when Anjela was not interested in talking or did not know what to say, she would give Anjela ideas, such as, "tell your dad what you did at school today." She also testified that there were occasions when she offered to take Anjela to visit Harold which Harold rejected. We do not find the evidence supports Harold's allegation.

Summary. Based on our review of the record, we find that, despite some differences in parenting style, both Casey and Harold showed similar connection to Anjela. The level of care they are capable of providing to Anjela is comparable. We do not find the evidence warrants a finding that Harold can provide superior care justifying the modification of custody. The order modifying physical care is reversed and the matter is remanded to consider the issue of visitation.

ATTORNEY FEES ON APPEAL.

Casey requests an award of no less than \$3,000 in appellant attorney fees. An award of attorney fees rests within the discretion of the appellant court. *Spiker v. Spiker*, 708 N.W.2d 347, 360 (Iowa 2006). When determining the award of attorney fees, we consider the needs of the requesting party and whether the requesting party is forced to defend the appeal. *Id.* We award no attorney fees.

REVERSED AND REMANDED.