

IN THE COURT OF APPEALS OF IOWA

No. 7-441 / 07-0076
Filed August 8, 2007

JOSHUA JAMES HARDIE,
Petitioner-Appellee,

vs.

MARCELINE MARY ST. GERMAIN,
Respondent-Appellant.

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

The respondent appeals from the district court's order modifying custody
and physical care of the parties' minor daughter. **AFFRIMED.**

Karen Taylor of Taylor Law Offices, Des Moines, for respondent-appellant.
Steven Guiter of Johnston, Hicks, Guiter & Griffith, Knoxville, for
petitioner-appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Marceline (Marcy) St. Germain appeals from the district court's order granting Joshua Hardie's petition to modify custody and physical care of their daughter, Makayla. We affirm.

Marcy and Joshua never married, but Makayla was born in June 1999 during a time when the parties were cohabitating. After they separated, the parties stipulated to joint legal custody, joint physical care, and related matters. Visitation and transfer arrangements were modified by a stipulated order in October 2005. Joshua filed a petition for modification of the joint physical care arrangement in August 2006 after Marcy notified him that she, her husband, and Makayla planned to move to Arizona. Following a contested hearing in December 2006, the district court found a significant change in circumstances existed due to Marcy's stated intentions to move to Arizona, that Joshua was better able to parent Makayla, and it was therefore in Makayla's best interests to modify physical care to Joshua. Marcy appeals.

In modification proceedings, our review is de novo. Iowa R. App. P. 6.4. We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

Marcy argues on appeal that Joshua failed to show a material change in circumstances warranting modification, because she had not yet moved to Arizona. At a temporary hearing in September 2006, Marcy agreed to wait until after trial to move to Arizona and at trial she testified that it was still her intention to move. In fact, the move was so imminent that Marcy and her husband had

employment opportunities secured in Arizona that ultimately fell through due to their delay in moving. In addition, Marcy's parents were planning on relocating to Arizona to be closer to family members. Iowa Code section 598.21D (Supp. 2005) states that a move of more than 150 miles by a parent with physical custody may be considered a substantial change in circumstances for purposes of modification. We agree with the district court that Joshua carried his burden of proof in establishing a substantial change of circumstances based on Marcy's planned move to Arizona and affirm on this issue.

Marcy also contends that Joshua did not show he was better able to parent Makayla or that the change from joint physical care was in Makayla's best interests. Where the parties shared joint physical care, neither parent is automatically deemed the superior parent. *Melchiori v. Kooi*, 644 N.W.2d 365, 368-369 (Iowa Ct. App. 2002). Instead, the petitioning party, in this case Joshua, has the burden of showing he will provide superior care. *Id.* Physical care issues are not to be resolved based upon perceived fairness to the *spouses*, but primarily upon what is best for the *child*. *In re Marriage of Hansen*, ___ N.W.2d ___, ___ (Iowa 2007). The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity. *Id.*

During the trial, Joshua presented evidence that he had stable employment, housing, and child care arrangements for Makayla. He and his wife live in a two-bedroom home with her two-year-old son, and the couple was expecting a child of their own. They anticipated moving to a larger home to accommodate their expanding family. Joshua also appears to have been very

active and consistent in Makayla's educational and religious instruction. While both Marcy and Joshua have changed employment several times over the last few years, the district court concluded Joshua currently had the more stable employment situation. Marcy, at the time of trial, did not have either employment or housing secured in Arizona. The district court also harbored concerns over her past relationship with an abusive man. Marcy moved to Missouri in May 2005 with this man, without informing Makayla of her move, and leaving Makayla in Joshua's care until November 2005. The record also shows that Marcy and Joshua have increasingly experienced problems cooperating and communicating on matters concerning their daughter. While they agreed in the October 2005 order to "participate in counseling for the purpose of improving their communication with each other involving the needs of their daughter," Marcy quit attending after only two sessions. In addition, Marcy testified that Makayla wants to refer to Marcy's husband of six months as her father, which Joshua feels is part of Marcy's further attempt to alienate him from Makayla. All of these matters considered, we agree with the district court that Makayla's best interests support physical custody be placed with Joshua. The district court was in a far better position than we are to assess the parties' credibility, and thereby gauge their testimony regarding stability of their housing and employment situations, the effect of their new spousal relationships, and, most importantly, what would be in Makayla's best interests. See *In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000) (stating child's best interests concept is interwoven into modification standard). We therefore affirm.

AFFIRMED.

Vogel and Miller, JJ. concur. Sackett, C.J., concurs specially.

SACKETT, C.J. (concurring specially)

I concur specially with this opinion.