IN THE COURT OF APPEALS OF IOWA

No. 8-029 / 07-1036
Filed March 14, 2008

STEVEN A. BUSCHBOM,
Petitioner-Appellee/Cross-Appellant,

vs.

MERRY G. FRENCH,
Respondant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Bremer County, John S. Mackey, Judge.

A mother appeals and a father cross-appeals from the district court's modification decree ordering joint physical care of the parties' son. **AFFIRMED.**

Carter Stevens of Roberts, Stevens & Prendergast, P.L.C., Waterloo, for appellant.

Teresa Rastede and Brian Sayer of Dunakey & Klatt, P.C., Waterloo, for appellee.

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

BAKER, J.

In this case we are asked to decide whether a joint physical care arrangement is in a child's best interests where the parents have demonstrated animosity toward each other and have longstanding communication problems, but have recently improved their communication and insulated the child from their differences. Because the child is doing well under the arrangement, we affirm.

I. Background and Facts

Merry and Steve are the parents of a son born in September 1999. They have never been married or resided together. After the son's birth, although there was no court order regarding custody or child support, Steve financially supported and visited the son. On November 29, 2000, Steve filed a petition to establish paternity, custody, and support. On February 14, 2002, consistent with their stipulation, the parties were granted joint legal custody. Merry was awarded physical placement, and Steve was awarded liberal visitation.

Since the son's birth, the parties have had numerous conflicts and communication problems. For example, in 2001 Steve began documenting their exchanges, including videotaping their pick-up and drop-off for visitations. Merry prefers e-mail communication to face-to-face interactions with Steve. At one point she requested that, unless it pertained to their son's health, Steve contact her only through her attorney. In March 2003, Steve made a child abuse report to the Iowa Department of Human Services (DHS), alleging Merry as the perpetrator. The report was determined to be unfounded.

Steve has a bachelor's degree and is employed as a juvenile court officer. He lives on an acreage approximately thirty miles from the son's school.

At age twenty-four, Merry underwent substance abuse treatment after being charged with possession of marijuana. After she had successfully completed treatment, she enrolled in college and graduated with a bachelor's degree. Despite her possession of marijuana charge, she was hired by the Department of Corrections and was eventually promoted to a supervisory position.

In 2002, after fourteen years of sobriety, Merry began using alcohol. The frequency and quantity of her drinking increased. She admits to drinking to the point of drunkenness while the son was in her care and to drinking before and after work. In October 2004, she agreed to a demotion after her employer began an investigation into her drinking. Her employment was terminated following her arrest for operating while intoxicated and child endangerment.

On December 19, 2004, Merry was late to pick up the son following visitation. When she called Steve to say she would be late, he thought her speech sounded slurred. He contacted the Oelwein Police Department and reported his concerns. The dispatcher told him officers were in the area. When Merry arrived, Steve gave the son to Merry and allowed her to drive away. Within a few blocks, Merry was pulled over.

Following this incident, Merry enrolled in an in-patient treatment program. Since her discharge, she has participated in aftercare and has remained sober. She is employed as a substance abuse counselor. During the twenty-nine days Merry was participating in the program, the son lived with Steve. Just prior to her discharge from the program, Steve sent Merry a fax asking that she agree to immediate joint physical care and placement of the son in another school district, or Steve would file for modification of custody.

The son has had some behavioral and emotional problems. The parties disagree on the reason for these problems. Steve has taken the son to see counselors without informing Merry. Due to the child endangerment charge, Merry and the son were involved in services through DHS. In October 2005, after several contacts with the son and parents, licensed psychologist George M. Harper, Ed.D., reported:

> I doubt that we can ever ascertain with any certainty the origins of [the son's] emotional and behavioral problems . . . . I suspect that the difficulty reported in transitions from one parent to the other is at least partially the result of strained relations between his mother and father. Because [the son] is very sensitive, I am quite certain that he can easily detect stress, anxiety, and depression in either of his parents . . . . [The] behavioral difficulties may represent his immature way of trying to cope with very uncomfortable feelings he is experiencing.

On January 20, 2005, Steve filed an application for modification, asserting that a substantial change in circumstances had occurred and asking that he be awarded physical care. He also filed an application for a temporary emergency order placing the son's physical care with him, which was denied.

Trial on the application for modification was first scheduled for August 2005, then for December 2005, and then for May 2006. Each time, the trial was continued and rescheduled pursuant to the parties' motions and consents. Trial was eventually held on June 8 and 9, 2006; September 21, 2006; and March 29 and 30, 2007. Following the June 2006 proceeding, the trial court determined that the appointment of an attorney to represent the son would be in the son's best interests. The parties agreed to appoint Timothy Ament as the son's guardian ad litem (GAL). Following the June 2006 proceeding, the parties operated under a joint physical care arrangement.

On September 21, 2006, the parties attempted to reach a settlement, but were unable to do so. At that time, the parties agreed to continue to try joint physical care until the next trial date. The specific terms of the agreement are set forth in the court's September 25, 2006 order.

In September 2006, the GAL did not recommend joint physical care. Noting the "inability and unwillingness of the parties to communicate," their disagreement about which school the son should attend and in what activities he should participate, and Steve's secretly taking the son to see counselors, the guardian ad litem reported that joint physical care would be "doomed to failure."

For the March 2007 proceeding, the GAL recommended joint physical care continue. The son had expressed a strong desire to continue joint physical care. The GAL reported that, although he was still concerned about the parents' communication, they were able to communicate and coordinate sufficiently for joint physical care to work.

The trial court found that Merry's relapse, and the possibility of future relapse, constitutes a substantial change of circumstances sufficient to change the physical placement provisions of the original order, and that joint physical care is in the son's best interests. The court ordered that joint physical care continue consistent with the terms of the September 2006 parenting agreement.

Merry appeals, arguing there is no substantial change in circumstances, and Steve does not minister more effectively to the son's well being. Steve cross-appeals, arguing the modification was warranted, the son is thriving under the current arrangement, and, should we decide against joint physical care, he should be awarded physical care because he is the superior parent.

II. Merits

Our review in equity cases is de novo. Iowa R. App. P. 6.4. We are not bound by the trial court's findings of facts, but we give them deference because the trial court had a firsthand opportunity to view the demeanor of the parties and evaluate them as custodians. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998); *see also* Iowa R. App. P. 6.14(6)(*g*).

When we determine physical care, our primary concern is the best interests of the child, not the perceived fairness to the parents. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). The objective is to place the child in the environment most likely to bring him "to health, both physically and mentally, and to social maturity." *Id.* at 695-96. "Determining what custodial arrangement will best serve the long-range interest of a child frequently becomes a matter of choosing the least detrimental available alternative." *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

A. Substantial Change in Circumstances

Child custody should be modified only when there has been a material and substantial change in circumstances since the original child custody order. *In re Marriage of Erickson*, 491 N.W.2d 799, 801 (Iowa Ct. App. 1992). The change in circumstances must be ongoing and must not have been contemplated by the court when the original order was entered. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The parent requesting the modification must establish by a preponderance of the evidence that conditions since the original order was entered have so materially and substantially changed that it is in the child's best interests to change custody. *Id.* The party seeking modification has

a heavy burden because once custody has been established, it should be disturbed for only the most cogent reasons. *Id.* "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987) (citations omitted). While not bound by the court's findings, we give them deference. *Walton*, 577 N.W.2d at 871.

Steve contends modification was warranted due to Merry's substance abuse relapse and criminal conviction for child endangerment. Merry argues that Steve has not met the heavy burden to modify custody.

Whether a substantial change in circumstances exists is a close call. Our precedent cautions us to exercise care in "judging a parent based on activities which take place during a particular time frame . . . . Instead, a better picture of a parent can be found by viewing the total circumstances, and putting isolated events into perspective." *In re Marriage of Ihle*, 577 N.W.2d 64, 69 (Iowa Ct. App. 1998). We have held that a parent's serious criminal record and substance abuse does constitute a substantial change in circumstances, but that sparing substance abuse that does not endanger the child does not. *In re Marriage of Montgomery*, 521 N.W.2d 471, 474 (Iowa Ct. App. 1994); *In re Marriage of LeGrand*, 495 N.W.2d 118, 120 (Iowa Ct. App. 1992).

Merry appears to be on the right track in maintaining her sobriety, and we commend her for her progress. Her relapse, however, was not an isolated incident. She used alcohol for two years, lost her job due to her drinking, and put

her son in danger by driving under the influence. We conclude that Merry's relapse constitutes a substantial change in circumstances.

We recognize that our determination may be perceived as unfair to Merry. On the day Merry was arrested, Steve was sufficiently concerned about her intoxication to contact the police, but then allowed her to leave with his son. We are unconvinced by Steve's claim that he was unsure Merry was intoxicated. The officer who pulled her over a few blocks away reported her "driving pattern was extremely poor," there was a strong odor of alcohol emanating from her, and her "eyes were bloodshot and watery." Additionally, Steve later contacted the Bremer County Attorney's office, asking they take steps to ensure the case be prosecuted. These circumstances suggest that Steve wanted to use the criminal charges against Merry to gain an advantage in the child custody case. Our primary concern in physical care determinations, however, is not on fairness to either parent. *Hansen*, 733 N.W.2d at 695.

We also recognize that our determination may be perceived as rewarding Steve's apparent willingness to place his son in danger in order to gain an advantage. Our objective is not "to reward or punish either parent." *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Regardless of Steve's complicity, Merry put her son in danger by drinking and driving. We affirm the trial court's conclusion that there was a substantial change in circumstances.

B. Joint Physical Care

The trial court concluded that the parties' communication is adequate to support joint physical care and that the arrangement documented in the parenting agreement is in the son's best interests. "Joint physical care" is

> an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child, including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has physical care rights superior to the other parent.

Iowa Code § 598.1(4) (2005). While no longer disfavored, there is no presumption favoring joint physical care. *Hansen*, 733 N.W.2d at 692. Any consideration of physical care must "be based on Iowa's traditional and statutorily required child custody standard—the best interest of the child." *Id.* at 695. The advantage of the best interests standard is that it provides flexibility to consider the unique custody issues of each case. *Id.* at 696.

Iowa Code section 598.41(3) contains a non-exclusive list of factors, including the wishes of the child, which "are relevant in determining whether joint physical care is in the best interest of the child." *Id.* (citing *Winter*, 223 N.W.2d at 166-67). Critical factors include the proportion of time the child has historically spent with each parent, the parents' ability "to communicate and show mutual respect," the degree of conflict between the parents, and "the degree to which the parents are in general agreement about their approach to daily matters." *Id.* at 698-99 (citations omitted). There is, however, "no ironclad formula or inflexible system of legal presumptions." *Id.* at 699-700.

1. Approximation

We apply the approximation principle, i.e., the proportionate amount of time the child has historically spent with each parent, to determine whether joint physical care is in the best interests of the child. *Id.* at 697. Although a significant factor, other factors may mitigate the importance of approximation. *In*

re Marriage of Berning, ____, N.W.2d ____, ____ (Iowa Ct. App. 2007). For example, where a father had been an active and interested parent since the child's birth and was capable of stable parenting, the mother had left the child with him for extended periods of time, and the child had spent a considerable amount of time in daycare, we held the mother's role as predominate caretaker was "not an overwhelming factor mandating that she be awarded physical care" of the son. *Id.*

While much of the record does not reflect positively on Merry or Steve, it is clear that both parents love their son and both are suitable parents. When we consider joint physical care between two suitable parents, "stability and continuity of caregiving have traditionally been primary factors." *Hansen*, 733 N.W.2d at 696 (citation omitted). Considering the approximation principle and the unique facts of this case, we note that the "trial" joint physical care agreement has been in place since June 2006. Since then, the son seems to be doing well in school and has not needed additional counseling. Custody of children who are receiving proper care should not be disturbed absent cogent or compelling reasons. *Erickson*, 491 N.W.2d at 803. Under these circumstances, we find the best option for providing stability and continuity of caregiving to the son weighs in favor of the continuation of the joint physical care agreement.

2. Communication and Mutual Respect

Another important consideration is the parents' ability to communicate and demonstrate mutual respect. *Hansen*, 733 N.W.2d at 698. Where a father called a mother derogatory names in front of their son only three weeks before trial, our supreme court found the mutual respect and communication required for joint

physical care was lacking. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). Where there was an ordinary level of tension between parents, however, we found "no reason to conclude the existing communication or level of respect between the parties would be a significant impediment to joint physical care." *Berning*, ____, N.W.2d at ____.

Recently Steve and Merry have been increasingly able to communicate and get along with each other. For example, they agree that the amount of information they share has increased, and they have been able to sit with each other at the son's activities. In March 2007, although their communication was still "miserable," the GAL reported "the parties have been able to communicate and coordinate enough for shared physical placement to work." We agree with the trial court that, despite the parties' animosity, their communication has improved sufficiently to support joint physical care.

3. Conflict and Daily Matters of Care

Other important considerations in determining whether joint physical care is in the best interests of the child are the degree of conflict between parents and "the degree to which the parents are in general agreement about their approach to daily matters." *Hansen*, 733 N.W.2d at 698-99 (citations omitted). Merry objects to joint physical care. Her concerns include Steve's desire to have the son in many "unnecessary" activities, an ongoing need for outside mediation when they cannot agree, the tension she experiences when she deals with Steve, and that, in her opinion, joint physical care has not been successful. We agree with the trial court that these concerns either have been addressed or can be addressed by utilizing the provisions of the parenting agreement.

While "[t]he prospect for successful joint physical care is reduced when there is a bitter parental relationship and one party objects to the shared arrangement," pursuant to Iowa Code section 598.41(5)(a), the court must "consider joint physical care upon the request of either party." *Id.* (citations omitted). In this case, notwithstanding her dislike for Steve, Merry entered into the trial joint physical care agreement and, according to her brief to this court, "invested herself fully in the shared placement concept." Although a parent's objection to joint physical care "can be an indicator of instability in the relationship that may impair" the arrangement, Merry has been willing and able to fully invest herself in the arrangement. *Id.* at 699. We will not disturb the court's decision based on her objection to joint physical care.

III. Conclusion

Considering the "total setting presented" by the unique facts of this case, including the son's expressed desire to continue the joint physical care arrangement and the recommendation of the GAL, we affirm the trial court's order modifying custody. *Id.* at 699; *see also* Iowa Code § 598.41(3)(*f*). Because we affirm joint physical care, we need not consider the issue of who can more effectively minister to the son's needs.

In the final analysis, we must remember that our overriding goal is to look to the best interests of the child. Custody and physical care are neither a reward nor a punishment for the parents. By all accounts, the son is doing well under the current arrangement. We will not disturb the court's decision to continue the joint physical care arrangement.

AFFIRMED.