

**IN THE COURT OF APPEALS OF IOWA**

No. 9-1066 / 09-1068  
Filed February 24, 2010

**HEATHER M. MAYES,**  
**n/k/a HEATHER M. MARSHALL,**  
Petitioner-Appellant,

**vs.**

**GABRIEL J. HAGEN,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,  
Judge.

Heather Mayes appeals the issues of physical care and child support in  
this action modifying the parties' paternity decree. **AFFIRMED.**

Dennis D. Jasper, Bettendorf, for appellant.

Carrie E. Coyle, Davenport, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

**DANILSON, J.**

Heather Mayes<sup>1</sup> appeals the issues of physical care and child support in Gabriel (Gabe) Hagen's action for modification of the parties' paternity decree. We affirm.

**I. Background Facts and Proceedings.**

Heather and Gabe are the parents of Maci, born in November 2001. The parents never married. Sometime before Maci's first birthday, the parents separated and Heather and Maci moved to the Davenport area. Gabe remained in Cedar Rapids. In November 2002, Heather commenced an action to establish paternity and child support. After a trial, the district court entered an order on September 25, 2003, declaring Gabe to be Maci's father, granting joint legal custody, granting Heather physical care, and granting Gabe visitation. The order also addressed child support, insurance, and transportation. In its order, the district court noted evidence of Heather's moral misconduct and promiscuous behavior since the parties' separation. The district court found, however, that Heather's actions had not affected the safety or care of Maci, and concluded she should have primary physical care. Our court affirmed that decision in *Mayes v. Hagen*, No. 04-0086 (Iowa Ct. App. Apr. 28, 2005).

On May 30, 2007, Gabe filed the present action, alleging several changes in circumstances and seeking to modify the decree and change physical care to him. Heather filed an answer and a counterclaim, requesting the court increase the amount of child support paid by Gabe. Due to continuances and

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<sup>1</sup> Heather Mayes is now known as Heather Marshall.

rescheduling caused by several other filings by the parties, trial did not take place on this matter until March 17 and 18, 2009.

Since the entry of the original order in 2003, Gabe has continued to work in the electrical engineering field, and is considered an excellent employee. In 2006 Gabe married and moved into a home in Durant with his wife, Sherann, and Sherann's daughter, Lexi, who is two years older than Maci. Gabe has worked for his current employer for three years. He works a "swing shift"—two weeks of day shifts (7 a.m. to 7 p.m.), then two weeks of night shifts (7 p.m. to 7 a.m.).

Sherann works for Mercy Hospital in Iowa City as a respiratory therapist. She works some night shifts. Gabe's and Sherann's work schedules require that Lexi spend four nights a month with Sherann's sister, who lives down the street.

Heather lived with her parents in Blue Grass after the parties' separation and furthered her education on and off for a number of years. She has an AA degree, and is not currently enrolled in any classes. Heather's employment has been sporadic and mostly part-time. She is currently employed part-time by a grant funded program that helps low income families find child care. Prior to that job, she worked as a teacher's aide for several months, but quit because she felt it was too hard working with behavior disorder children. She also has a history of numerous part-time jobs as a waitress.

In the last four years or so, Heather has had several tumultuous relationships with boyfriends, and subsequently, with her husband, Cameron. Heather and Cameron married in May 2008, four months after becoming acquainted. Heather and Maci now live in a home with Cameron. Since June

2008, police have been called to the home five times due to incidents of domestic abuse. At least two incidents have resulted in charges against Cameron for criminal domestic assault, but those charges were dismissed when Heather refused to testify at trial.

Cameron is an ex-Marine. He is on military disability due to his being diagnosed with post-traumatic stress syndrome after serving two tours of duty in Iraq. He was divorced from his first wife, Tara, in 2007 as a result of his violence toward Tara's eight-year-old son who Cameron adopted during their marriage. He does not exercise visitation with that son, but he does maintain visitation with his four-year-old son that was born during he and Tara's marriage.

Prior to Heather's marriage to Cameron, she obtained protective orders in 2005 and 2006 on separate occasions against two previous boyfriends because of domestic abuse. An ex-boyfriend also obtained a protective order against Heather in Illinois prior to her relationship with Gabe.

Heather has a poor driving record. She was convicted of operating while intoxicated (OWI) in 2000, before she and Gabe met. Between 2003 and 2007, Heather had a series of convictions for speeding, seatbelt violations, and careless driving. She was arrested again for OWI in 2007. Her license was revoked for OWI test refusal, although later she was granted a restricted license. Heather's license has been revoked at least one other time. She has admitted to driving with Maci in the car as many as ten times while her license has been suspended. Cameron's license has also been suspended and, at one point, neither Heather nor Cameron had a license.

Maci is involved in extra-curricular activities, including swimming and softball. Both parents attend these events; however, there have been numerous communication problems and arguments at or regarding Maci's activities. Visitation has also been a nearly constant source of friction for these parties. Many disputes between the adults in this case (Gabe, Sherann, Heather, and Cameron) have taken place in Maci's presence. Upon the advice of her teachers, Maci is now in counseling for her "acting out" behavior in school.

In October 2004, Gabe sought to have Heather held in contempt for withholding visitation. He voluntarily dismissed his application in February 2005. In April 2005, Gabe again filed an application seeking to have Heather held in contempt, due to her continued refusal to allow Sherann (then Gabe's girlfriend, now his wife) to pick Maci up for visitation. After a trial, the district court found Heather's refusal was willful and established by the evidence beyond a reasonable doubt. Heather was sentenced to serve thirty days in jail with all but three days suspended on the condition that there be no further violations of the visitation order and that Gabe be allowed to make up twenty-seven days of lost overnight visits. Heather served the three days in the Scott County Jail.

On April 9, 2009, the district court modified the paternity decree. In its order, the court determined: (1) a substantial change of circumstances had occurred since the entry of the parties' September 2003 decree; (2) the change of circumstances affected Maci's welfare; (3) the change of circumstances was more or less permanent; and (4) Gabe had established that he could render superior care of Maci's needs than Heather. The court therefore modified the

decree to change physical care of Maci from Heather to Gabe. The court ordered the visitation schedule to remain the same: Heather was to have visitation with Maci during the times Gabe previously had visitation. Heather was also ordered to pay child support in the amount of \$128.75 per month. Both parties filed a motion to amend or enlarge the court's ruling. On June 15, 2009, the court entered an order on the motions to amend or enlarge, clarifying the visitation schedule, among other things. Heather now appeals.

## **II. Scope and Standard of Review.**

We review *de novo*. Iowa R. App. P. 6.907 (2009). We give weight to the district court's fact findings, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.904(3)(g). The criteria governing our decision are the same whether or not the parties are married. *In re Petition of Purcell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995). Our primary consideration is the best interests of the child. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003).

## **III. Physical Care.**

Courts are empowered to modify the custodial terms of a custody order "if it has been established that conditions since the decree have so materially and substantially changed that the children's best interests make it expedient to make the requested change." *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005); *see In re Marriage of Hocker*, 752 N.W.2d 447, 450 (Iowa Ct. App. 2008). The change must be more or less permanent, relate to the welfare of the children, and must not have been contemplated by the district court when the

original order was entered. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004); *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

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 parent seeking modification of physical care must show an ability to administer more effectively to the child's needs. *Grantham*, 698 N.W.2d at 146. The party seeking modification has a heavy burden because once custody has been established, it should be disturbed only for the most cogent reasons. *Frederici*, 338 N.W.2d at 158.

Heather argues the district court erred in changing the physical care of Maci to Gabe. She contends the court did not consider all the relevant factors for the change of physical care. Heather alleges there was no substantial change of circumstances in that Maci has done very well in her care, and any animosity between the adult parties in this action has had no adverse effect upon Maci. Heather argues the court erred in determining that she was the major cause of the bad relationship between the adult parties in this case. Rather, Heather contends Gabe's wife, Sherann, has been the cause of the parties' poor communication, lack of responsibility, and the extreme tension that exists between the parties. She further contends Gabe's and Sherann's work schedules are not conducive for physical care, and for many reasons, Gabe is not better able to administer to the long-term needs of Maci.

Gabe continues to argue, however, that it is in Maci's best interests to be in his care. Gabe points to several facts in support of this contention: Heather's

OWI arrests and dangerously poor driving record; Heather's failing to allow Gabe extra time with Maci; repeated incidents of domestic violence between Heather and Cameron; Gabe now living in Durant instead of Cedar Rapids; Heather telling Maci not to speak with Gabe about her concerns; and Heather's overall failure to include Gabe in Maci's extracurricular activities, medical needs, and therapy. Gabe also contends he is a reliable employee at a good job, he is in a stable relationship with Sherann, Maci gets along well with her half-sister, and Maci regularly asks to spend more time at Gabe's home.

**A. Substantial Change of Circumstances.**

We first must determine whether a substantial change of circumstances has occurred. Conflict between parents can amount to a substantial change of circumstances. *Melchiori v. Kooj*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The district court found this type of conflict existed in this case. As the court determined, the conflict "can only be characterized as an awful relationship between the four adults who have the most contact with Maci and should therefore be most concerned about providing her a happy environment to live in." The court noted that the parents' relationship and lack of adequate communication and respect was adversely affecting Maci.

It is clear from the record that much of the conflict and noncooperation stems from Heather's animosity toward Sherann. Therefore, we are convinced that the degree of intractability reflected in the record was not contemplated at the time the original decree was entered.



Pursuant to the original paternity decree, the parents noted that they were “putting their own needs above those of the child when they argue over visitation and thereby undermine their own relationship with the child and burden the child with the guilt of responsibility for such disputes.” They understood they were to “promptly transmit” to the other parent any information received regarding academics or extracurricular activities and were to arrange appointments at a time when the other parent can be present.

From the testimony at the modification hearing, it is clear communication and interaction between Gabe and Heather (and also between the parties and Sherann and Cameron) has broken down. The relationship between the parties has changed considerably since their separation. Both admitted communication between them is horrible, but only Gabe attempted to take any responsibility for the lack of good relations between the parties. Sherann even testified that at one point, she suggested separating from Gabe, not because she did not want to be with him, but because she did not want to be a major issue in Gabe and Heather improving their relationship.

On our de novo review of the record, we conclude the breakdown in communication was so complete that a substantial change of circumstances was proven. See *Melchiori*, 644 N.W.2d at 368. Although we believe the breakdown in communication is alone sufficient to establish a substantial change in circumstances, other facts support this conclusion. Heather’s contempt adjudication for willfully denying visitation, her continual commission of traffic offenses, and the conflict in her home (or at least her need to obtain domestic

abuse protective orders from her paramours) provide further evidence that a substantial change in circumstances has occurred since the entry of the original order filed in 2003.

***B. Superior Caretaker.***

The district court also determined Gabe could provide superior care for Maci. The court noted numerous incidents of Heather's irresponsible and immature behaviors, as well as her insistence on being in "control." The court considered Heather's dangerous and "chaotic" relationships with men, including her current husband; her complete disregard toward the law and "unwillingness to abide by the rules everyone else is expected to follow"; her continued "bad behavior" in knowingly failing to schedule appointments at times that Gabe could attend; her continued disrespect of Sherann; and her lack of consistent employment. In determining the better parent to provide for Maci's best interests, the court emphasized the lack of stability and security Heather and Cameron's home provided for Maci. As the court stated:

The most striking contrast between the parties is the stability and lack of conflict between Gabe and Sherann that appears to be the norm for their relationship, and what can only be described as ongoing chaos between Heather and Cameron. The only testimony of marital conflict between Gabe and Sherann appears related to the stress due to the poor relationship with Heather.

Gabe admits that his conduct and response to the conflict between him and Heather has probably contributed to the fact that Maci is now in counseling for her "acting out" behavior at school, which the teacher saw as "attention seeking." While Heather makes no such admission the evidence shows she bears a greater share of the fault for it. Heather has done nothing to foster the relationship between Gabe and Maci and appears for the most part to go out of her way to make it more difficult. She has steadfastly refused to have anything to do with Sherann, and her intransigence, left unchecked, will only continue. While she

appears to adequately meet the day-to-day needs of Maci, she is a poor role model for Maci to follow. Heather's instability for the past two or three years has not appreciably improved by her marriage and, in fact, has exposed Maci to an increased risk of harm. The court is satisfied that Gabe is the better choice to provide security and stability in Maci's life and that she has a better chance of maturing to a healthy adult with Gabe than she does with Heather.

The court's decision is fully supported by the record. With regard to parents' capabilities, the record reflects strengths and weaknesses in both, but clearly shows Heather has been the root of the bulk of the conflict to which Maci continues to be exposed. The record also reflects, as the district court noted, the stability and lack of conflict present in Gabe's home, Gabe's ability to take responsibility for his actions and the effect his actions have on Maci, and his desire to get along with Heather and Cameron to further Maci's best interests. Maci is fortunate to be so loved by her parents and step-parents. However, the adults in this case must put their conflicts aside, stop making this child feel guilty by the ongoing tension between them, and serve Maci's best interests.

The district court aptly noted all the significant and important facts in this case in reaching its conclusion that Gabe is the superior caretaker, and on this record, we see no reason to conclude otherwise. We affirm as to this issue.

#### **IV. Child Support.**

Heather argues the district court erred in denying her counterclaim seeking a retroactive commencement date for an increase in child support paid to her. She contends that even if she is unsuccessful in her request for a reversal of the change of physical care, the increase in child support should still be effective until the date of the change of physical care to Gabe.

Pursuant to section 598.21C(5) (2007), child support may be retroactively modified beginning three months after the date of the notice of the pending petition for modification is served on the opposing party. Heather filed an answer and counterclaim to Gabe's application for modification on June 26, 2007. Therefore, Heather contends the court had the ability to commence an increase in child support as of September 26, 2007, and the court erred in failing to do so.

The district court has discretion in deciding whether modified support payments should become effective from the date the action was filed or from the date of the modification order. See Iowa Code § 598.21C(5). Upon our review, we find no abuse of discretion in the court's denial of a retroactive commencement date for an increase in child support.

#### **V. Appellate Attorney Fees.**

Heather and Gabe both request attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.*; *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We decline to award attorney fees for this appeal. Costs on appeal are assessed to Heather.

**AFFIRMED.**