

IN THE COURT OF APPEALS OF IOWA

No. 9-989 / 09-1055
Filed February 10, 2010

**IN RE THE MARRIAGE OF ERIC E. ENGLE
AND HEIDI R. ENGLE**

**Upon the Petition of
ERIC E. ENGLE,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
HEIDI R. ENGLE,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker,
Judge.

Heidi Engle appeals from the district court's decree placing physical care of the parties' children with Eric. She also seeks appellate attorney fees. Eric cross-appeals, arguing the district court erred in determining Heidi's income for purposes of calculating child support. **AFFIRMED.**

Melissa A. Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for
appellant.

Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C.,
Marshalltown, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Eric and Heidi Engle were married in 1997. Heidi had a daughter from a previous relationship, Taylor. Eric and Heidi's son, Caleb, was born in August of 1998. The parties divorced on June 7, 2000. The dissolution decree approved the parties' stipulation that granted Heidi physical care of Caleb, with liberal rights of visitation for Eric.

Eric and Heidi continued their relationship after the divorce proceedings and reconciled in August of 2001. The parties did not remarry. The parties' second child, Presley, was born in October of 2002. The parties resided together with the three children until Heidi again left Eric in May of 2004. Though no court order governed the physical care of Presley, Heidi took all three children with her when she moved out of Eric's home.

After Caleb's birth, Heidi became a childcare provider so she could remain home with her children. Heidi has run her childcare business for ten years, and has been a registered provider for the last seven years. Heidi is subject to unannounced visits by the State, and her license as a childcare provider has never been suspended. Heidi now cares for a full complement of children and has a waiting list for future openings. Twenty parents have discontinued Heidi's services in the last four years, though the parties disagree on why services were discontinued. Two of Heidi's former clients testified that they discontinued her services because they were dissatisfied—one because she felt the children were not properly supervised and the other because of an incident involving Heidi's boyfriend, which is detailed below. Two of Heidi's current clients testified they

were satisfied with Heidi's services. Eric alleges that Heidi often leaves her daycare children unattended, either in the yard alone or in her vehicle while she runs errands. Heidi testified that her policy was that someone should always be supervising the children.

Heidi's boyfriend Darin Blocker lives with Heidi and the three children. At the time of trial, Heidi and Darin had been living together for roughly three and one-half years. During that time period, Darin moved out of Heidi's home three or four times. Eric alleges that there is domestic violence between Darin and Heidi, but Heidi denies this allegation. There was testimony regarding an incident in which Darin threatened to tear down walls of the house using a chainsaw. The record suggests Darin gets along with the children, although he acknowledges there have been difficulties when his daughters visited him at Heidi's home.

Eric is employed at GROWMARK, where he has worked for two years, though he has been employed by its parent company for nine years. He is a district and regional sales manager who works out of his home, with an annual salary of \$77,400. Eric's work hours are fairly flexible, and though he occasionally has to travel for work, his overnight traveling is very limited. At the time of trial, he was in an almost two-year marriage with Nicole, with whom he was expecting a child in April of 2009. The record suggests Nicole gets along with the children. Eric lives in the BCLUW school district; the children have attended school in the East Marshall school district.

Both parents are actively involved in raising their children. Heidi has been the children's primary caretaker because she was able to stay home with them

during the day. Eric is involved in activities with the children, including helping coach Caleb's wrestling and football teams. Eric also communicates regularly with Caleb's teachers about his behavioral and academic problems at school.

Caleb was ten and in fourth grade at East Marshall at the time of trial. He is an active boy who has a quick temper and trouble controlling his anger at times. Caleb has had problems with his aggression at school, on the bus, and with his grandparents. He also has a tendency to play too rough with Presley and with the children in Heidi's daycare. The record establishes that Heidi struggles more than Eric when it comes to disciplining Caleb and getting him to act with respect. At the time of trial, Caleb's academic performance was good, and both parents maintain frequent communication with Caleb's teachers. However, Eric is able to attend Caleb's school events and his parent-teacher conferences more often than Heidi.

Presley was six and in kindergarten at East Marshall at the time of trial. Presley is a well-behaved child who does well in school. She also participates in dance and loves to draw and color.

Heidi's daughter, Taylor, was sixteen at the time of trial and shares a bond with the younger children, especially with Presley. Taylor grew up in the same household as Presley and Caleb and accompanies them on visits to Eric's house at times, though Eric is not her biological father. Eric and Taylor maintain a fine relationship in spite of Eric and Heidi's problems. Heidi believes Taylor could be used as a messenger between the parents to avoid discord.

Eric and Heidi's relationship was historically difficult. In 1998, Eric was charged with assaulting Heidi. He admits he was guilty and that his actions at

the time were unwarranted. In 2000, before Eric and Heidi divorced, Eric was convicted of criminal mischief resulting from another altercation with Heidi. Heidi asserts that Eric was verbally and physically abusive throughout their entire relationship. Eric asserts that he has not been physically abusive to Heidi since the incident in 1998, though he admits the parties continued to fight verbally and alleges that Heidi continued to be physically aggressive.

Unfortunately, the parties have been unable to set aside their differences in front of the children, and their relationship seems to have disintegrated even further during the course of these proceedings. Both parties admit to having significant communication problems—calling each other vulgar names, cursing, and yelling at one another in front of the children. Though both parties recognized their behavior was inappropriate, neither party seemed to be able to control these behaviors during the life of this case.

On July 7, 2008, Eric filed a petition to modify the decree with regard to physical care of Caleb and to establish custody and visitation with regard to Presley. Eric expressed several concerns at trial that he believed justified an award to him of physical care of the two children. Eric apparently began to gather evidence in support of his petition by recording telephone conversations with Heidi and talking to parents of the children in Heidi's daycare.

Eric claimed Heidi failed to provide for the emotional and physical well-being of the children, citing an incident where Heidi left Caleb at Hy-Vee and drove home without realizing he was not in her vehicle. Upon arriving home, she received a call from Caleb, who had walked roughly one mile to use a telephone to call home. Eric cited another incident that occurred when the parties were

living together after their divorce in which Heidi left Caleb in her car while she went window shopping. A concerned citizen reported this to the police, and the Iowa Department of Human Services (DHS) investigated. Eric told DHS that Heidi was a great mother. Although the incident was confirmed, DHS found it did not need to be placed on the registry because it was an isolated incident.

Eric asserted the tumultuous and probably violent relationship between Darin and Heidi did not provide the children with stability. He also stated that Heidi's admitted tendency to yell and curse at and in front of the children was not beneficial to them.

After trial, the district court issued a decree modifying physical care of Caleb from Heidi to Eric and granting Eric physical care of Presley. An order on the parties' motions to amend and enlarge provided that each party should pay his or her own attorney fees. Further, Heidi was granted visits two evenings per week and every other weekend.

Heidi now appeals, arguing the district court erred in placing physical care of the children with Eric and seeking appellate attorney fees. Eric cross-appeals, claiming the district court erred in the determination of Heidi's income for purposes of calculating child support.

II. Standard of Review

Because this is an action in equity, our review is de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). The district court has reasonable discretion in determining whether modification is warranted and we will not disturb that discretion on appeal unless there is a failure to do equity. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998).

Our primary concern is the best interests of the children. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

III. Physical Care

The party seeking a modification of physical care must “establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children’s best interests make it expedient to make the requested change.” *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The changed circumstances must not have been contemplated by the district court when the decree was entered, and they must be more or less permanent. *Id.* The parent seeking physical care must prove an ability to minister more effectively to the children’s well-being. *Id.* The burden on a parent seeking a change of physical care is a heavy one, and physical care of children, once decided, should be disturbed for only the most cogent reasons. *Id.*

After our de novo review of the record, we find the evidence of a material change of circumstances minimally adequate for changing the physical care arrangement for Caleb as established by the dissolution decree. Neither party contends the evidence is insufficient to show an unanticipated material change of circumstances. The district court found Eric has established a stable home life, while Heidi’s life is somewhat tumultuous, particularly considering her relationship with Darin. Heidi has been distracted and lost her focus on the care of the children. Although we are less concerned with the incidents showing Heidi’s inattentiveness to the children, we agree with the district court that Heidi’s relationship with Darin is unstable and negatively affects the children. Though

new relationships are common after dissolutions, the nature of a relationship has an impact on children's lives and demonstrates the parent's priorities. We find that Heidi's relationship with Darin is sufficiently volatile to create an unhealthy environment for the children.

We also agree with the district court that Eric has shown he can offer superior care to Caleb. For whatever reasons, Caleb appears to be more receptive to Eric's mode of discipline and is clearly resistant to Heidi's practice of yelling at him. Caleb's potentially serious behavior problems are an overriding concern. The record establishes that Caleb's behavioral problems decrease under Eric's care. Eric has been available to the school as a resource and has coached Caleb in football and wrestling. The evidence about Caleb's need for counseling is disputed, but Eric testified he would be willing to arrange it if suggested by the school. Thus, Eric has demonstrated that he is better able to minister to Caleb's well-being.

Eric also seems to better understand that the children should not be put in the middle of his and Heidi's problems. Heidi testified that she believed sixteen-year-old Taylor would be a good intermediary between her and Eric. She admitted at trial that she uses the children to send messages to Eric. She sent the children to Eric's home without coats to teach Eric a lesson. Heidi does not seem to grasp the effect on her children of putting them in the middle of her poor relationship with Eric. As the physical custodial parent, Heidi abused her power to grant or withhold Eric's time with the children. Instead of trying to shield the children from her disagreements with Eric, Heidi attempted to use the children to gain an advantage. This is not in the children's best interests.

We find the history of domestic abuse between the parties a decade earlier does not prohibit placing physical care of the children with Eric after the changes he has made in his life since his marriage to Heidi. Eric concedes that his abusive actions during the marriage precluded an award of physical care to him at the time of the divorce. However, he contends he has changed and learned from his batterer's classes. More importantly, there is no suggestion that Eric was ever abusive to the children, and Eric and his spouse Nicole testified that there is no domestic abuse in his current home.

We further find that the children's relationship with Taylor does not require a finding that Heidi retain physical care. "There is a presumption that siblings should not be separated from one another without good and compelling reasons." *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). This principle applies to an award of physical care in the case of a half-sibling as well. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). The record is clear that the children are closely bonded with Taylor. However, Taylor's age indicates that she may leave home soon, and Presley's best interests are in long-term stability, which Eric and Nicole can best provide. Further, Eric maintains an amicable relationship with Taylor and supports her relationship with Presley and Caleb, allowing her to spend time with them at his house.

We therefore affirm the district court's modification of physical care of Caleb and award of physical care of Presley to Eric.

IV. Heidi's Income for Purposes of Child Support Calculations

Eric argues in his cross-appeal that the district court erred in considering some of Heidi's business expenses in calculating her net income and the

resulting child support. He argues that Heidi's deductions for business use of her home, vehicle, cell phone, and garbage pickup services should be added back to her net income, dollar for dollar, for a total annual income of \$36,474. At trial, he submitted child support worksheets which used a gross annual income for Heidi of \$30,833.

Application of child support guidelines first involves determination of the "net monthly income" of the custodial and noncustodial parent. *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004). The court must determine the parents' current income from the most reliable evidence presented. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa Ct. App. 1996). "Net income is gross income less certain allowable deductions." *In re Marriage of Hilmo*, 623 N.W.2d 809, 811 (Iowa 2001). Gross monthly income is not defined in the guidelines; however, Iowa courts have stated it is the total taxable income on Federal Form 1040. *In re Marriage of Cossel*, 487 N.W.2d 679, 683 (Iowa Ct. App. 1992). Because the guidelines provide for the consideration of a parent's state and federal income tax liability, "the amount of child support ultimately owed . . . is dependent on the allocation of tax exemptions and credits." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 338 (Iowa Ct. App. 2005).

Income for child support calculation purposes is "not limited to income that is reportable to the federal government as income." *Hilmo*, 623 N.W.2d at 811. However, the definition of net monthly income as provided in Iowa Court Rule 9.5 generally does not contemplate adding back in deductions that were taken on the Federal Form 1040 and thus excluded from a party's gross monthly income. We conclude the trial court did not abuse its discretion in allowing these deductions

in calculating Heidi's gross income. See *In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa Ct. App. 1995).

However, this does not end our analysis. Heidi is the owner of her in-home daycare business and enjoys the benefits of self-employment. "We have recognized salary packages can be substantially enhanced by nonsalary items and . . . the court should look at these factors in assessing a child support award." *Id.* These factors/benefits "can support a discretionary call by the trial court to depart from the guideline amount." *Id.* This is particularly true when "absent the benefit, the noncustodial parent would need to purchase the employee benefit in the market place." *Id.*

Nonetheless, recognizing that Heidi may have covered some normal personal living expenses through her business, we conclude equity does not require the recognition of the value of business-paid personal expenses as a factor that could justify a deviation from the amount of support provided by the guidelines. See *id.* This record does not support a finding that the guidelines amount of child support would be "unjust or inappropriate" under the criteria established in Iowa Court Rule 9.11. See *Kupferschmidt*, 705 N.W.2d at 334. Eric has sufficient income to support the children with the help of the child support ordered by the district court.

V. Attorney Fees

Heidi argues Eric should be responsible for her appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's sound discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). The court considers the needs of the party making the request, the

ability of the other party to pay, and whether the party making the request is obligated to defend the trial court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). Upon considering the foregoing factors, we decline to award appellate attorney fees. Costs on appeal are assessed equally between the parties.

AFFIRMED.