

**IN THE COURT OF APPEALS OF IOWA**

No. 1-815 / 11-0146  
Filed November 23, 2011

**IN RE THE MARRIAGE OF NICHOLAS L. DODSON  
AND LACEY DODSON**

**Upon the Petition of**

**NICOLAS L. DODSON,**  
Petitioner-Appellee,

**And Concerning**

**LACEY DODSON, n/k/a LACEY BYLER,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Dallas County, Gregory A. Hulse,  
Judge.

Lacey Dodson appeals from the district court order modifying the child  
custody and support provisions of the decree dissolving her marriage to Nicolas  
Dodson. **AFFIRMED AS MODIFIED.**

Erin M. Carr of Carr & Wright, P.L.C., Des Moines, for appellant.

Susan Ekstrom, Des Moines, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

**TABOR, J.**

Lacey Dodson appeals from the district court order modifying the child custody and support provisions of the decree dissolving her marriage to Nicolas Dodson. Neither party disputes that a substantial change in circumstances warrants modification. The question presented for our review is which parent can better minister to the children's best interests. Weighing the factors set forth in Iowa Code section 598.41(3) (2009), we agree with the district court that Nicolas has shown himself to be that parent. Accordingly, we affirm the modification of custody and support.

Lacey also contends the district court erred in awarding Nicolas \$2500 in trial attorney fees. Considering the needs and resources of the parties, we find the court abused its discretion in awarding attorney fees. We decline to award Nicolas his appellate attorney fees.

***I. Background Facts and Proceedings***

Lacey and Nicolas were married in September 2003. They have two children: Zane, born in October 2000, and Blake, born in March 2004. The district court entered a decree dissolving the marriage on April 9, 2008. It provided for joint legal custody and shared physical care of the children by agreement of the parties, with Nicolas caring for the children from Monday until Wednesday morning and Lacey caring for them from after school Wednesday until Friday morning. The parties alternated weekend care.

The parenting plan provided the children would attend school in Van Meter unless the parents agreed otherwise. In the event the parents disagreed on any

issue requiring a joint decision, the parents were to resolve the disagreement through a designated mediator. The parties agreed to reside in Dallas County as long as the children were minors. The court ordered Nicolas to pay child support to Lacey.

Lacey is a part-time student taking online classes through Kaplan University. She does not work outside the home. She expects to earn approximately \$35,000 when she completes her education, but wishes to work part-time. She married Trenton Byler in September 2009. Trenton is a full-time active-duty member of the military stationed at Fort Des Moines. Although the parties' dissolution decree ordered Nicolas to provide health insurance for the children, health insurance for the boys is available at no cost through Trenton's employment, so the children are on his healthcare plan.

Lacey and Trenton moved to Indianola, which is approximately thirty to forty miles away from Van Meter. She claims she and Trenton were unable to purchase a house in their price range in Van Meter. Indianola is outside of Dallas County.

Despite Lacey's move, the children have continued to attend school in Van Meter. Zane is an average student; Lacey believes he is struggling in school due to his failure to turn homework in on time, which she blames on Nicolas. Blake is in the special education program.

Nicolas is employed with Advanced Rehab Technologies and earns approximately \$35,000 per year. He resides with his parents on the Van Meter acreage, where the parties lived during the marriage and where Nicolas lived at

the time of dissolution. The dissolution decree required Lacey to refinance or sell a trailer the parties had purchased. She failed to do so, and judgment was entered against Nicolas in the amount of \$4305.85. His credit was damaged as a result, limiting his ability to establish another residence.

Nicolas has been in a relationship with Wendy for approximately three years. He waited one year before introducing Wendy to the children. Wendy works with autistic children and adults at an organic community-supported agriculture (CSA) farm. She has custody of her own thirteen-year-old daughter. The testimony shows Lacey has not been receptive to Wendy's relationship with Nicolas; Lacey reportedly has used foul names to refer to Wendy in front of the children.

The relationship between Wendy and one of the children also concerned Lacey. In July 2010 Wendy slapped Zane for talking back to Nicolas. Lacey claims it caused the boy's mouth to bleed; several days later, she found a small cut inside Zane's lip. Wendy admitted she "lightly slapped him across the left side of his face, with the back of her hand" but claims she "did not even touch his mouth and he did not bleed or have any cuts." Wendy believes "the slap hurt his pride more than anything." Lacey reported the incident to the police and the Department of Human Services (DHS). After an investigation was conducted, the DHS determined the report of abuse was founded. Wendy testified that it was a mistake and that she apologized to Zane for it.

On February 26, 2010, Lacey filed a petition to modify the physical care and child support provisions of the dissolution decree. She sought physical care

of the children. In his answer, Nicolas asked that he be granted physical care in the event a substantial change of circumstances was found to exist. In his counterclaim, he alleged a substantial change of circumstances existed because Lacey had moved out of Dallas County and failed to attempt mediation before filing her action.

Following a trial in October 2010, the district court entered an order on December 28, 2010. The court found a substantial change of circumstances warranted modification because Nicolas and Lacey were unable to co-parent effectively, which was likely to cause strife, worry, and confusion for the children. Analyzing the factors set forth in Iowa Code section 598.41(3), the district court found Nicolas had shown a superior ability to care for the children, and that their long-term best interests would be served by granting him physical care. The court granted Lacey visitation every Wednesday night from 5:00 p.m. until school starts the following day, as well as alternating weekends. The court also ordered Lacey to pay Nicolas child support in the amount of \$255 per month. Finally, the court awarded Nicolas \$2500 in his trial attorney fees. Lacey filed a timely notice of appeal from the court's modification ruling.

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

Modification actions are reviewed de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). This court examines the entire record and decides anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We do not need to consider assignments of error in the trial court's findings of fact and conclusions of law

separately, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We do give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. *McKenzie*, 709 N.W.2d at 531.

We review the district court's award of attorney fees for an abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

### **III. Modification of Custody.**

When making physical care determinations, we seek to place children in the environment most likely to advance their mental and physical health and social maturity. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). Our prime concern in fashioning physical care arrangements is the best interests of the children. *Id.* at 690. To determine the children's best interests, we weigh all relevant conditions affecting physical care. *In re Marriage of Thielges*, 623 N.W.2d 232, 237-38 (Iowa Ct. App. 2000).

Once the court establishes a physical care arrangement, the party seeking to modify it bears a heightened burden and we will modify the arrangement only for the most cogent reasons. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). Generally, the party requesting modification must make two showings: (1) a substantial change in material circumstances that is more or less permanent and affects the children's welfare; and (2) he or she is able to provide superior care and minister more effectively to the children's needs. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *In re Marriage of*

*Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Where the existing custody arrangement provides for shared physical care, as is the case here, the court already has deemed both parents to be suitable custodians. See *Melchiori v. Kooi*, 644 N.W.2d 365, 368-69 (Iowa Ct. App. 2002). Under this shared-care scenario, where the applying party has proved a material and substantial change in circumstances, the parties are on equal footing and bear the same burden as the parties in an initial custody determination; the question is which parent can render “better” care. *Id.* at 369. In addition to assessing the parties’ respective parenting abilities, courts should consider whether the shared physical care arrangement remains in the children’s best interests. See *id.* “The significance of an award of physical care should not be minimized. Children are immediately, directly, and deeply affected by the kind and quality of home that is made for them.” *Frederici*, 338 N.W.2d at 160-61.

Neither party disputes there has been a substantial change of circumstances warranting modification of the custody provisions of the dissolution decree. Lacey’s move of forty miles impacts their ability to continue a shared care arrangement. The discord between the parties also makes such an arrangement unworkable.

The question this court must consider is which parent is better able to minister to the children’s long-term best interests. See *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998). This court’s objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *Id.* The critical issue in determining the

best interests of the children is which parent will do a better job in raising them.

*Id.* In determining the children's best interests, courts must consider the following:

- a. Whether each parent would be a suitable custodian for the child.
- b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
- c. Whether the parents can communicate with each other regarding the child's needs.
- d. Whether both parents have actively cared for the child before and since the separation.
- e. Whether each parent can support the other parent's relationship with the child.
- f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.
- g. Whether one or both the parents agree or are opposed to joint custody.
- h. The geographic proximity of the parents.
- i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.
- j. Whether a history of domestic abuse, as defined in section 236.2, exists.

Iowa Code § 598.41(3).

Lacey alleges she is the better parent and the best interests of the children would be served by granting her physical care. In particular, she cites to the fact she has provided primary care in the past,<sup>1</sup> is better able to foster the children's relationship with the other parent, and has the most stable and supportive home environment.

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<sup>1</sup> Although the parties have had shared care of the children since the divorce, there was a two-year period before they were married where Nicolas had physical care of Zane.



Lacey is currently the parent with more flexibility in her schedule to care for the children. She is not working outside the home and takes classes as a part-time student online, allowing her to keep the same schedule as the children. Nicolas's job requires him to travel within the state, though the travel is not overnight.

As a result of Lacey's flexible schedule, she has been responsible for taking the children for medical appointments, which are slotted during the times Nicolas is required to work. But there is no evidence Nicolas is unable to handle such appointments. Nicolas's boss testified about the freedom he was allowed in his job to attend to his children's needs. He testified the company would "allow [Nicolas] the flexibility to take whatever time he needs to go take care of his kid, or like sports, family functions, or just medical emergency." He also testified to witnessing Lacey "bombard" Nicolas with telephone calls during his working hours, and that while Nicolas would get frustrated, he was calm and collected in dealing with her.

Lacey also claims Nicolas is less active in the children's education. She claims he has not attended parent-teacher conferences. But the evidence shows Lacey set the conferences during Nicolas's working hours for her own convenience. Nicolas has taken the step of scheduling conferences after his working hours to be more involved. Blake's teacher also testified she had talked to Nicolas on the telephone on several occasions. Nicolas also has been involved in the children's extra-curricular wrestling activities, volunteering his time

as a coach. One of the head coaches in the wrestling program testified Nicolas has been active during the three years he has been with the program.

Lacey claims she is the parent better able to foster the children's relationship with the other parent. She testified Nicolas complained she called too much when the children were in his care and that he had disconnected the telephone on occasion while she was talking or attempting to talk to them. She claims Nicolas has evidenced a lack of willingness to communicate with her about the children.

Contrary to Lacey's claims, we find the evidence suggests Nicolas is the parent who has more strongly fostered the children's relationship with the other parent. The record shows Lacey acted in ways to undermine the children's relationship with their father. For example, she encouraged the children to refer to her husband as "dad" and to call their father "Nick." Nicolas suspects Lacey buys toys for the children before they are to stay with him but will not let them take the toys along, motivating a desire to return to their mother's house. Her act in scheduling parent-teacher conferences when Nicolas could not attend shows she is not inclined to support his relationship with the children. When Nicolas tried to hire Blake's teacher for summer school, Lacey picked another person, with whom Blake had no relationship. Lacey also moved outside of Dallas County in contravention of the parties' agreement and did not attempt to mediate any dispute.

The evidence also shows Lacey does not support the children's relationship with Nicolas's family. The wrestling coach testified about an incident

where Lacey argued with Nicolas's father at a wrestling tournament when he was saying goodbye to his grandchildren, yelling at him that she did not want him anywhere near her children. The coach had to intervene, telling them to "take it outside."

Lacey has been very negative about Nicolas's relationship with Wendy, despite never meeting her. Although she denies it, the record shows Lacey has called Wendy names in front of the children and told the boys they did not need to listen to any of the adults when in their father's care. She told Nicolas that if Wendy attended the children's wrestling tournament, she would have her sister "kick Wendy's butt."

The greatest concern regarding Nicolas's care of the children is the evidence of Wendy hitting Zane for talking back to his father. This act resulted in a founded child abuse report. Lacey worries that Nicolas, his parents, and Wendy all physically discipline the children. Nicolas admits occasionally spanking the children but states he has never left a mark on them. He claims he has not spanked either child in more than a year. He also admits an incident in 2009 where he struck Zane across the buttocks with a foam sword. Nicolas claims Zane had purposely hit Blake in the face with the sword and he used it on Zane to show him how it felt. The district court found Nicolas's testimony regarding physical discipline of the children to be credible. We give weight to these credibility findings, *Witten*, 672 N.W.2d at 773, because of the trial judge's superior ability to gauge the witnesses' demeanors. *In re Marriage of Pundt*, 547

N.W.2d 243, 245 (Iowa Ct. App. 1996). With regard to physical discipline, the district court made the following finding:

Nick and Lacey are not in agreement about child-rearing practices, especially disciplinary measures. The Court does not condone a parent physically abusing children or allowing others who are physically caring for the children to do so. Wendy definitely made a mistake in using physical force to discipline one or both of the boys on one occasion, but she admits her indiscretion and there is no showing that her action had any long-lasting effect upon the children. The Court does not expect her to act in the same way again. Neither does the Court believe that Nick's occasional spanking of the boys in the past, although not condoned, should constitute an overriding factor in the determination of who should have primary physical care of the boys.

In reviewing the factors set forth in Iowa Code section 598.41(3), the evidence supports granting Nicolas physical care of the children.

#### ***IV. Attorney Fees.***

Iowa Code section 598.36 provides, "In a proceeding for the modification of an order or decree under this chapter the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court." Lacey argues the district court abused its discretion in awarding Nicolas \$2500 in trial attorney fees because he is employed and earning \$35,000 per year while her imputed income for purposes of child support calculation is \$16,848 per year. Given Nicolas's superior ability to pay, she seeks a reversal of the award.

We agree an award of attorney fees is not warranted under the facts of this case. Even imputing income to Wendy, Nicolas is in a superior position to pay his own attorney fees. Because the district court abused its discretion in awarding Nicolas attorney fees, we modify that portion of the order.

Nicolas seeks an award of his appellate attorney fees, noting he has to defend the district court's ruling. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Erickson*, 553 N.W.2d 905, 908-09 (Iowa Ct. App. 1996). In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decree on appeal. *Id.* Based on the foregoing, and primarily on their relative abilities to afford the costs of representation, we decline to award Nicolas appellate attorney fees. Costs are assessed equally to each party.

**AFFIRMED AS MODIFIED.**