IN THE COURT OF APPEALS OF IOWA

No. 2-1010 / 12-0636
Filed January 24, 2013

MEKENZIE LYNNE HANS,
Petitioner-Appellee,

vs.

CHRISTOPHER RYAN HAWXBY,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn Pille, Judge.

Christopher Hawxby appeals from the district court's ruling on his application to modify physical care of the parties' child. **AFFIRMED.**

Frank Steinbach III of McEnroe, Gotsdiner, Brewer & Steinbach, P.C., West Des Moines, for appellant.

Scott D. Fisher, West Des Moines, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Christopher Hawxby challenges the district court's refusal to change the physical care arrangement for his three-year-old son. Christopher sought to modify the stipulated custody decree when MeKenzie Hans announced her plan to move with their son from Polk County to Sioux Falls, South Dakota. On appeal Christopher contends the custodial parent should bear the burden to show moving to another jurisdiction is in the child's best interest.

Because our supreme court has placed the burden on the parent challenging removal to establish the decree should be modified, we cannot entertain Christopher's contention.[1] Accordingly, we affirm the district court's decree of modification.

I. Background Facts and Proceedings

Bryden was born in December 2009. His parents, Christopher and MeKenzie, lived together on and off, but never married. On January 21, 2011, the district court approved a stipulated decree establishing paternity, custody, and support. The decree provided the parents with joint legal custody of their son and awarded MeKenzie physical care, subject to visitation for Christopher.

On August 19, 2011, Christopher filed an application to modify the stipulated decree, alleging a material change in circumstances and asking for Bryden's physical care to be transferred to him. The application asserted MeKenzie "has announced she is moving out of state." The district court held a

---

[1] Christopher's attorney asked the Iowa Supreme Court to retain this appeal pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(f), but the Supreme Court transferred the case to our court.

hearing on the application on February 23, 2012. The parties stipulated at the outset that MeKenzie's move of more than one-hundred-and-fifty miles with Bryden constituted a substantial change in circumstances not contemplated in January 2011. The remaining question before the court was which parent should have physical care of the child.

Both Christopher and MeKenzie testified at the hearing. Both offered an overall generous view of the other's parenting ability, and both expressed a desire to cooperate in providing maximum contact with Bryden.[2] Christopher did question the legitimacy of MeKenzie's decision to move out of state. MeKenzie, who was twenty-one at the time of the modification hearing, testified that she moved to Sioux Falls because her mother lived there and could be of help with Bryden.

At the close of the hearing, the court found MeKenzie's justification for her move to South Dakota to be "reasonable." The court acknowledged that Bryden had more family support in central Iowa, but noted the maternal grandmother "did step forward" and provide support at a time of need and continued to do so. The court found nothing in the evidence to suggest MeKenzie was an unfit mother or was incapable of providing for the needs of the child.

On March 2, 2012, the court issued a written decree of modification, stating: "[T]he Court does not find the evidence establishes a change in primary physical care is warranted." The court revamped the visitation schedule to

---

[2] The district court found each party's testimony concerning the other's positive attributes to be "refreshing." We agree.

account for the distance between the parents' homes. Christopher appeals from the decree of modification.

II. Standard of Review

We engage in a de novo review an action to modify a custody decree. Iowa R. App. P. 6.907; *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). We give weight to the district court's factual determinations, but are not bound by them. *Id*.

III. Discussion

Generally, the party requesting modification must establish (1) a substantial change in material circumstances, which is more or less permanent, was not contemplated by the court when the decree was entered, and affects the child's welfare and (2) the requesting parent is able to provide superior care and minister more effectively to the child's needs. *In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983).

In this case Christopher requested modification of the physical care arrangement and thereby assumed the burden to establish these two factors by a preponderance of the evidence. *See id.* The parties stipulated to the substantial change in circumstances, stemming from MeKenzie's move with the child to Sioux Falls, South Dakota. Moreover, under Iowa Code section 598.21D (2011), the district court may consider a custodial parent's move of more than one-hundred-and-fifty miles to be a substantial change in circumstances. At issue is the second *Frederici* factor: whether Christopher established a superior ability to minister effectively to Bryden's needs.

Our courts have "historically not changed custody on the basis of a parent's move from the area where both parties reside absent other circumstances." *See In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). When we consider the stability of a child's situation, we place greater emphasis on the child's relationship with his or her primary caregiver than on the physical setting. *See In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000).

In his appeal Christopher does not assert he has met his burden to show he can provide his son with superior care. Instead he argues the burden is misplaced. The appellant's brief contends: "Mr. Hawxby is faced with an uphill battle not of his own creation, whereas Ms. Hans can unilaterally remove her son from all familiar surroundings and go about her business with no explanation as to how her decision is in the child's best interest." He cites to cases from Nebraska and Illinois to support his position that the burden should shift to the parent removing a child to another jurisdiction. *See In re Marriage of Eckert*, 518 N.E.2d 1041, 1044 (Ill. 1988) (noting the Illinois statute requires the party seeking removal to prove it is in the best interests of the child); *Gerber v. Gerber*, 407 N.W.2d 497, 503 (Neb. 1987) ("Before a court will permit removal of a child from the jurisdiction, generally, a custodial parent must establish that such removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial

parent's remarriage."). Christopher urges our appellate courts "to adopt the method of presentation and review as found [in] our neighboring jurisdictions of Nebraska and Illinois."

Our precedents have rejected the approach advocated by Christopher. The supreme court has declined to place the onus on custodial parents to justify a long-distance move:

> [G]eographical proximity is not an indispensable component of joint custody, and, at least when the decree is silent on the issue, the parent having physical care of the children must, as between the parties, have the final say concerning where their home will be. This authority is implicit in the right and responsibility to provide the principal home for the children. The right would mean little if the other custodian could veto its exercise. Even with joint custody, therefore, the burden is on the parent challenging removal to establish that the decree should be modified to preclude it.

Frederici, 338 N.W.2d at 159-160.

As Christopher acknowledges on appeal, section 598.21D "does not provide a mechanism whereby the non-custodial parent can take steps to prevent the very relocation that will prompt the filing of a modification action." Our court examined the one-hundred-and-fifty-mile provision in *Thielges*, and determined it did not change the burdens of proof applicable to custody modification requests. *Thielges*, 623 N.W.2d at 237.

We believe the current system of placing the burden of proof on the parent trying to modify the physical care arrangement best serves the goal of fixing custody and changing it only for the most cogent reasons. But even if we saw merit in Christopher's suggestions, it is not our prerogative to overrule previous holdings of our supreme court. *See Figley v. W.S. Indus.*, 801 N.W.2d 602, 608

(Iowa Ct. App. 2011). Given the current status of the law, the district court appropriately declined to modify the child's physical care.

AFFIRMED.