IN THE COURT OF APPEALS OF IOWA

No. 3-643 / 12-1787
Filed August 7, 2013

IN RE THE MARRIAGE OF MEGAN ASEFI AND SADEGH ASEFI

Upon the Petition of
MEGAN ASEFI, n/k/a MEGAN FAULHABER,
Petitioner-Appellee,

And Concerning
SADEGH ASEFI,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

Sadegh Asefi appeals from the district court's modification of the physical care provision of the decree dissolving his marriage to Megan Asefi. **AFFIRMED.**

Robert S. Gallagher and Peter G. Gierut of Gallagher, Millage & Gallagher, P.L.C., Bettendorf, for appellant.

Katherine Varlas Teel of McGehee, Olson, Pepping, Balk & Kincaid, Ltd., Silvis, Illinois, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Sadegh Asefi appeals from the district court's modification of the physical care provision of the decree dissolving his marriage to Megan Asefi (n/k/a Megan Faulhaber). He argues no material change in circumstances exists to warrant modification, and the court erred in finding Megan could provide superior care. We find the court correctly modified the physical care arrangement.

I. Facts and proceedings.

Megan and Sadegh married in 2008; their marriage was dissolved in August 2011. The parties had one child during the marriage, born in 2010. The stipulated dissolution decree granted the parties joint legal custody and joint physical care. Megan works full time and Sadegh attends chiropractic school. Both parties were raised in different religions, and no religion was chosen for the child. Before and after the dissolution, the parties disagreed over immunizations for the child. Sadegh had never received immunizations as a child for religious reasons, and was unwilling to agree to all of the immunizations recommended. He wanted to research each one before it was administered and had signed a waiver declining immunizations for the child. The child became overdue for immunizations, and Sadegh objected to the "catch-up" schedule of shots. Sadegh arranged for the child to receive chiropractic care every three weeks as a health maintenance issue. Megan objected to the ongoing chiropractic care. The parents discussed these issues over several months between February 2012, when the application to modify was filed, and July 2012. While their e-mails were relatively courteous and civil, they were not able to reach an agreement. Sadegh's schedule at Palmer College of Chiropractic became a

problem for the visitation schedule to which the parties had agreed as part of the joint physical care. Megan also filed an emergency application to continue child care arrangements with her mother while Sadegh was in class.

Megan filed an application to modify in February 2012. She stated the following circumstances constituted a material change of circumstances: Sadegh was not regularly exercising his visitation, his living arrangements became unstable, and Sadegh would not share information or discuss the daily care and medical treatment of the child. Megan requested physical care and a changed visitation schedule. The court granted this motion. Sadegh filed a motion for rule to show cause alleging a denial of visitation, which was dismissed by the court.

Sadegh filed a motion to dismiss Megan's application for modification, based on a lack of material change in circumstances. He stated that the parties only disagreed on a day care provider and immunization schedule. His motion to dismiss was denied. The child began receiving immunization shots a few months before trial, though Sadegh was still hesitant regarding how many shots should be given to the child at once. Trial was held on the application to modify on August 23, 2012. Both parties testified, along with Megan's mother and father, Sadegh's mentor, Sadegh's peer, and Sadegh's mother. Several exhibits were admitted, including e-mail correspondence between Sadegh and Megan regarding the child's immunizations. The court made the following findings of fact:

> One of the substantial material changes in circumstances the petitioner alleges is that [Sadegh]'s schedule with the child has been messed up since he started Palmer Chiropractic College. The Court does find that this has caused some changes to the schedule. However, this was an event that was clearly

contemplated at the time of the Decree and has not affected the situation enough to warrant a substantial change in circumstances.

Megan also alleges a substantial change in circumstances in that the parties cannot agree on the child's medical care and religious upbringing. [Sadegh] does not want the child immunized and she does. The child did not get any immunization shots until July of this year, when he was two years old. And [Sadegh] agreed to no shots until [Megan] filed the Application for Modification of Decree requesting to be the primary caretaker. Although [Sadegh] denies it was the filing of the Application that got him moving on agreeing to immunization, the Court finds that this testimony is not credible. It is clear from the record which contains numerous emails and testimony of the parties that [Sadegh] was against immunizations and only grudgingly agreed after Megan filed the Application for Modification. This is a significant and material disagreement between the parties—the medical care of the child. In addition to the immunizations, they also disagree on chiropractic care for the child. [Sadegh] thinks that he should be regularly visiting a chiropractor even though he is two years old, and he did have the child visiting a chiropractor every three or five weeks when the child was only one year old. Megan disagrees with the necessity of chiropractic care for a two year old. Megan testified the pediatrician did not recommend it, but still [Sadegh] believes it's necessary. Megan testified at the time the Decree was entered she hoped they could reach an agreement on the child's medical care; however, she says they are now in disagreement and between the two of them cannot reach an accommodation. The Court finds this to be true. It is obviously a significant disagreement regarding immunizations and chiropractic care. The Court also finds based on the child's age—two—they could have years of problems if no parent has the ability to make the final decision. Since the child began receiving his immunizations shots so late, the pediatrician recommended a catch-up schedule for the shots to catch him up with other children his age. [Sadegh] did not agree with the catch-up schedule the doctor recommended. The Court agrees with Megan that [Sadegh] wants to be in charge of the immunization schedule for the child instead of the doctor. Regardless of what anyone thinks of immunizations and the importance of them, it is obvious that the parties cannot reach an agreement and one of the parties needs to be in charge of the child's medical care. The Court also agrees with Megan that in the future, the child's religious upbringing will need to be decided by one of the parties, [Sadegh] being brought up as a Muslim and Megan being brought up as a Catholic. Although neither parent is devout, they have not reached an agreement regarding the religious upbringing of the child.

The parties disagree on the child's daycare. Right now they have a very nice arrangement for the child where Megan's mother

watches [the child] when Megan is at work and [Sadegh] is at Palmer on Monday through Thursday, and then, [Sadegh]'s mother watches the child on Friday when [Sadegh] is in classes. Both grandmothers are excellent caretakers of the child. The Court agrees with Megan that it is in the child's best interest that the child be watched by his grandmothers, if possible, until he is ready for preschool. The Court is convinced based on the evidence that it is a safe and stimulating environment. The Court agrees with Megan that it would be disruptive for the child to go to a separate daycare during the week when [Sadegh] is in classes and has day time visitation. Because, then the child would have three caretakers during the week: daycare, Megan's mother, and [Sadegh]'s mother. The Court also agrees with Megan that if [Sadegh] is in classes, it is disruptive to the child to have him picked up at seven a.m. at Megan's and then go into a daycare situation. The Court agrees with Megan that it is much better to just have the child be watched by Megan's mother until [Sadegh] is done with classes during the day.

Regarding the Rule to Show Cause filed by [Sadegh] on a day when he was not allowed to pick the child up even though under the Decree his visitation started, the Court finds that the emergency order entered by another judge in this case prevented him from picking the child up. Thus, the Court cannot find anybody willfully disobeyed a court order and finds there is no merit in the Rule to Show Cause.

Thus, the Court finds that on any weekday when [Sadegh] has the child and he will be in classes that Megan's mother will watch the child until he is done with classes, unless it is Friday when [Sadegh]'s mother can watch the child.

. . . .

The Court finds a material change in circumstance has happened since the decree and Megan should be awarded primary physical care of the child. Megan's ideas on medical care are more main-stream than [Sadegh], and thus the Court finds her preferable as a primary care giver. This means if the parties cannot agree on medical and other major decisions, Megan as primary care taker is the decider. The Court finds this will make the child's life less disruptive than if he has two parents who cannot agree.

The Court finds that the visitation schedule should be changed only that [Sadegh] not get the child on days he has classes at 7:00 a.m., but rather after classes, and that if possible the maternal grandmother should watch him those days, excepting Fridays. Megan works and [Sadegh] supports himself by student loans. No change in child support is ordered.

Sadegh appeals, arguing the district court erred in finding a material change in circumstances warranting modification, and in finding Megan offers superior care of the child.

II. Analysis.

Our review of a modification of the physical care provisions of a dissolution decree is de novo. *In re Marriage of Brown*, 778 N.W.2d 47, 51 (Iowa Ct. App. 2009). We give weight to the factual findings of the district court, especially regarding the credibility of the witnesses due to its ability to see and hear the witnesses first hand, but we are not bound by those factual findings. *Id.* The party seeking to change the physical care provisions of a dissolution decree has a heavy burden, which is greater than the burden to change visitation. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998).

> [T]he parent seeking to modify the physical care has the burden to establish that conditions since the last decree or modification was entered have materially and substantially changed and that the person seeking physical care has the burden of showing he or she will render superior care. This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons.

In re Marriage of Spears, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). Where there is an existing order for joint physical care, both parents have been found to be suitable primary care parents. *Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002). If the court determines the joint physical care agreement needs to be modified, the physical care provider should be the parent "who can administer most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives." *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998).

A. Material change in circumstances.

The district court found a material change in circumstances occurred as the parties' ability to decide important matters was lacking: after much discussion they were unable to agree on medical and religious decisions. Joint physical care was not working in the best interests of the child, and we agree this constituted a substantial change in circumstances.

The "substantial change in circumstance" upon which the district court based its decision to modify physical care pertains to the designation of one decision-making parent, which had become necessary to deciding the routine care of their child:

> The parent awarded physical care maintains the primary residence and has the right to determine the myriad of details associated with routine living, including such things as what clothes the children wear, when they go to bed, with whom they associate or date, etc.
>
> If joint physical care is not warranted, the court must choose a primary caretaker who is solely responsible for decisions concerning the child's routine care.

In re Marriage of Hansen, 733 N.W.2d 683, 690-91 (Iowa 2007). The disagreements between these parents reflect the basic communication problems they were experiencing—they disagreed about what was important to the health and wellbeing of their child. We find a substantial change in circumstances supports the modification of the physical care arrangement set forth in the stipulated decree.

B. Ability to provide superior care.

Once a material change in circumstances is established, the party seeking the change in physical care must also show she will provide superior care. *Spears*, 529 N.W.2d at 301. Sadegh takes issue with the district court's finding

that Megan's view on immunization and health is more "mainstream" and therefore equates to superior physical care. Iowa courts have historically favored a parent who provides immunizations when determining which parent should have physical care of the child. *See Lambert v*. *Everist*, 418 N.W.2d 40, 43 (Iowa 1988) (assigning physical care to child's father, noting "The fears of our parents caused by childhood diseases such as poliomyelitis are unknown to modern couples because of immunization programs. We find it significant in his favor that [the father] insisted upon immunizing [the child] even over [the mother]'s wishes"). Sadegh disagreed for months with Megan before initiating the required series of vaccinations. He still disrupts the treatment series, not because he does not believe in or has religious compunctions against inoculation, but because he doubts the physicians and their recommendations for combined shots. In the interim the child is falling behind in his ability to be properly inoculated for his eventual enrollment in school.

Both parents have been found suitable as primary care parents. *See Melciori*, 644 N.W.2d at 369. However, the child must be placed in an environment "that will foster healthy physical and emotional lives." *Walton*, 577 N.W.2d at 871. This includes being healthy and ready for enrollment in school when the time comes. The court appropriately found Megan will provide superior care.

Megan also requests attorney fees, which we do not grant. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005) (stating the award of attorney fees rests in the appellate court's discretion and the merits of the

appeal, the parties' ability to pay, and the needs of the party seeking the award). Costs on appeal are assessed to Sadegh Asefi.

AFFIRMED.