IN THE COURT OF APPEALS OF IOWA

No. 6-977 / 06-1064
Filed January 31, 2007

Upon the Petition of
KASSANDRA JANE FOURNEY,
Petitioner-Appellee,

And Concerning
ADAM TRAVIS BIRNLEY,
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Jeffrey L. Larson, Judge.

Father appeals from the district court's ruling on his application to modify the physical care and visitation provisions of a prior paternity order. **AFFIRMED AS MODIFIED; REMANDED.**

Jon J. Puk of Walentine, O'Toole, McQuillan & Gordon, Omaha, Nebraska, for appellant.

Aaron W. Rodenburg of the Law Officers of Aaron W. Rodenburg, P.C., Council Bluffs, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Adam Birnley appeals from the district court's ruling on his application to modify the physical care and visitation provisions of a prior paternity order. He asserts the district court erred in denying his request for joint physical care of his daughter, Payton, and in modifying the visitation schedule in a manner that decreased his visitation. Upon our review, we affirm the district court's rejection of Adam's request to modify physical care. We affirm the district court's modified visitation schedule with one minor exception. We modify the schedule to include some additional holiday visitation that was agreed to by Payton's mother. The matter is remanded to the district court for a determination, on the existing record, as to whether Adam is entitled to a child support credit for extraordinary visitation.

I. Background Facts and Proceedings.

Adam Birnley and Kassandra Fourney are the parents of Payton Birnley, born in September 2000. In December 2002 the district court entered an order, pursuant to a stipulation between the parties, which established Adam's paternity of Payton and addressed the issues of legal custody, physical care, visitation, and child support. The parents were awarded joint legal custody, and physical care was placed with Kassandra. Adam was awarded "liberal" visitation with Payton which included "[t]wo days per week," three weeks in the summer, and shared holidays.

The record reveals that the parties had difficulty implementing their visitation schedule. They disagreed about how some provisions of their order,

which lacked specificity, should be interpreted. In addition, their less than harmonious relationship exacerbated their disagreements.

Despite the parties' occasional disputes, Adam always received at least the minimum visitation that he was entitled to under the 2002 order. In fact, because Kassandra was both working and attending school, Adam often received an additional overnight visit during the week to accommodate Kassandra's class schedule or to allow her time to complete class projects.

In February 2006 Adam filed a petition to modify the 2002 order. He asserted a substantial change in circumstances warranted a modification of the order's physical care and visitation provisions. He contended the additional visitation he had received warranted modifying the order to provide for joint physical care or, alternatively, that he should be awarded specifically-defined extraordinary visitation in lieu of the "undefined" and "vague" visitation schedule set forth in the 2002 order.

Following a May 2006 hearing, the district court entered an order that denied Adam's request for joint physical care but modified the visitation schedule. The court determined Adam had not demonstrated a substantial change in circumstances regarding physical care, and also concluded joint physical care was not in Payton's best interests in light of the parties' inability to effectively communicate and cooperate regarding visitation and other issues. The court did, however, determine the parties' disagreements regarding the terms of their insufficiently specific visitation schedule constituted a change in circumstances that justified modifying the schedule. The court accordingly amended the schedule to award Adam visitation every other weekend, one

overnight each week from 5:00 p.m. Tuesday to 9:00 a.m. Wednesday, four weeks of summer visitation, and alternating holiday visitation.

Adam appeals from the court's decision. He asserts the 2002 paternity order should be modified to provide for joint physical care because his increased overnight visitation is a substantial and material change in circumstances, and because joint physical care would ensure Payton maximum continuing contact with both parents. He also asserts that, should physical care remain with Kassandra, Payton's best interests require the visitation schedule be modified to provide for three overnight visits per week and for additional holiday visitation.

II. Scope and Standard of Review.

We conduct a de novo review of the district court proceedings. Iowa R. App. P. 6.4; *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). Although not bound by the district court's fact findings, we give them weight, especially when assessing witness credibility. Iowa R. App. P. 6.14(6)(*g*).

III. Merits.

As the parent seeking to modify physical placement, Adam bears a heavy burden. He must prove conditions affecting Payton's welfare have so materially and substantially changed that it is in her best interests to alter her physical care. *In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). The change cannot have been contemplated by the district court when the 2002 order was entered, and must be more or less permanent in nature. *Melchiori*, 644 N.W.2d at 368. Adam must also prove that he has a superior ability to minister to Payton's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App.

1996). He faces such a heavy burden because "once custody of children has been determined, it should be disturbed only for the most cogent reasons." *Id*.

In contrast, to modify his visitation privileges, Adam need only show that there has been a change in circumstances, rather than a substantial change in circumstances, since the entry of the initial order. *Nicolou v. Clements*, 516 N.W.2d 905, 906 (Iowa Ct. App. 1994). As with physical care determinations, our governing consideration is Payton's best interests. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation is in a child's best interests because it maximizes physical and emotional contact with both parents. *See* Iowa Code § 598.41(1)(a) (2005).

After reviewing the record, we agree with the district court that Adam has not demonstrated a substantial and material change in circumstances in regard to physical care. The only substantial change asserted by Adam is the fact that he has exercised more visitation than was provided for in the 2002 order. Physical care decisions are entered with an eye to ordinary and reasonable changes, and natural occurrences which could be foreseen by the court are not sufficient to justify modification. *See In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991).

We agree with Kassandra that the allowance of some extra visitation by a physical caretaker is an ordinary and natural occurrence that was foreseeable when the 2002 order was entered. In addition, we note Adam has offered no evidence that he could provide Payton with superior care. Finally, we agree with the district court that joint physical care would not be in the best interests of this

school-aged child, especially given the parties' difficulties in communicating with one another.

We accordingly turn to the issue of visitation. We agree the parties' difficulties in implementing the 2002 visitation schedule is a change in circumstances that warrants imposition of a more precise visitation schedule. While the modified visitation schedule ordered by the district court does appear to grant Adam slightly less visitation than he received under the 2002 order, it does not drastically curtail his visitation with Payton and provides needed specificity. Moreover, Adam's request for three overnight visits each week would not be in Payton's best interests, as it would be overly disruptive to her schedule. Looking to the totality of the record, we conclude the modified schedule appropriately balances the goal of ensuring Adam maximum continuing contact with Payton and Payton's need for stability.

We note, however, that the district court did not award Adam extended visitation over Labor Day and Memorial Day weekends, even though such visitation was agreed to by Kassandra. There is no indication this additional visitation would prove disruptive to the child or would be difficult for the parties to implement, and it would further the goal of maximizing Adam's contact with Payton. We accordingly modify the visitation schedule as follows: In even numbered years, when Adam is entitled to visitation on Labor Day and Memorial Day, his visitation with Payton shall include the preceding weekend, commencing at 5:00 p.m. Friday, unless other times are agreed upon.

Seeing no reason to disagree with the remainder of the visitation schedule set by the district court, or its decision to deny Adam's request for joint physical

care, the remainder of the court's May 2006 order is affirmed. This matter is remanded to the district court for a determination, upon the existing record, as to whether the visitation schedule, as modified on appeal, amounts to extraordinary visitation and thus entitles Adam to a credit to his current child support obligation.

Kassandra's request for appellate attorney fees is denied. Costs of this appeal are assessed to Adam.

AFFIRMED AS MODIFIED; REMANDED.