IN THE COURT OF APPEALS OF IOWA

No. 9-546 / 08-1885
Filed September 2, 2009

IN RE THE MARRIAGE OF LEAH BETH DEIKER ABLER AND DAVID BENEDICT ABLER

Upon the Petition of
LEAH BETH DEIKER ABLER
n/k/a LEAH BETH BARBER,
Petitioner-Appellant,

And Concerning
DAVID BENEDICT ABLER,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

A mother appeals a district court ruling modifying a joint physical care parenting plan. **AFFIRMED.**

Patricia Shoff of Belin, Lamson, McCormick, Zumbach, Flynn, a Professional Corporation, Des Moines, for appellant.

Anjela Shutts and Diana Miller of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Leah Barber appeals a district court ruling modifying a joint physical care parenting plan.

I. Background Facts and Proceedings

David Abler and Leah Abler (n/k/a Leah Barber) divorced in 2005 pursuant to a stipulated decree. The decree authorized the parents to exercise joint physical care of their three-year-old child and set forth a parenting schedule for the immediate future. The decree also stated, "Once the minor child has reached the age of five years, the parties shall have parenting time on a 4 day/3 day alternating basis."

In 2007, Leah applied to modify the decree to grant her physical care of the child. Shortly thereafter, the parents signed a temporary mediation agreement establishing a new parenting schedule. David was to have parenting time from 5:00 p.m. Thursday to 5:00 p.m. Sunday and 5:00 p.m. Thursday to 3:00 p.m. Saturday on alternating weeks.

Following trial, the district court concluded that Leah did not prove she was entitled to physical care of the child. The court then turned to the joint physical care parenting schedule. The court addressed and rejected Leah's contention that the parenting schedule set forth in the mediation agreement remained in effect. Based on its conclusion that the schedule expired prior to trial, the court also rejected Leah's argument that David was "attempting to modify the schedule reached during mediation." The court stated that the sole question to be addressed was how to "effectuate the language in the original

decree on an appropriate parenting schedule now that [the child] has reached the age of five." On that question, the court wrote,

> It is clear from a reading of the original decree that whatever was meant by a "4 day/3 day alternating basis" once Juanita turned five, a parenting schedule approximating a 50/50 allocation of parenting time was contemplated.

Based on expert testimony at trial, the court concluded that this equal division of time could best be accomplished with the following schedule: Leah would have the child "every Monday beginning after school, until the following Wednesday after school," David would have the child "every Wednesday from after school, until the following Friday after school," and "[t]he parties shall alternate having the minor child on the weekends from Friday until the following Monday, with the respondent exercising the first parenting weekend."[1]

Both parents filed post-trial motions seeking enlargement of the court's findings and conclusions. *See* Iowa R. Civ. P. 1.904(2). After considering those motions, the court changed the schedule as follows: alternating care from Monday through Wednesday after school, Wednesday through Friday after school, and Friday through Monday after school.

Leah appealed.

II. Analysis

Leah does not contest the district court's denial of her request for physical care of the child. Her only challenge is to what she characterizes as the court's

[1] Although the court stated it was effectuating the original decree, the final schedule deviated from the four-day/three-day schedule required by that decree. Therefore, we believe it is appropriate to apply a modification standard as discussed below rather than to construe the decree based on the intent of the parties. *See In re Marriage of Goodman*, 690 N.W.2d 279, 283 (Iowa 2004) (noting that the decree should be construed according to its evident intention).

"visitation schedule." She asserts "that the evidence at trial was more than sufficient to justify continuing the parenting schedule which the parties had been following under the Mediation Agreement."

David does not appear to dispute Leah's characterization of the parenting plan as a visitation schedule nor does he dispute Leah's statement of the burden of proof for modification of visitation schedules. Instead, he contends that Leah improperly shifted that burden to him and did not satisfy her burden.

To the best of our knowledge, no published Iowa opinion equates a joint parenting plan with a visitation schedule. To the contrary, some opinions suggest that the two are different. *See In re Petition Seay*, 746 N.W.2d 833, 835 (Iowa 2008) (discussing distinction between "liberal visitation" and "joint physical care" in child support context); *In re Marriage of Hansen*, 733 N.W.2d 683, 691 (Iowa 2007) ("Visitation rights are ordinarily afforded a parent who is not the primary caretaker."). Nonetheless, there is also no published Iowa opinion holding that the two concepts cannot be equated. As the district court did not discuss this issue and David does not challenge Leah's characterization of the joint parenting plan as a visitation schedule, we will assume without deciding that the plan before us was a "visitation schedule." For the same reasons, we will assume without deciding that the burden is as the parties describe it.

That burden is as follows: "[A] much less extensive change of circumstances need be shown in visitation rights cases." *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985). All that is required is that there be a change in circumstances that relates to the child's welfare. *See id.*

This standard was met. At the time of the divorce, David was working from his home. He later starting working outside his home and continued to do so through the modification hearing. The alteration of his work day was a changed circumstance. That alteration affected the child's welfare, as David transitioned from working at home and simultaneously caring for the child to working outside the home for forty hours per week and using more day care services than he previously used. The change, therefore, justified a modification of the "visitation schedule" from the "4 day/3 day alternating" schedule identified in the decree.[2] *See id.*

As for the specifics of the modified plan, David argues that the schedule adopted by the district court was in the best interests of the child. We agree this is the ultimate consideration. *See In re Marriage of Thielges*, 623 N.W.2d 232, 235–36 (Iowa Ct. App. 2000).

The district court relied heavily on the testimony of Mary Hilliard, a clinical social worker who assisted David and Leah. The court stated:

> [T]he court accepts as appropriate the concerns of Mary Hilliard that a parenting schedule for a child as young as Juanita needs to allow for no more than four days apart from any one parent, while also utilizing neutral transitions for such times as after school rather than going from one parent almost immediately to the other. Lastly, the schedule should allow both parties to parent not only on the weekends but also during the week.

Based on this reasoning, the court ultimately adopted a plan that Hilliard recommended. On our de novo review, we find ample support for this plan and

[2] We fully concur with the district court that the relevant schedule is the one contained in the decree rather than the one contained in the mediation agreement, as the mediation agreement expired prior to trial.

conclude that it was in the child's best interests. Accordingly, we affirm the district court.

AFFIRMED.