IN THE COURT OF APPEALS OF IOWA

No. 9-823 / 09-0803
Filed December 17, 2009

IN RE THE MARRIAGE OF HANNAH F. HAYNES AND BILLY J. HAYNES

Upon the Petition of
HANNAH F. HAYNES, n/k/a
HANNAH F. HAYNES METCALF,
Petitioner-Appellant,

And Concerning
BILLY J. HAYNES,
Respondent-Appellee.

Appeal from the Iowa District Court for Van Buren County, Annette J. Scieszinski, Judge.

A mother appeals from a district court ruling modifying the physical care and visitation provisions of the parties' dissolution decree. **AFFIRMED.**

Jeffrey R. Logan of Curran Law Office, Ottumwa, for appellant.

Michael R. Brown of Brown Law Office, P.C., Fairfield, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Hannah Haynes, now known as Hannah Haynes Metcalf, appeals from a district court ruling modifying the physical care and visitation provisions of the decree dissolving her marriage to Billy Haynes. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

The parties' marriage was dissolved in August 2006. The dissolution decree incorporated the parties' stipulation that their two children, then two-year-old Tyrone and three-month-old Torance,[1] would be placed in their joint legal custody and in Hannah's physical care. The parties agreed to the following visitation schedule for Billy in order to accommodate his three-days-on, three-days-off work schedule:

> During Billy's 3 days off from work that do not cover a weekend, Billy shall have the children from 12:00 p.m. to 5:00 p.m.** When this daytime visitation schedule interferes with the children's school schedule, the visitation shall be from the time school lets out to 8:00 p.m. In addition to this visitation, Billy shall have two weekends of visitation each month which coincide with his weekends off from work. The practical effect is that Billy shall have 4 overnights with the children per month.** During the school year, the weekend overnights must occur on either Friday or Saturday night.
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> ** As of the preparation of this stipulation, there has been very little contact between Billy and child Torrance. While the above visitation schedule is in place for Tyrone, this will not be the schedule for Torrance until she has reached 18 months of age. Until Torrance has reached 18 months of age, Torrance shall go for visitation with Billy on the same occasions as Tyrone, however, she will only stay for visitation for 2 hours until two months from entry of the decree of dissolution. After two months from the date of entry of the decree has passed, Billy's visitation with Torrance shall increase to 5 hours. Once Torrance has reached 18 months of age, the visitation will then expand to the same as Tyrone's.

[1] The parents confirmed this spelling of Torance's name at trial, although it is spelled differently elsewhere in the court file and record.

Billy filed a contempt application less than three months after the dissolution decree was entered. He alleged Hannah had denied him visitation during a weekend in October 2006. Prior to the hearing on Billy's application, the parties agreed to modify the decree to provide for specific yearly schedules detailing Billy's visitation with the children. The "Consent Decree of Modification" entered in January 2007 stated: "[T]he visitation schedule for the year 2006 is attached (see Exhibit A). . . . [A]nother schedule is to be prepared by [Billy] similar to Exhibit A for the year 2007 and the parties will confer and consent to a yearly schedule."

Unfortunately, Hannah and Billy were unable to agree on the visitation schedule for 2007. Billy filed an "Application for Hearing on Visitation" in March 2007. A hearing on that application was continued several times while the parties negotiated the schedule for 2007. They finally reached an agreement in June of that year, but it was short-lived.

Hannah filed a petition to modify the visitation provisions of the dissolution decree in May 2008, alleging the current schedule was not in the children's best interests. Billy filed an answer and "counterclaim," requesting the dissolution decree be modified to place the children in his physical care. He alleged Hannah was continuously denying him visitation with the children. The petition and counterclaim came before the district court for trial in April 2009.

At the time of the trial, Hannah was employed part-time at a convenience store. She typically works every Friday, Saturday, and Sunday from 5:30 a.m. until 1:00 p.m. She also works one or two other days during the week. When Hannah has to work, she wakes the children up around 4:45 a.m. and takes them

next door to her mother's house. The children usually go back to sleep once there, although Tyrone has to be awake by 6:30 a.m. during the week to get ready for school. The school's bus driver testified that Tyrone often falls asleep on the bus. He has also had some behavior problems at school, which Hannah attributes to him being tired from the mid-week visits with Billy.

Hannah testified her "main concern is to get a more structured schedule for the kids." She explained the current visitation schedule was confusing for both the parties and the children because the days on which Billy was to have visitation constantly varied. Hannah testified she and Billy have not been able to agree on a schedule for his visitation with the children since the dissolution decree was entered. According to Hannah, "every month it seems like there's problems." She consequently proposed modifying the decree to provide for visitation every Wednesday from after school until 7:00 p.m., every other weekend from Friday after school until Sunday at 7:00 p.m., and alternating weeks during the summer, with the following proviso: "If either party has visitation with the children and they are unable to personally supervise and spend time with the children, the other parent shall have the first opportunity to supervise the children."

Hannah explained that if Billy had to work on a weekend the children were scheduled to be in his care, she would pick the children up at his house at 6:00 a.m. before he went to work and return them at 6:00 p.m. when he returned home from work. She testified that way "the children spend the most maximum time with a parent. So if, you know, if the parent's not going to be there, why do they need the kid or kids?"

Billy was engaged to be married at the time of the trial. He and his fiancée have a six-month-old daughter that lives with them in their five-bedroom house, which is located within blocks of a school and daycare. As noted, Billy works twelve-hour shifts at a factory on a three-days-on, three-days-off rotation. He testified that every time he prepared a visitation schedule Hannah objected to it, resulting in him seeing his children less. He has "constantly given up days in the hope of [Hannah] letting [him] have more and more days, but it has not worked out that way." Billy testified he could "count three [times] in the past two and a half years where she's let me have them one extra overnight. Three nights where she let me have them an hour or two extra when it benefits her work schedule."

Billy further testified that Hannah did not share information about the children's school and doctors' appointments with him despite his requests that she do so. He stated Hannah chose where Tyrone was going to attend school without discussing that decision with him. She also told him "that only her and her parents are allowed to pick up the children from the school, and if I ever showed up on the school property, I was to be escorted off." Hannah denied that allegation, though she did confirm that she has made most of the decisions for the children without consulting Billy. She also testified that she did not want Billy to drop the children off at school in the mornings because "they ride the bus and everything, and I know they're going to get to school on time and everything the way it is right now." She was "not secure in the fact of knowing for sure they'd be there" if Billy were to take them.

Following the trial, the district court entered a detailed and lengthy ruling concluding the children should be placed in Billy's physical care. The court found the "unconventional" visitation schedule set forth in the original dissolution decree and subsequent modification

> has been stymied by Hannah's rigid interpretation of Decree terms, her intransigence in facilitating the children's interactions, and the parties' deteriorating ability to work together. In addition, the joint legal custody that was agreed upon and decreed, has not been honored to afford Billy opportunity to be involved in the aspects of parenting that were contemplated, such as schooling decisions and medical matters. In sum, there has been a substantial change of circumstances that neither parent foresaw, nor did the court contemplate at the time of the divorce.

The court determined Billy could provide the children with better care than Hannah despite her greater experience as their caregiver due to his willingness to "accommodate[ ] the rotation between the parents' homes, rather than frustrate[ ] it." The court devised a liberal visitation schedule for Hannah but did not adopt the parties' stipulation regarding holiday visitation.

Hannah appeals. She claims the district court erred in modifying the dissolution decree to place the children in Billy's physical care and in failing to incorporate the parties' agreement as to holiday visitation.

II. Scope and Standards of Review.

Our review is de novo in this equity case. Iowa R. App. P. 6.907 (2009). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. 6.904(3)(*g*); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

III. Discussion.

A. Physical Care.

To change a custodial provision of a dissolution decree, the applying party is required to establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to grant the requested change. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). The change must be more or less permanent and relate to the children's welfare. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the children and to minister more effectively to the children's well-being. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). This heavy burden stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. *Id*.

The district court determined Hannah's lack of cooperation in communicating with Billy and facilitating his visitation with the children was a substantial change in circumstances necessitating a change in physical care. Under Iowa Code chapter 598.41(1)(c) (2007), the denial by one parent of the children's opportunity to have meaningful contact with the other parent is a significant factor in determining the custody or physical care arrangement. *See In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992); *In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa Ct. App. 1998). The court must consider the willingness of each party to allow the children access to the other party. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). A custodial

parent's lack of cooperation with the noncustodial parent's visitation and communication with the children may be considered a substantial change in circumstances warranting a modification of the dissolution decree. *See In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa Ct. App. 1988); *In re Marriage of Grabill*, 414 N.W.2d 852, 853 (Iowa Ct. App. 1987).

Hannah does not dispute the foregoing principles. Instead, she argues the district court "erred in placing blame for the parties' conflict solely on [her]." To some extent, the result of this case is dependent on the credibility of the witnesses. As explained earlier, although we are not bound by the fact findings of the trial court, we do give them weight especially when considering the credibility of the witnesses. *Nicolou v. Clements*, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *Will*, 489 N.W.2d at 397. We therefore defer to the court's credibility findings in this case, including its sense that the main reason for the parties' disputes about visitation was Hannah's intractability.

Like the district court, we find a prime example of this is the proposal Hannah detailed at trial for Billy's modified visitation schedule. As the court explained,

> Despite the positive dynamic in Billy's household Hannah asks the court to suppress her children's exposure to it. Any time Billy is not physically present in the home during a visitation, she wants to be accorded "biological parent time." Her goal is to eliminate time that Tryone and Torance would spend with someone who is not biologically related as a parent. As an example, Hannah's plan would allow her to show up at Billy's house before 6:00 a.m. on a Saturday morning of his weekend visitation, take the children away with her when Billy leaves for work, and then return the children to the home at 6:00 p.m. when Billy re-enters the house. Hannah fails to grasp the physical and emotional impact such a disruption of

> visitation time would have on Tyrone and Torance. The proposal illustrates a preoccupation with control, undercuts her credibility as a leader in family interactions, and shows that she is not suitable as a custodial parent.

On the other hand, the district court found Billy was

> sincere and has been persistent in his plea for more time with his children. He appreciates how impressionable they are, and sees urgency in curing the problems they have experienced in getting quality time and quantity of time with him. He is believable when he asserts his commitment to be a pro-active, and interactive parent with Hannah. In courtroom testimony and demeanor, Billy exhibited effective communication skills and an abiding respect for all members of his children's family.

We agree with those findings based upon our de novo review of the record. At several different points in his testimony, Billy stressed the need for greater cooperation and communication between himself and Hannah for the benefit of their children. For example, he testified that although the visitation schedule in the original dissolution decree needed "to be more defined, . . . both of us need to be working with each other." According to Billy, Hannah opposed every schedule he presented to her for his visitation with the children, resulting in monthly disputes between the parties that occasionally culminated in police intervention. Although Hannah faults Billy for his testimony that he did "not want her at my house," Billy explained "there's been several times where there's been altercations, and I've actually had to call—well, she's called the law and the law's came and had to escort her off of my property. It causes a scene at the household."

Hannah's rigid attitude towards the implementation of the admittedly confusing visitation schedule in the original dissolution decree and subsequent modification, which envisioned some degree of cooperation and flexibility

between the parties, is prevalent throughout her testimony. In particular, she testified that Billy thinks "he's supposed to have them every day he doesn't work. It doesn't say that specifically in the Decree, and there's also times when he thinks he's supposed to have them even when he does work." *See In re Marriage of Fortelka*, 425 N.W.2d 671, 672 (Iowa Ct. App. 1988) ("Parents who must measure visitation periods by minutes do not have the maturity and flexibility contemplated in joint custody awards."). She was unapologetic in her refusal to share information and make decisions about the children's schooling and medical needs with Billy, testifying that she believed "primary physical care gives more of that responsibility to the parent that carries the primary physical care."

As this court stated in *Fortelka*, 425 N.W.2d at 673,

> Joint custody gives both parents not only rights to the child but at least as important it gives responsibilities. The responsibilities include the obligation to allow the child significant contact with the other parent. Rights and responsibilities of legal custodians of a child include but are not limited to *equal participation* in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

(Emphasis added.) "[T]he parent then having physical care has a responsibility of communicating to the other parent the need to make the decision and making the necessary information available." *Id.* Billy indicated he would be able to carry out those responsibilities, while Hannah did not.

We must ensure that the children "are placed where a satisfactory relationship between them and both parents will most likely be accomplished." *Downing*, 432 N.W.2d at 694. The district court found, and we agree, this relationship could best be advanced if the children's physical care is placed with

Billy, who is more willing than Hannah to help his children develop a strong relationship with both parents.

We reject Hannah's arguments regarding several erroneous factual findings made by the district court as such errors are cured by our de novo review. *See Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968) (stating an equity case is not reversed based "upon such complaints as these" because we "draw such conclusions from our review as we deem proper"). We also reject her assertion that the court erred in transferring the children's physical care to Billy because she has historically been the children's primary caregiver. "Successful parenting following a dissolution implicates far more than a parent's ability to attend to the daily details of raising a child." *Kunkel*, 555 N.W.2d 250, 254 (Iowa Ct. App. 1996); *cf. In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (noting "stability and continuity of caregiving are important factors that must be considered" in the multi-factored approach to physical care decisions). The parent in whose physical care the children are placed "must also possess those parental attributes that are consistent with the obligations inherent in a joint custody arrangement. Most notable among these is the ability to set aside understandable resentments and act in the best interest of the child." *Kunkel*, 555 N.W.2d at 254.

For the foregoing reasons, we affirm the district court's decision modifying the physical care provisions of the parties' dissolution decree. We must next consider whether the court erred in failing to adopt the parties' stipulation regarding holiday visitation.

B. Visitation.

During a break in the trial, the parties reached an agreement as to holiday visitation. Their stipulation was read into the record. The district court then stated: "It will be the order of the Court then that the terms of agreement just specified into the record are approved and will be included in whatever the Court's ruling ends up being on the disputed issues." However, in its subsequent written ruling, the court declined to adopt the parties' stipulation regarding holiday visitation, noting as follows:

> The trial record reflects some agreements reached by the parties about visitation terms. The court decrees basic visitation terms that shall apply if the parties cannot agree between themselves as to terms of visitation. Any visitation terms that are not contained within the court's default list in this Decree, are denied as part of the court's adjudication—whether or not the parents indicated an agreement at trial.

Hannah claims this was in error. We do not agree.

"A stipulation settling an issue in a dissolution proceeding is a contract between the parties which becomes final when accepted and approved by the court." *In re Marriage of Gordon*, 540 N.W.2d 289, 291 (Iowa Ct. App. 1995). Until approved, however, "it is not binding on the court, but may be considered in rendering its decree." *Id.* The question in this case is whether the court's approval of the stipulation during the trial bound the court in its later written ruling. We think not.

Our supreme court recently recognized in *State v. Kramer*, 760 N.W.2d 190, 195 (Iowa 2009) that "[w]e have . . . long allowed the correction of an order before its entry on the docket." "What precedes the entry of record is the mere announcement of the judge's mental conclusion, and is not the court's action."

State v. Manley, 63 Iowa 344, 344, 19 N.W. 211, 211 (1884). In reducing its ruling to writing, the court in this case clearly changed its mind as to its earlier oral approval of the parties' stipulation. This was the court's prerogative. *See Lutz v. Iowa Swine Exports Corp.*, 300 N.W.2d 109, 111-12 (Iowa 1981) ("The reason for requiring orders to be made in writing and recorded is that the court might change its ruling before the order is signed and entered."). We therefore reject this assignment of error as well.

IV. Conclusion.

We affirm the district court's ruling granting Billy's request to modify the physical care and visitation provisions of the parties' dissolution decree.

AFFIRMED.

Vogel, P.J., concurs; Mansfield, J., dissents.

MANSFIELD, J. (dissenting)

I respectfully dissent. The district court's order uproots these children, aged five and three, from Hannah, who has always been their primary caregiver, and transfers them to Billy, who has never fulfilled that role. Modification is appropriate only when there has been a material and substantial change of circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the children. *Id.* The applicant also must carry the heavy burden of showing an ability to offer superior care. *Melchiori v. Kooi,* 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). "[O]nce custody of children has been fixed it should be disturbed only for the most cogent reasons." *In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983). I do not believe Billy met those heavy burdens here.

My colleagues and the district court appear to fault Hannah in three areas, none of which in my view individually or collectively justify the outcome in this case. First, there is the contention that Hannah has been "rigid" in her interpretation of the "admittedly confusing" visitation plan. The parties stipulated to a complicated visitation plan in 2006 in order to accommodate Billy's three-days-on, three-days-off 6 a.m. to 6 p.m. work schedule. The plan provided that Billy would have the children for several hours "[d]uring Billy's 3 days off from work that do not cover a weekend" and in addition would have "two weekends of [overnight] visitation which coincide with his weekends off." As I read Billy's testimony, the controversy stemmed from how to handle the situation when

Billy's three consecutive work days ended on a Saturday. I do not think Hannah's interpretation of the decree was so unreasonable as to support a modification of physical care.

Second, there is criticism of Hannah for proposing under her new visitation plan that she be able to have the children from 6 a.m. to 6 p.m. while Billy is working on "his" weekends. The district court commented, "Hannah fails to grasp the physical and emotional impact such a disruption of visitation time would have on Tyrone and Torance." If Hannah failed to grasp that impact, so did Billy. He testified:

> Q. And if you had to work and Hannah didn't have to work, would you prefer Hannah watch the kids? A. Yes.

In any event, I do not believe the inclusion of an unreasonable provision in a proposal to modify visitation should be grounds for transferring physical care to the other party.

Third, there is the claim that Hannah has failed to allow Billy to participate in decisions about the children's schooling and medical care. Again, I think there is less here than meets the eye. As Hannah explained, she enrolled Tyrone in the only local school district that exists. Furthermore, Billy acknowledged that Hannah informed him when she did this. Billy's testimony regarding Tyrone's schooling is revealing:

> Q. Who's his teacher? A. I have no idea. He says his teacher is Miss Hamm or Mrs. Hamm is one of his teachers and from what I understand from him.
>
> Q. Have you ever contacted the school and asked who his teacher was? A. No, I have not.
>
> Q. Have you ever contacted the school and asked for a schedule of activities? A. No, I have not . . . .

> Q. So if Hannah doesn't give you that information, you're not going to call and get it yourself? A. No. I ask Hannah about it in person.

Similarly, regarding the children's medical care, Billy testified he had no idea who their pediatrician or dentist was, even though he maintained their health insurance (and thus presumably would have seen claim information). He also admitted he had never scheduled a doctor's or dentist's appointment. In addition, he had never taken either child to a doctor's or dentist's appointment. To my mind, this record supports the conclusion that Billy preferred to rely on Hannah to handle these matters.

I am also not convinced that Billy would offer superior care. The district court cites the fact that Billy lives in a somewhat larger home, and that the local public schools are close to that home, thereby saving the bus ride that Tyrone currently has to take to get to his school. But if these were significant factors, the more affluent parent or the parent who resides in a larger town would have an advantage in child custody disputes, which I do not believe to be the case. The district court also cites its belief that a shift into Billy's care will mean that the children's upbringing "can be enriched with both parents' influence." However, given that Billy's abilities as a primary care provider are untested, and the evidence that Billy has in the past willingly delegated that role to Hannah, I would not agree that this prospect of enrichment outweighs the potential loss the children will suffer from being taken away from their lifelong primary caregiver.

I would reverse.