IN THE SUPREME COURT OF IOWA

No. 23-0826
Worth County No. DRCV012527

Upon the Petition of
KATIE VANDEWALKER, f/k/a
KATIE VENECHUK,
Petitioner-Appellant,

And Concerning
GARY A. LANDHERR,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WORTH COUNTY
THE HONORABLE BLAKE H. NORMAN

APPELLEE'S FINAL BRIEF

JUDITH O'DONOHOE - AT0005849
ELWOOD, O'DONOHOE,
BRAUN, WHITE, LLP
116 North Main Street, P.O. Box 307
Charles City, IA 50616
(641) 228-8054 Telephone
(641) 228-8057 Facsimile
charlescity@elwoodlawfirm.com
ATTORNEY FOR APPELLEE

CERTIFICATE OF FILING

I, Judith O'Donohoe, hereby certify that I filed the attached Final Brief via the electronic filing system on the 15th day of December, 2023.

Judith M. O'Donohoe

Judith O'Donohoe #AT0005849

CERTIFICATE OF SERVICE

I, Judith O'Donohoe, hereby certify that on the 15th day of December, 2023, the attached Final Brief was served on all registered parties via the electronic filing system.

Judith M. O'Donohoe

Judith O'Donohoe #AT0005849

CERTIFICATE OF COST

I, Judith O'Donohoe, certify that the costs of producing this Final Brief was $0.00.

Judith M. O'Donohoe

Judith O'Donohoe #AT0005849

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases: **Page**

State Statutes:

Rules:

STATEMENT OF THE ISSUES

1. Did the Trial Court err in finding that it was not in the best interest of M.N.L. to change school districts from St. Ansgar to Riceville?

Collett v. Vogt, 913 NW2d 274 (Table) (IA App 2018)
Gaswint v. Robinson, 838 NW2d 870 (Table) (IA App 2013)
Gould v. Alderin, 990 NW2d 314 (Table) 2022 WL 16985434
Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson & Sanger, LLP, 764 NW2d 534, 538 (IA 2009)
Hemesath v. Bricker, 780 NW2d 249 (IA 2010)
In Re Marriage of Bakk, 841 NW2d 355 (IA 2013)
In Re Marriage of Comstock, 958 NW2d 611 (Table) (IA App 2021)
In Re Marriage of Frazier, 996 NW2d 120 (Table) (IA App 2023)
In Re Marriage of Hansen, 733 NW2d 683, 690-1 (IA 2007)
In Re Marriage of Koffman, 812 NW2d 726 (Table) (IA App 2012)
In Re Marriage of Laird, 817 NW2d 32 (Table) 2012 WL 1449625
In Re Marriage of Matteson, 896 NW2d 785 (Table) 2017 WL 361999
Vogt v. Hermanson, 906 NW2d 205 (Table) (IA App 2017)
Iowa Code Section 598.1
Iowa Code Section 598.1(1)
Iowa Code Section 598.1(3)
Iowa Code Section 598.1(5)
Iowa Code Section 598.1(7)
Iowa Code Section 598.41
Iowa Code Section 598.41(1-4)
Iowa Code Section 598.41(5)

Iowa Code Section 598.41(5)(a)
Iowa Code Section 598.41(5)(b)
Iowa Rule of Appellate Procedure 6.907

ROUTING STATEMENT

This appeal involves questions of existing legal principles and the case should be transferred to the Court of Appeals.

STATEMENT OF THE CASE

The parties, who are unmarried parents, of one child, M.N.L., born in 2013, started with a Petition to Establish Custody, Physical Care, Visitation and Child Support filed 09-15-2017 by then Katie Venechuk, now Katie Vandewalker. (App.7) Gary's Answer requested joint legal custody and joint physical care. (App.11) In a Temporary Stipulation, the parties agreed that Katie's older daughter, K.L., could go along on some visits, providing some visitation for Gary every day of the week. (App.14) The final Stipulation filed 05-31-2018 provided that both parties are fit and proper to be awarded joint legal custody and Katie shall have physical care. (App.17) Gary had one midweek and every other weekend visitation, as well as a First Option of Care, anticipating that while Katie worked, he would have the First Option of Care. The Stipulation also included an extensive joint parenting plan providing for regular communication about a number of specific issues, including:

> "The parties presently contemplate the child attending the St. Ansgar School District. In the event either parent desires the child to attend a school district other than St. Ansgar and if the other party does not agree to such a change in district, the party desiring to change the school district shall obtain prior court approval."

The Stipulation also specifically indicates that joint parenting decisions that must be made include educational placement and that a counselor or mediator should be used for final resolution of any disagreements. It also provides for regular contact between the child and the parent who does not have the child by phone calls, Skype and/or Facetime. It requires flexibility in trading parenting time and indicates that mediation must be used prior to the filing of any contempt action. (App.17)

On 05-31-2019, Gary filed an Application for Citation of Contempt indicating a lack of cooperation by Katie with the First Option of Care; unwillingness to schedule makeup time for Gary's visits; unwillingness to mediate parenting disputes; and unwillingness to meet with the counselor who had been counseling M.N.L. (App.37) Katie answered with a denial and filed a Counterclaim for Contempt. (App.40) The Counterclaim indicates Gary has failed to give a First Option of Care on occasion; he has not encouraged the relationship between Katie and M.N.L. as M.N.L.'s sessions with Steve Kaduce are not for Katie's benefit; M.N.L. wrote a note to Steve Kaduce indicating she wants more time with her father; and the parties had

not mediated their disputes. (App.40) Gary answered the Counterclaim indicating he tried to mediate and Katie refused. (App.45)

Gary then filed an Application for Modification requesting shared physical care. (App.47) Katie answered, denying the Application; requesting the First of Option of Care be eliminated; limitations placed on telephone contact from Gary to M.N.L.; requesting cancellation of visitation without makeup if the weather causes school to be cancelled; and suggesting Cody Williams as a successor mediator. (App.51)

The parties entered into a Partial Stipulation in resolution of the pending applications for contempt and modification, allowing Gary to change his midweek overnight visit to accommodate M.N.L.'s dance class as Katie was not taking her to these classes in St. Ansgar. The Stipulation also provides for making up of Gary's missed visitation and at Katie's request, preventing Gary from meeting M.N.L. prior to the commencement of school on the days when she is arriving from her mother's residence, specifically indicating that Gary is allowed to eat lunch with M.N.L. or attend events at school. The Stipulation specifies that the place of exchange for visitation will be Casey's in the towns of their respective residences. The First Option of Care was modified to apply only if a parent is going to be gone overnight Monday-Thursday. The term "mediation" was deleted from the joint

parenting plan and the term "parent coordinator" was substituted. The parent coordinator was specified to be Kimberly Stamatelos. It also allows Gary to provide a suitable device for Facetime or video calls for M.N.L. Thomas Langlas was named the mediator in the requirement for mediation prior to contempt. (App.58, 64)

Trial was 11-17-2020 and the Court issued a Ruling 12-14-2020 noting approval of the Partial Stipulation and finding there was a substantial change of circumstances relating to parenting time because of the reduction by Katie of the First Option of Care. The Court increased Gary's visitation by adding Thursdays to his every-other-weekend and providing accommodation for M.N.L. to be able to attend her dance class through Gary's flexibility in changing his midweek overnight. (App.66)

On 07-22-2022, Katie filed a Petition for Modification wishing to obtain court approval to change school districts from St. Ansgar to Riceville, indicating the parties submitted the question through their parent coordinator, Kimberly Stamatelos, and no agreement was reached. At paragraph 10, Katie alleged, "A substantial change in circumstances has occurred since the original agreement because (1) Petitioner has remarried; (2) Petitioner moved from St. Ansgar School District; and (3) M.N.L.'s two sisters are now in the Riceville School." (App.78)

On 08-09-2022, Katie filed a Motion for Emergency Declaratory Judgment, mandating the change of schools for M.N.L. because she lives the majority of the time with the Petitioner, her older half-sister goes to Riceville School and her younger half-sister will start preschool in the following year. (App.82) The Motion also misstates the transportation time from Riceville to St. Ansgar School District, indicating that M.N.L. will spend sixty to ninety minutes traveling to and from school regardless of the method of travel; and indicating it is in M.N.L.'s best interest to make the change. This was resisted by Gary on 08-16-2022. (App.85) Hearing was set for 08-23-2022. Gary's attorney could not be present for that hearing and requested a postponement which was resisted by Katie 08-16-2022 and the continuance was denied. (App.87) A Request for Reconsideration was filed 08-19-2022 by Gary, and again resisted. (App.89) An Order was issued 08-23-2022 indicating that the Judge had previously misunderstood the situation and believed that the "emergency" was Gary trying to change M.N.L.'s school to St. Ansgar from Riceville. Since Katie had always attended St. Ansgar School, the Court indicated there was no emergency. (App.93)

Modification Trial was held 04-20-2023. Katie called herself and her husband, Ryan Vandewalker, as her witnesses.

Gary called himself; M.N.L.'s dance teacher, Dakota Hansen; M.N.L.'s good friend's parent, Jennifer Blunt; Carol Adams, a former CASA volunteer and St. Ansgar School Board member who had, on occasion, given advice to Gary; Jerry Reshetar, a former longtime principal/teacher and resident of St. Ansgar; and Josh Culbertson, the current principal of the school attended by M.N.L. (App. Katie 11-34, 85-99; Gary 36-84; 100-110; Ryan 112-120; Hansen 121-5; Blunt 127-134; Adams 136-147; Reshetar 148-53; Culbertson 161-190)

Katie's exhibits were:

150 3rd Grade Progress Report 1st Semester

151 Parent-Teacher Conference Skills Report showing Katie exceeding the expected benchmarks for Reading, Math and CPMR

152 I-Ready Math showing Katie approaching grade 3

153 Skills Report 03-04-23 re: English showing various scores in Lexia and a score of 78%.

154 Book Fair wish list

155 Email 02-08-23 from Katie expressing concern about 1s and 2s on M.N.L.'s report card and the teacher's reply she is not concerned because M.N.L. learning, growing daily and working hard in class.

156 Riceville School Calendar

157 Map showing commute from Riceville to St. Ansgar Elementary School at 21.5 miles or 28 minutes.

158 Katie's residence in Riceville and the location of the school.

159 Data re: St. Ansgar School District

160 Data re: Riceville School District

161 Data showing Riceville as having 211 students and a rank of 366 and St. Ansgar having 309 students and a rank of 182.

162 Six pictures of M.N.L. with her siblings at home.

Gary's exhibits were:

240 St. Ansgar School District data showing a total enrollment of 612 and a rating of 18th out of 311 districts and Riceville total enrollment of 383 students and a rank of 236 out of 311 districts.

241 M.N.L.'s report cards for 2nd and 3rd grade. The same benchmarks showing M.N.L. as above grade level benchmarks as found in Petitioner's Exhibit 151. Parent-teacher conference data from 2019. Attendance data from 2019-2020.

242 16 pictures of M.N.L. with St. Ansgar friends and activities.

243 Page from book authored by M.N.L. indicating "We are moving to a new home. To make this clear, I am not MOVING SCHOOLS!!! Just because I live in Riceville, does not mean I am moving schools. It is a long story."

244 Videos with informal transcripts.

246 Map of drive from St. Ansgar to Riceville showing 25 minutes, 20.5 miles and driving distance from the in-town address to the old Riceville address of 8 minutes or 5.8 miles, driving distance from St. Ansgar to Grafton where Katie lived at the time of the initial decree is 19 minutes and 11 miles, driving distance from St. Ansgar to Northwood where Katie also lived prior to the first decree 17 miles, 30 min. Distance from Riceville to Northwood where Katie worked 38 miles, 1 hour 4 min.

247 St. Ansgar School Calendar including Calendar of Events

248 Statement of Affairs, only pages 1-6. (App.100)

On 04-24-2023, the Court issued its Order setting forth Katie's position that M.N.L.'s best interests are served by attending Riceville School where her older half-sister attends and her three-year-old sister will attend next year. Further, Katie has some concerns about the quality of the St. Ansgar School District education and M.N.L. would benefit from less travel time going to and from school. (App.100)

Gary's position is noted as claiming that Katie is trying to marginalize his relationship, per past practices, by changing the school district. M.N.L. has always attended the St. Ansgar School and she has numerous friends and is well integrated into the community and the school. She is also doing well academically and St. Ansgar is ranked higher than Riceville. The Court did not believe there was definitive proof of M.N.L.'s desires.

The Court decided that the Court's approval is required for change under the Stipulation and as an objective arbiter given the disagreement of the parties. The Court found that M.N.L.'s best interest was to remain at St. Ansgar School because she would not have much contact with her half-siblings given their age disparity. Gary offered to provide transportation to school when Katie is unable to do so. Gary has only one child and can devote more time to M.N.L. and his employment is flexible enough that he

can attend school lunches, sporting events and community activities, as well as dance. The Court also found "no evidence was presented that Riceville had an alternative approach or that would be a better benefit for M.N.L." The Court found that M.N.L. should remain in St. Ansgar and if Katie wished, she could have M.N.L. ride the bus and Gary could provide transportation in lieu of the bus. And, if, for some reason, Gary is long-term unable to provide transportation, the matter could be reviewed again.

On 04-24-2023, Katie moved to amend and enlarge per Rule 1.904, claiming that the ruling conflicts with the Partial Stipulation of 11-23-2020, which indicates that Gary agrees not to meet M.N.L. prior to the commencement of the school day on days when she is coming from her mother's residence. (App.108) This is an argument not made at the time of hearing. Katie also claims it violates the requirement that the parties meet at Casey's in their respective hometowns. (There is no explanation why this is violated as the Court's Order could be implemented meeting at the Casey's in Riceville if Gary is taking M.N.L. to school.) The prayer is that the Court modify the Order by indicating, "If Katie wishes to have M.N.L. ride the bus, Gary shall have the right to provide transportation for M.N.L. in lieu of the bus." Gary replied 05-08-2023 indicating that Katie should decide how to send M.N.L. to school but asked that certain days be allocated for him to

provide transportation and other days for Katie to provide transportation. (App.108) On 05-16-2023, the Court entered its Order adopting the suggestion that Katie could decide that M.N.L. ride the bus twice per week. (App.110)

STATEMENT OF FACTS

Katie was born in 1985 and Gary was born in 1982. They were never married and have one child, M.N.L., born in 2013. She was age 9 at the time of the last Modification Trial 04-20-23. Katie also has an older daughter, K.L., born in 2009 and a younger child, E.V., born in 2020. (Tp11 L.14-21; 12 L.21-2)

Katie has two years of community college and Gary obtained an accounting degree from the UNI in 2005. (App.236) The parties lived together for approximately four years until May 2017 when Katie moved out to live with her parents in Northwood and later with her brother in Grafton. (App.236; Tp36 L.19-23; 37 L.5-8) Gary's residence in St. Ansgar is the only stable home M.N.L. has known throughout her lifetime.

Since separation, Gary has taken M.N.L. to dance class, St. Ansgar school activities and Katie's family church in Grafton. M.N.L. enjoys dressing up as a cheerleader for St. Ansgar teams since she was age 3. (Tp45 L.6-12; 48 L.21-5; 59 L.23) M.N.L. has well-established friendships through

participation in these activities. (Tp59 L.1-10; 60 L.6-10) M.N.L. has been attending St. Ansgar school since pre-K. (Tp13 L.3-5; 128 L.5-25; 129 L.6-12; 131 L.22-5; 132 L.1-3; 134 L.13-18)

When the parties were still together and for a short time after, Gary was close to K.L., Katie's older child. This was acknowledged in their original temporary stipulation. (App.14) Jennifer Blunt, who observed K.L. during school events, thought she was Gary's daughter also. (Tp130 L.23-5; 131 L.1-2; 133 L.23-5)

Gary has always been self-employed selling electronics and does some roofing in the summer. (App.236) Katie works 36 hours a month for her parent's catering business. (App.236; Tp93 L.15-20) This schedule is flexible and she can work less. (Tp94 L.5)

In early 2019, Katie moved to Riceville to live with her then-significant other, later husband, Ryan Vandewalker. (Tp12 L.10-15) As a Deputy Sheriff, Ryan, is required to reside in Howard County. (Tp12 L.6-17) In the fall of 2019, M.N.L. expressed concern to Gary about not being able to attend School in St. Ansgar. (Ex.244 Video 3)

M.N.L. concerned about changing her school to Riceville from St. Ansgar (talk while driving to school) 09-04-2019.

Gary: Maybe you can do a learning experiment with it. And you let me know if mom brings the markers. I'll call you on the phone tonight,

okay? Are you going to ride the bus home today? And I sent her the video of you making your first basket last night like you asked me to. So, you can ask mom about that, okay?

M.N.L.: (inaudible)

Gary: C., it's good that you want mom to see your pictures too, okay, and if there is something you do with mom with K.L. you guys can send me pictures, okay?

M.N.L.: Okay, yeah, but she probably won't.

Gary: If she says no, then that's fine, okay? You just got to ask her one time.

M.N.L.: (inaudible)

Gary: You just got to try. I know.

M.N.L.: I'm scared she won't want to.

Gary: Ok, ok, then just don't worry about it. I'll just text her like we've been doing, okay? You're going to have a great day in school today, right?

M.N.L.: I guess so.

Gary: No, I want to see a smile.

M.N.L.: I don't want to. I feel like I'm missing something.

Gary: Why do you feel like you are missing something? Everybody's

in school. All your friends are there.

M.N.L.: (inaudible) and I go to a different school.

Gary: No, you're not going to go to a new school.

M.N.L.: (inaudible)

Gary: That's silly.

M.N.L.: (inaudible) be there.

Gary: They what?

M.N.L.: (inaudible)

Gary: They put you in a new school.

M.N.L.: (inaudible) near my house.

Gary: Have you seen any videos like that recently?

M.N.L.: No.

Gary: That's okay, C. It's just a dream, okay? It's not real, okay? Remember, I love you, okay?

M.N.L.: (inaudible) a new bed.

Gary: You got a new bed?

M.N.L.: Yeah, and it was (inaudible). They're really getting ready for Halloween.

Gary: They are? I forgot, that's the next holiday in a little over a month, a month and a half.

M.N.L.: Yeah, we went to go, when we went to go, um, to the store for like stuff, they were getting like ready for Halloween.

Gary: And after that, what comes . . .what's the next holiday?

Gary: There, thanks….

M.N.L.: Giving.

Gary: Giving. It is in November and then what's after that?

M.N.L.: My birthday.

Gary: Yup, your birthday's the next week and then what's after that?

M.N.L.: The next week?

Gary: No, the next week after Thanksgiving.

M.N.L.: Oh.

Gary: The police officer is sitting over there to make sure nobody's speeding. There are kids on bikes over there.

M.N.L.: Daddy, what is that? (beeping)

Gary: It just tells me that a police officer is around.

M.N.L.: (inaudible) talking.

Gary: It sends off a signal.

M.N.L.: What's a signal?

Gary: Kind of like our Wi-Fi signal at home that goes to your phone. There is a signal that goes from the police car all around.

M.N.L.: (inaudible)

Gary: When mom comes in, she's going to come to your room and bring your markers, remember, and then you can have mom put your hair up if you want, or you can wear it down like that look.

M.N.L.: (inaudible)

Gary: Ok.

M.N.L.: What did you do on your first day of kindergarten?

Gary: Um, the same thing that you do. We did a lot of playing, and we had three recesses too.

M.N.L.: Two snacks?

Gary: No, we only got one, but we had a nap time when we had to lay down and try to go to sleep. What do you usually do? Just -

M.N.L.: Well, we just rest.

Gary: Just rest a little bit?

M.N.L.: Uh, oh, and relax. You know, I'm going to need blankets or pillows. (Arrive at school.)

Gary: Okay, well, have a good day.

K.L. attended St. Ansgar school until the 2021-22 schoolyear when Katie changed her to Riceville because she believed that K.L. was not getting adequate attention at St. Ansgar. (Tp15 L.24-5; 16 L.1-5) K.L.,

having Downs Syndrome, requires special needs. (Tp16 L.6-16) There is no extrinsic proof that K.L.'s education was not adequate in St. Ansgar or that it was better in Riceville.

Gary has consistently wanted to spend as much time as possible with M.N.L. This has been actively resisted by Katie. The First Option of Care awarded to Gary in the original stipulation failed to materialize when Katie refused to provide her work schedule.

In October 2018, Katie started taking M.N.L. in the backdoor of the St. Ansgar school so Gary could not say "hi" to her before school. Katie insisted on a provision in the Partial Stipulation preventing Gary from contacting M.N.L. in the mornings when she is coming to school from Katie's home. (App.58) Katie also discontinued Facetime or video calls between M.N.L. and Gary at this time. (App.236)

In March 2019, Katie refused to take M.N.L. to her dance classes if they occurred on Katie's days.

In October 2019, Katie refused to take M.N.L. to her Sunday School spring concert which was on her weekend.

In March, Gary asked Katie if she would allow them to use an App for video calling if he downloaded it. Katie did not respond.

In June 2020, Katie advised M.N.L. that Gary was now breaking his agreement from two years ago because he requested extra time so M.N.L. could attend dance class.

In December 2020, Gary sent an old I-phone with M.N.L. for Facetime.

In February 2021, Katie would not take M.N.L. to her dance performance because it was on her day.

In the same month, Katie tried to further restrict Gary's visitation which required the efforts of the parenting coordinator, Kimberly Stamatelos, to correct. (Ex.238)

In September 2021, M.N.L. indicated her mother is asking her to refer to Ryan as "dad". (This is contrary to the parenting agreement.)

In February 2022, Gary is still not getting his Facetime calls. A schedule is set up through the assistance of Kimberly Stamatelos.

In May 2022, M.N.L. is signed up to play softball in *both* St. Ansgar and Riceville. While Gary took M.N.L. to Riceville practices on his time, Katie did not reciprocate, causing M.N.L. anxiety. (App.236) Even when M.N.L. played in Riceville, it was missed by Katie and Ryan. (Ex.244)

Discussion in Gary's Car with M.N.L. when Katie and Ryan were a "No Show" at Riceville Softball Practice 06-07-2022

(View of softball field in Riceville.) (Sound of car door closing.)

M.N.L.: Can I call Mom now?

Gary: In just a minute, C. (His nickname for M.N.L.)

M.N.L.: I have one big question. Why nobody came?

Gary: Yep. Maybe something came up. I know you thought they were coming.

M.N.L.: She said that Ryan was coming.

Gary: Yep, I know.

M.N.L.: Why didn't you text her?

Gary: Because, C., it wasn't up to me. You said they were supposed to come. You thought they were coming.

M.N.L.: They? Mom said –

Gary: Yes. Something must have come up, C. I can't do anything about it. It's up to them to come to watch you, okay? I know.

M.N.L.: Can I have the phone?

Gary: Do you want to just wait to talk to them tomorrow about it?

M.N.L.: No. I want to talk to her about it now.

(Shows car driving away from school on way to Gary's.)

Gary: Okay. Just a minute. A short call, okay, ‘cuz, C., you didn’t do anything wrong, okay.

M.N.L.: Yeah. She lied. She said they were going to come. (Inaudible) (Ring tone.)

Katie: Hello?

M.N.L.: Hi, Mom.

Katie: How are you?

M.N.L.: Good.

Katie: Good. What’s up?

M.N.L.: Uh, where’s Ryan? Did you forget to come to my game?

Katie: Me and Ryan were going to go and we just got home. (Inaudible) And we had really just got home. (Inaudible) I’m sorry.

M.N.L.: That’s fine.

Katie: I’m sorry but we were going to go on Thursday. I didn’t know if your dad is taking you or not but I didn’t hear anything so –

M.N.L.: Oh, I was just wondering.

Katie: Yeah. Did you go?

M.N.L.: Yeah, I did.

Katie: Gotcha. I didn’t know. (Inaudible) Not being there.

M.N.L.: Hi, P., how are you?

Katie: (Inaudible) talk – can you talk?

M.N.L.: P. – Hi, (unintelligible). (Sound of dialing phone.) Ah, what the heck was that?

Katie: She's just pushing buttons.

M.N.L.: Oh.

Katie: (Inaudible).

M.N.L.: Oh, I was, like, what the heck is that?

Katie: She was just pushing buttons.

M.N.L.: I just wondered.

Katie: (Inaudible)

M.N.L.: What?

(Sound of baby talk)

M.N.L.: What the heck?

Gary: (inaudible) do C.?

M.N.L.: Let me go to the back, not baby (inaudible).

Gary: (Inaudible)

M.N.L.: I don't know what (inaudible). What was that?

Katie: (Inaudible)

M.N.L.: What did K.L. say?

Katie: K.L. said (inaudible).

M.N.L.: What? (noise)

M.N.L.: I can't (inaudible) what she just said.

Katie: That's because (inaudible) -

M.N.L.: Oh. (Inaudible)

M.N.L.: What . . . everything is just like breaking up.

Katie: (Inaudible) She got her hair done and she got her hair cut.

(Inaudible) She's excited to show you.

M.N.L.: Yes, I am very excited (in excited voice) (inaudible)

M.N.L.: Sure.

Katie: (inaudible) to her ear.

M.N.L.: Hello, is this E.? (inaudible) E., what happened? (inaudible)

M.N.L.: It happened to me too.

Katie: I set her down. That's what the problem.

M.N.L.: Oh, P, you're a big girl (inaudible) have feelings (inaudible)

E.: (baby talk back)

M.N.L.: E. (inaudible)

Katie: (inaudible) I got to get her . . . E.

M.N.L.: Yeah.

Katie: Hold on (inaudible) a bit.

M.N.L.: Bye mama, I love you.

Katie: Love you too.

M.N.L.: Ok, I love you, mama.

Katie: I love you too.

M.N.L.: Bye.

Katie: Bye.

Gary: Hey C., I got to plug it in.

M.N.L.: Oh, I want your phone.

Gary: Can I tell you how good you did? That one drill when they were just throwing the ball.

M.N.L.: (inaudible) That was funny.

Gary: That's called soft toss. I saw you hit like four in a row really far. You hit what?

M.N.L.: Do you remember when I was practicing (inaudible)

Gary: Yeah, I saw that. Did he like when you were throwing that hard at his nuts?

M.N.L.: (inaudible) I'm could have hit him, dang it. (giggles)

Gary: I was so proud of you. I was talking to Adam right there.

M.N.L.: (inaudible)

Gary: C., they were at the doctor or whatever for K.L., but if mom told you that Ryan was coming over, then Ryan should have showed up. It

wasn't your fault, ok?

M.N.L.: I don't know Ryan (inaudible) go to work or something that (inaudible) had to do something.

Gary: Right C., I'm going to show up too at every practice for you. If mom says they're going to come, then they'll come next time, ok? I can't do anything about it. You did real good. You played awesome tonight, especially after swimming after summer rec-ing. It's been a long day for you.

M.N.L.: Yeah, it has.

Gary: How's your ankle feeling now?

M.N.L.: (inaudible)

Gary: I know. We'll get some ice on the way home (inaudible) We'll be home about 10 minutes. You did so good C. I'm going to come watch you on Thursday after . . . I'll get there at 7 o'clock. I'll just miss the first 30 minutes on Thursday, okay?

M.N.L.: (inaudible)

Gary: But I'm going to come there and watch the whole time and give you a big hug when you are done. You're doing so well. Your first time doing soft toss, you hit into the outfield when you batted from the plate. You got it into the outfield, C.

M.N.L.: I know (inaudible)

Gary: I know. That was a good hit.

M.N.L.: (inaudible)

Gary: You were learning a lot since you had extra practice.

M.N.L.: But I want mom to see it.

Gary: I know C., I wish she could too. I know you want mom to come watch. The same way you, like -

M.N.L.: That's the reason I did it there so they could come watch me and so, I could have some fun.

Gary: Exactly, they can come watch you in St. Ansgar too, but maybe they can.

M.N.L.: (inaudible)

Gary: C., they've got to make time to come watch you. Just like I make time to come watch you. If something is very important to somebody, you're the most important thing to me in the whole wide world. That's why I come out and watch you. That's why we do all those dance things and gymnastics.

M.N.L.: (inaudible) You and mom were fighting (inaudible) doing things like gymnastics and dance (inaudible).

Gary: No, you were not in softball then.

M.N.L.: A lot of things like swimming lessons. I was just supposed to do one and you were like (inaudible).

Gary: That's why I've been sticking up for you all these years because I know you want to do all these fun things, right?

While still awaiting a trial date on Katie's request for M.N.L. to change schools, M.N.L. started 3rd grade in St. Ansgar. On her first day of 3rd grade, M.N.L. called her mother and talked enthusiastically about her experience. (Ex.244 Video 1)

Transcripts of Exhibit 244

First day of school (2022-23) discussion between Katie and M.N.L. by phone from Gary.

M.N.L.: Mrs. Mogk is a very nice teacher and guess what?

Katie: What?

M.N.L.: We got Starburst.

Katie: How did you get it?

M.N.L.: So, how we got the Starburst is – so, the goal was to get to know everybody's names and there was – you have to pick something like a color, so, like, red was what you want to be when you grow up (inaudible). I picked what I want to be when I grow up and guess what I said?

Katie: What?

M.N.L.: Catering with you and grandma and grandpa.

Katie: (Inaudible)

M.N.L.: And then everyone was, like, what does catering mean? What does that mean? Because they don't really know what that means. I said where you bake stuff and then you serve it to other people and then also – and Mrs. Jorgenson said if you were in our class last year, you would have done this before. So, you would say your name, like, Maddie Monkey and it would be fun and there's a new kid in our class.

Katie: A new kid?

M.N.L.: Uh-huh. There's 61 kids.

Katie: (Inaudible)

M.N.L.: Isn't that crazy how there's 61 and I was just about to say 62.

Katie: That's pretty cool.

M.N.L. And guess what?

Katie: What?

M.N.L.: I sit by K.

Katie: You do?

M.N.L.: Yeah. So, it's K., then me and there's some more people but it is Kat, me then L. which he's actually pretty nice to me, like – like, not, like, the best but he's actually, like, pretty nice.

Katie: Who's that?

M.N.L.: Um, L.? He was in my class, like, I don't know what year. I think in Mr. (Inaudible) I think, like, he was a little, like – he was naughty. I remember once when Mr. Williams said give me one minute, I have to grab something, then he said one – then he said, okay, all done. So, then he had to go outside in the hallway.

Katie: (Inaudible)

M.N.L.: He used to be, like, get in trouble, I think, but then, like, since then, he's actually kind of nice.

Katie: Sure.

M.N.L.: And guess what? I thought Ky. was in my class but she's not in my class.

Katie: Is that good or bad?

M.N.L.: Good because I really didn't want to be in her class.

Katie: (Inaudible)

M.N.L.: And then for Math, I have to sit in J.'s desk.

Katie: Oh, my gosh, what are the odds?

M.N.L.: (Inaudible) I was so upset. I would sit anywhere else but his desk.

Katie: (Inaudible), you know.

M.N.L.: And I think it's going to be like that, like, every day. And tomorrow we have to bring a rock to school 'cuz – not the teacher – but somebody else on You Tube wrote a book about rocks and I didn't want to (inaudible) steps to get a rock so I just so I just – not good because I don't want to do it.

Katie: (Inaudible)

M.N.L.: I did and everybody was talking about the new lunches on the school lunch menu and I don't have actual but Mrs. Moch said she will have an extra one tomorrow so I can bring it.

Katie: For what?

M.N.L.: The school lunch menu.

Katie: Oh, yeah.

M.N.L.: So, we have it because we usually just had burgers but I think tomorrow we have cheeseburgers.

Katie: (Inaudible)

M.N.L.: It's, like, so, you can get cheeseburgers or whatever. Like, some people, like, if they don't go to school, they're, like, why are you so excited about cheeseburgers? They don't understand we don't get cheese on our burgers.

Katie: Um-hum. (Inaudible)

M.N.L.: (Inaudible) Amazing – everybody's been talking about that. Well, not everybody but, like, some people have been talking about that.

Katie: Sure.

M.N.L.: It was crazy. It was, like, whoever – I thought Mr. Culbertson picked the lunch but I guess he doesn't.

Katie: No. Principals don't, sweetheart.

M.N.L.: Um, that's what I thought and it was so fun but today was really fun.

Katie: (Inaudible) I am glad that (inaudible).

In December 2022, Katie would not share the Christmas break with Gary as required by the stipulation, necessitating the intervention of Kimberly Stamatelos.

Also in December, information provided by Katie to M.N.L.'s physician led to a sexual abuse allegation against Gary related to when M.N.L. was in the bathroom at his house. This was returned "unfounded" but was upsetting to M.N.L. (Tp52 L.1-53 L.20)

At the beginning of 2023, Katie took M.N.L. to a counselor in Mason City rather than sending her to the school counselor from the same agency because she wanted to drive her to and from the appointments. Gary asked if

he could take M.N.L. to some of the appointments. In order for this to happen, there had to be intervention from Kimberly Stamatelos.

On 3-14-2023, Katie refused to switch time with Gary to allow him to attend a Father-Daughter Dance in St. Ansgar with M.N.L. (App.236)

Katie requested that the Court prevent M.N.L. from attending St. Ansgar 3rd Grade because she would be too unhappy not to attend in Riceville. This is contrary to M.N.L.'s report to Katie about her first day of school in St. Ansgar. (Ex.244 Video 1)

At some point during 3rd grade, M.N.L. wrote a book, the last page of which indicated she was not moving schools, "Just because I live in Riceville doesn't mean I have to move schools." (App.218) Katie's explanation that this was not M.N.L.'s opinion, just that classmates were teasing her about it, is unbelievable. (Tp19 L.1- 20 L.7)

In the summer of 2023, M.N.L. attended a summer recreation program in Stacyville when she was with Gary on Tuesday, Wednesday or Friday. (App.236)

ARGUMENT

1. Did the Trial Court err in finding that it was not in the best interest of M.N.L. to change school districts from St. Ansgar to Riceville?

A. Preservation of the Issue and Scope of Review

This Appellee agrees that the issue was preserved, the scope of review is "*de novo*" and the Appellate Court gives some weight to the District Court's factual findings and credibility determinations but is not bound by them. Iowa R. App. P. 6.907

B. Legal Framework

Educational decisions for a minor child, when parents are joint legal custodians, are governed primarily by the definitions in Section 598.1. Subsection 2 defines "joint legal custody", which applies to Katie and Gary: "means an award of legal custody of a minor child to both parents, jointly, under which both parents have legal custodial rights and responsibilities toward the child and under which neither parent has legal custodial rights superior to those of the other parent. Rights and responsibilities of joint legal custody include but are not limited to equal participation in decisions affecting the child's legal status, medical care, education, extra-curricular activities and religious instruction."

By contrast, "physical care", "means the right and responsibility to maintain a home for the minor child and provide for the routine care of the child."

Clearly, the definition of "physical care" does not include educational decisions. For further explanation of this framework, see In Re Marriage of

Hansen, 733 NW2d 683, 690-1 (IA 2007). The Court's involvement in an educational decision such as school placement is different depending on whether this is a request to change a specified school district from a prior decree or an initial determination and whether the educational determination also requires a modification of physical care. If the latter, then the burden of proof is a material and substantial change of circumstances. If the former and it is an initial determination, then the Court is the final arbiter of the question of which school should be attended by the minor child. If it is a request to change the school district, then there must be a change of circumstances that does not have to be substantial but has to be in the best interest of the minor child. The Appellant's Brief puts all of these cases in the same category. This is confusing rather than clarifying.

The statutory language pertinent to the question is contained in §598.1 and 598.41. Section 598.1(1) defines "best interests of the child" includes but is not limited to "the opportunity for maximum continuous physical and emotional contact possible with both parents. . ." For subsection 3 "joint custody" or "joint legal custody" means an award of legal custody of a minor child to both parents jointly under which both parents have legal custodial rights and responsibilities toward the child and under which neither parent has legal custodial rights superior to those of the other parent. Rights

and responsibilities of joint legal custody include but are not limited to equal participation in decisions affecting the child's legal status, medical care, education, extra-curricular activities and religious instruction.

Subsection 5 indicates "legal custody" or "custody" means an award of the rights of legal custody of a minor child to a parent under which a parent has legal custodial rights and responsibilities toward the child.

Section 598.41(1-4) specifically applies to a determination of joint custody or joint legal custody terms which are the same per the definitions. Per subsection 2, either parent may apply for the Court to grant joint custody if the parents do not agree on this concept. However, pursuant to subsection 4, if the parents do agree to joint custody, then it is awarded. In this case, the parents, from the first decree, have agreed to joint custody or joint legal custody.

Section 598.41(5) presents the possibility that the Court may award either sole physical care to one parent or joint physical care to both parents. In this case, the parties have always agreed that physical care will be awarded to Katie.

Section 598.41(5)(b) indicates, "If joint physical care is not awarded . . . and only one joint custodial parent is awarded physical care, the parent responsible for providing physical care shall support the other parent's

relationship with the child. Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child. Rights and responsibilities as joint legal custodian of the child include but are not limited to equal participation in decisions affecting the child's legal status, medical care, education, extra-curricular activities and religious instruction." Thus, if joint legal custody is awarded, despite the award of physical care to only one parent, which is the case here, the parent who does not have physical care does not lose the opportunity to participate equally in decisions affecting the child, including her legal status, medical care, education, extra-curricular activities and religious instruction.

If the Court awards joint physical care to one parent and joint legal custody to both parents, there is no specific requirement for a parenting agreement. In this case, the parties incorporated a parenting agreement in their stipulation which attempts to ensure adequate communication and resolution of disagreements, such as the one presented here.

The Court, however, in light of the lack of a legislative solution to the question of how to resolve disputes between joint legal custodians, has fashioned its own remedy to this problem. In Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson and Sanger, LLP, 764 NW2d 534 (IA 2009), the Court was asked to decide, between joint legal custodians, whether the

parents should be privy to their children's mental health records. At p.538, the Court observed that neither parent had an absolute right to their children's medical records, nor does either parent have the right to direct the children's medical care. Since there was nothing in the decree to govern the situation, the Court indicates, "The Court must step in as an objective arbiter and decide the dispute by considering what is in the best interest of the child." The Court proceeded to do that. Thus, if an issue, which is not governed by a decree, arises in an area which would be considered the responsibility of joint legal custodians, is disputed, the Supreme Court must decide the matter looking at "the best interest of the child."

In Hemesath v. Bricker, 780 NW2d 249 (IA 2010), joint legal custodians could not agree on the school which their child should attend. There was nothing in the decree to designate a school, however, the child was attending Iowa City schools at the time of the original decree. Since that time, both parents moved and neither of them lived in the Iowa City School District, thus, the Court, as the arbiter, had to make a decision as to where the child should go to school: Iowa City, where she was currently attending; Cedar Rapids, where her mother had moved; or North Liberty, where her father had moved. The Court, applying the "best interest test" based primarily on the amount of time the child would spend commuting to and

from school with either parent, found that the several-minute commute from the mother's house to the school and the 20-25-minute commute from the father's house to the school in Cedar Rapids would be in the best interest of the child. The Court found that the Cedar Rapids and North Liberty School Districts, academically, were essentially equivalent and it was impractical to keep the child in a school district where no parent resided.

In In Re Marriage of Laird, 817 NW2d 32 (Table) 2012 WL 1449625 (IA App), a similar question was presented. There was no school district designated in the stipulation, however, at the time of the initial divorce, the child was attending the Gladbrook-Reinbeck School District. Her mother, who was residing there, subsequently moved to Nashua-Plainfield. The Court selected Nashua-Plainfield, where the mother lived, as in the best interest of the minor child rather than Gladbrook-Reinbeck, finding that the roundtrip driving time from Waterloo, where her father lived, to Plainfield would be an hour and 15 minutes and to Nashua, one hour 30 minutes. The mother's roundtrip driving time to Nashua would be 30 minutes and 45 minutes to Plainfield. The Court found it significant that having the child in the Nashua-Plainfield School District kept the traveling times as similar as possible to the previous traveling times. In making this decision, the Court noted, "Thus, this is a case where joint custodians are unable to reach a

mutual resolution to an issue that they have equal participation in making . . . decisions affecting the child's education . . ." p.2

In In Re Marriage of Bakk, 841 NW2d 355 (IA 2013), the decree did not specify anything about attendance of the minor child at a preschool daycare program. There was no specific dispute about what daycare educational program should serve the child between the joint legal custodians, however, the mother, who was an educator, wanted to remove the child from the program periodically during the summer as she had time to devote to the child's education herself. The Court found that this was an educational decision that had to be decided under Harder *Id* by the Court. Looking at the child's best interest, it would be served by allowing the mother to take the child out of the educational program during the summer.

In Gould v. Alderin, 990 NW2d 314 (Table) 2022 WL 16985434 (IA App), the parents were joint legal custodians under a decree issued in March 2020. The child's mother moved from the Davenport area into Illinois and wanted the child to attend school where she lived rather than in the Davenport area. Her primary reason for this was because she had other children who were going to school in Illinois. The District Court held that the child should remain in the Davenport School District as the two school districts were of equal quality and the main reason to move the child was

logistics as argued by the mother. The father offered to do transportation as needed from the mother's home to the school district due to flexibility in his work schedule. The Court found, " . . . Wendy's argument pertains to a schedule that will work best for her and not how long E.G. will spend traveling." p.2 The District Court cited an advantage in continuity and stability for the child to attend the same school. This decision was affirmed by the Iowa Court of Appeals.

Finally, in In Re Marriage of Frazier, 996 NW2d 120 (IA App 2023) (Table), an issue was presented, relative to a healthcare decision, as to whether the children should receive vaccinations as there was a dispute between the joint legal custodians. This issue was not specifically covered by the Decree of Dissolution. The Court of Appeals remarked, "Our Supreme Court recognized the judiciaries' tie-breaking authority in Harder v. Anderson, 764 NW2d 534, 538 (IA 2009)." In this case, the Court specifically differentiated between an initial tie-breaking decision on a matter within the province of joint legal custodians and a modification of a decree designating a specific course of action, indicating that if it was a modification, then there needed to be a change of circumstances. If not, then there did not need to be a change of circumstance but just a consideration of "the best interest of the child." It also indicated, "The Court's tie-breaking

authority is necessary to implement the 'equal participation' mandate set forth in Iowa Code §598.1(3). Thus, it appears plain that if the Court is looking at determination of a decision which falls within the province of joint legal custodians and the decree is silent, the only test which needs to be applied is "the best interests of the child."

However, there is another line of cases that governs the situation where the Court is asked not to be the initial arbiter but to make a change in a joint legal custody decision directed by the initial Decree of Dissolution.

In In Re Marriage of Koffman, 812 NW2d 726 (IA App 2012) (Table), the parents, at the time of dissolution, stipulated that their child would attend the Moravia School District. This was the district midway between the parent's homes. At the time, the father lived in Albia and the mother lived in Blakesburg, so they were each about 12 miles away. The mother moved so the parties, at this point, lived farther apart and the minor child was spending considerably more time in the car. The parties agreed that Moravia was no longer the appropriate school for their son to attend. The father requested that the child attend Oskaloosa School District as a compromise between the two residences. Mother was seeking to change from shared physical care to sole physical care. The Court of Appeals determined that the change in location was not sufficient to modify physical

care and that the decree contemplated the child traveling a distance to school by designating a school district between the residences of the parties; therefore, the mother's move was a change in circumstance but not a substantial change in circumstance and, "The parents continue to live in close enough proximity to each other that there is no showing to meet a substantial change in circumstance."

The Court further remarked, "The decree recognized, and it was in the contemplation of the Court and the parties, that the child would attend school and if the parties were in different communities, arrangements for transportation to school by one or both parents would need to be made. An argument could be made that a child should not spend considerable time with a parent in a car and a counterargument can be made that a parent who transports a child to school has the benefit of the child's undivided attention and the experience can increase the parent's and the child's bond." p.3 Accordingly, the child was determined by the Court to attend school in Oskaloosa and nothing else was changed.

In Vogt v. Hermanson, 906 NW2d 205 (IA App 2017) (Table), at the time the Decree of Dissolution was entered, the parties designated that the child would attend the Cedar Rapids School District unless otherwise agreed. There was no attempt by Petitioner Vogt to modify the custodial

arrangement, however, he sought an Order to change the school district from Cedar Rapids to Center Point. The Court quoted the language of §598.1(5) regarding joint legal custodians, determining that the parents, as joint legal custodians, were to make an educational decision about the school where the child was to attend. The parents had enrolled the child in Center Point for preschool and Vogt had urged this as a material change in circumstances, triggering modification of the explicit terms of the decree regarding school attendance. The Court found that this did not constitute a material change of circumstance. There was also an attempt by Vogt to claim that the Center Point-Urbana School District was better than the Cedar Rapids Community School District. The Court found that since the Cedar Rapids Community School District had been designated at the time of the initial decree, the parents had already determined that it was the best alternative for the education of their child and no circumstance was presented to the Court to show that the education provided in the district had changed since the original decree was entered, finding that Vogt failed to prove a material change in circumstance to merit changing the school of attendance by the child. The Court also remarked that, "removing the child from Cedar Rapids District was not shown to be in the child's best interest because the child was already enrolled in Kindergarten in the Cedar Rapids Community

School District pursuant to the terms of the original decree and the child was settled in to the district, had made friends and was doing well in school." *Id*

In Collett v. Vogt, 913 NW2d, 274 (IA App 2018) (Table), among the issues presented to the Court was the modification of the school selection provision of the original decree. Both parents initially lived in Onawa and designated that school district as the appropriate one in their initial decree. The mother planned to move 25 miles away. The initial decree indicated that the child should attend in Onawa unless the parties agreed otherwise. The mother's request to modify the school district was denied. The Court found, "There has been no material change in circumstances not contemplated by the Court at the time of its original custodial decree." *Id* p.3

The Court of Appeals specifically indicated that to prevail on the change of school selection, the mother had to prove: (1) a material change of circumstances since the filing of the decree; and (2) that the change is in the child's best interest. *Id* p.3 The request to change the school district was denied.

In summary, since the question presented to the Court was one of modification of an existing provision designating the St. Ansgar School District as the place of attendance of M.N.L., it was the burden for Katie to

show: (1) a material change of circumstances; and (2) that it was in the best intertest of the child to change schools from St. Ansgar to Riceville. [1]

Vandewalker argues that In Re Marriage of Matteson, 896 NW2d 785 (IA App 2017) 2017 WL 361999, holds that the physical care parent has the right to designate the school where a child will attend, shutting the other joint legal custodian out of the educational decision entirely. This case was not argued to the Trial Court and was not cited by the Trial Court or adopted by it. This argument is likely waived by the failure to present it to the Trial Court. However, the case is an outlier which expressly violates the provisions of §598.1 and 598.41 regarding the roles of joint legal custodians versus a sole physical care parent. It is clear that the school determination is not one of the decisions allocated by the physical care provisions to a physical care parent. Pursuant to §598.1(7), "Physical care' means the right and responsibilities to maintain a home for the minor child and provide for the routine care of the child." The responsibilities of a physical care parent are further explained in §598.41(5)(a) which states that a physical care parent, if joint, must submit a plan which addresses: (1) how decisions

[1] The Court and Appellant briefly touch on the possibility that the designation of a school requiring a Court to decide if it should be changed when the parents do not agree is ineffective, citing In Re Marriage of Thielges, 623 NW2d 232 (IA 2000). This case is not on point as it involves a provision insisting that any move out of the school district would constitute a substantial change of circumstance regarding modification of custody of the minor children. The provision in this case does not do that, and in fact, tracks with case law that if there is a disagreement about relocation of school where the child attends, that should be determined by the Court.

affecting the child are made; (2) how a home will be provided for the child; (3) how the child's time will be divided between the parents; (4) how each parent will facilitate the child's time with the other parent; (5) arrangements for the payment of child support or the child's expenses; and (6) how the parents will resolve major changes or disagreements affecting the child. Subsection "b" specifically indicates if joint physical care is *not* awarded, "physical care awarded to one parent does not affect the other parent's rights and responsibilities as joint legal custodian of the child. Rights and responsibilities as joint legal custodian of the child include but are not limited to equal participation in decisions affecting the child's legal status, medical care, education, extra-curricular activities and religious instruction." There is no requirement in the joint physical care parenting plan to designate a school. Further, courts both before and after this decision have specifically stated that a physical care parent cannot simply designate the school where a child attends as this is an educational decision that needs to be made by the joint legal custodians or submitted to the Court.

In Gaswint v. Robinson, 838 NW2d 870 (IA App 2013) (Table), the Court awarded the father, a joint legal custodian, sole physical care of the child, however, designated the Sioux City Community School District as the place of school attendance. On appeal, the father indicated that he had

advocated for Akron-Westfield as the best choice for a school district than the Sioux City Community School District. The Court, on appeal, indicated that as joint legal custodians, they were both entitled to make a decision about the child's education, and therefore, the Court, as the final arbiter, would designate a school district in light of their disagreement. Thus, the physical care parent was found not to have control over the school where the child was to attend.

In In Re Marriage of Comstock, 958 NW2d 611 (IA App 2021) (Table), parents, who were joint legal custodians, disagreed about the place of school attendance for their three minor children. After hearing the case, the District Court found that the mother, who was the physical care parent, had the power to designate the school of attendance. On appeal, the case was reversed and remanded and the Court cited §598.41(5)(b)(2020) regarding equal participation in educational decisions and Harder *Id* to support its decision that the case had to be remanded for a determination as to what school district would be appropriate using the "best interest test."

In summary, this case is appropriately reviewed as a request for modification of the school district. Therefore, there must be: (1) a change of circumstances; and (2) determination of whether it is in the best interest of M.N.L. to change her school district.

Katie's primary change of circumstance, since the original decree was entered in 2018, is that at some point in time, M.N.L.'s younger half-sister, E.V., currently age 2, will be attending the Riceville Community School District, along with her older half-sister, K.L., who is currently age 13 and in Middle School.

The Trial Court observed that these children will all be in different school areas: the youngest in preschool, M.N.L. in elementary school and K.L. in Middle School. There is no showing that they would be in the same classroom or have substantial contact with each other while in school. M.N.L. is four years younger than K.L. and seven years older than E.V. Apparently, the elementary, junior high and high school are all in one building in Riceville but Katie acknowledged that the only interaction the girls might have is possibly passing each other in a hallway. (Tp94 L.21-5) Katie also acknowledged that E.V., who would be attending preschool in the 2024-5 schoolyear, would only be enrolled for two hours either in the morning or afternoon. It is too early to tell what her schedule will be. (Tp90 L.13-p.91 L.6)

Katie acknowledged that M.N.L. has always gone to the St. Ansgar Community School District. (Tp98 L.20-5) Katie indicated she just changed K.L. from the St. Ansgar school to Riceville in the 2021-22 schoolyear at

age 11. (Tp15 L.1-4) The move was made because it was Katie's belief that Riceville would better accommodate K.L.'s needs as a special needs student. (Tp15 L.24-p.16 L.16) Aside from failing to explain any real benefit to the girls for all of them going to the same school but be in different areas, Katie ignores the fact that the girls' bonding opportunity really occurs at home. There is no proposal to change the allocation of parenting time for M.N.L. She is with her father five out of 14 days and her mother the remaining 9. (Tp74 L.5-13) Also indicative of the type of bonding between the girls, the photographs offered by Katie as Exhibit 162 taken at home and showing the three girls interacting. Thus, the significance of the girls attending or not attending the same school district together is minimal and certainly not material.

Katie then argues that she is now experiencing logistic problems trying to get M.N.L. to St. Ansgar school and K.L. and eventually E.V. to Riceville school.

Riceville school starts at 8:15 a.m. and if M.N.L. is going to ride the bus, she should be at her bus stop at about 6:45 a.m. (Tp89 L.16-21) Further, since Katie has moved into the city limits of Riceville, about five miles farther, it takes 5-10 minutes for her to get M.N.L. to the bus stop. (Tp88 L.3-4) However, she acknowledged that the transportation issues were not

materially different than they were the previous schoolyear. K.L. was picked up by a bus and Katie could get M.N.L. to school as it "just happened to work out." (Tp87 L.9-20)

Since Katie's move into Riceville, she has been able to get M.N.L. to St. Ansgar school by driving her every day. (Tp116 L.17-21; 119 L.1-5) In fact, after complaining that M.N.L. spends about an hour on the bus, the Trial Court ordered Gary, who was willing to provide transportation, to do so any time that M.N.L. was to ride the bus to St. Ansgar rather than going by car with a travel time of only 25 minutes. (App.165, 219; App.100; Tp20 L.22-p.21 L.1)

Katie obviously did not want Gary to provide any transportation for M.N.L. from Riceville to St. Ansgar. When she was asked about it, she indicated, "That wouldn't be my first choice." Katie indicated she could not answer why Gary should not pick up M.N.L. to take her to school in St. Ansgar to eliminate Katie's logistic problems. (Tp89 L.22-p.90 L.2, 7-12)

Katie's husband, Ryan, indicated he was aware that Gary was willing to provide transportation for M.N.L. but has not been asked to do so. (Tp117 L.2-4)

Switching positions on the "problem" presented by the bus ride, Katie filed a post-trial motion requesting permission to put M.N.L. on the bus to

ride from Riceville to St. Ansgar up to two days per week instead of having Gary drive her under these circumstances. The Court granted that motion. (App.110) Thus, given the inclination of the Vandewalkers to drive M.N.L. to and from Riceville to St. Ansgar and the option that Gary would always be available to do so, there is no significant transportation problem. M.N.L. has a 25-minute car ride which when compared to the analyses done by the courts in Koffman *Id*, Vogt *Id* and Collett *Id*, would not be considered significant. (Tp20 L.13-17) Further, this transportation issue has existed since late 2018, early 2019 when Katie moved to Riceville and was also present before that time when Katie was residing either in Grafton or Northwood. Thus, it does not represent a material change.

The only difference in schedules mentioned by Katie is that although both schools have a teacher workday one day a month on Wednesday, these workdays fall on different Wednesdays in each month. (Tp25 L.17- p.26 L.9; App.164, 228) There is no explanation of why this different workday would be a problem as when there is a workday, school is not in session for M.N.L. and Gary has M.N.L. through 5pm. Further, Katie did not indicate that there was a conflict with her work schedule if she only works 36 hours per month and indicates a great deal of flexibility because she works for her parents. (Tp93 L.15-20; 94, L.5)

Katie argues that the quality of education at the Riceville school is better than St. Ansgar. There was no information specifically presented by any witness about the quality of education in the Riceville school, aside from Katie's unsubstantiated claim that K.L. was better off in the special education program in Riceville. There is no information about the quality of education for 4th graders in Riceville other than district-to-district comparisons, utilizing state benchmarks and other criteria. This information was presented in Ex.159 (App.167), 160 (App.169) and Ex.240 (App.178). There is no dispute that St. Ansgar School District is ranked considerably higher at 182 than Riceville at 366. (Tp27 L.15-24; 28 L.3-13)

Katie complains M.N.L. is not doing well in the 3rd grade, ignoring the fact that she is achieving beyond the state benchmarks for her grade level in all categories. (App.241; Tp29 L.6-p.30 L.1, 22-p.31 L.3, 11-p.32 L.8) Instead, Katie focuses on what she perceives as spelling and punctuation errors in notes written by M.N.L. and scoring on two new programs used by St. Ansgar: Lexia and I-Ready. According to the St. Ansgar elementary school principal, Josh Culbertson, these are new programs and experimental and do not detract from the fact that Katie is doing well given her scores related to the state benchmarks. (Tp171 L.3-5, 11-20; 172 L.7-11, 17: 25 L.1-16; 177 L.20-4; 178 L.5-13; 179 L.6-20) Contrary to Katie's testimony,

he does not recall speaking to Katie about any concerns she had regarding M.N.L.'s progress. (Tp180 L.14-23) He also indicated that he changed employers from the town where he grew up to St. Ansgar because of the quality of education provided in St. Ansgar. (Tp162 L.2-7; 164 L.16-165 L.2)

Katie complained that there were too many students for the teachers to provide individual instruction as the class size to M.N.L. in 3rd Grade. In Riceville, there were 23-25 students and 60 students in St. Ansgar; however, there were three teachers for the 3rd grade so there would only be 20 students per class in St. Ansgar. (Tp32 L.12-33 L.13; 169 L.3-20)

There was also testimony from Jerry Reshetar who had taught and been a middle school principal in St. Ansgar for 20 years then moved to become superintendent of schools at a district in Minnesota and returned in 2009 to St. Ansgar. He indicates that St. Ansgar is an excellent school district and there is a strong connection between the school and community and has been for decades. He has three children that went to the St. Ansgar School District. He still knows some of the teachers and sees them often. In his opinion, the school has been strong for a long time. (Tp148 L.15-25; 149 L.5-150 L.23; 151 L.16-20.

There was testimony from Carol Adams who does Human Resources for the State of Iowa. She had been a St. Ansgar School Board member for six years and also was President of the Parent School Support Group. She moved out of the area a while ago but her sons attended St. Ansgar School and went on for further education. She also observed that the community is very supportive of the school. (Tp136 L.23-137 L.14; 138 L.1-18; 141 L.11-142 L.7; 142 L.19-25)

In conclusion, there was no showing that M.N.L. would have better educational opportunity in Riceville than St. Ansgar. Further, there was no showing of a material change of circumstance by Katie which would open up the question of M.N.L.'s best interest.

Katie's arguments for it being in M.N.L.'s best interest to change school districts is similar to her arguments related to change of circumstance with two additions: (1) that such a change would not affect Gary's relationship with M.N.L.; and (2) that disrupting M.N.L.'s relationships with her friends, school and activities could easily be replaced by similar relationships in Riceville.

As to her first argument, changing schools would clearly impact the relationship between Gary and M.N.L. as Gary attended the school district and this is something that they have in common. (Ex.244; Tp46 L.5-24; 48

L.21-49 L.5; 77 L.3-8) Gary talks to M.N.L.'s teachers once or twice per month about her progress and eats lunch with her at school on days when he does not have visitation with her. (Tp42 L.9-11) Gary and M.N.L. also attend as many school events as they can together. (Tp46 L.5-24) Gary also takes M.N.L. to activities which she has enjoyed over most of her childhood which involves her contacts in and around St. Ansgar. Katie indicates she will continue to support these activities even if M.N.L. is in Riceville; however, the record indicates the opposite. Katie would not take M.N.L. to dance class in St. Ansgar which gave rise to the last modification which allowed Gary to take M.N.L. to classes on Tuesday and every other Thursday. Although the class meets every Thursday and Katie does not take M.N.L. so she misses every other Thursday. (App.66; Tp74 L.25-75 L.5; 75 L.9-23)

Katie has refused to communicate over changing times to allow M.N.L.'s attendance at dance and softball in St. Ansgar. (Tp49 L.12-23; 123 L.18-22; 124 L.4-7) Further, she refused to allow a change of Gary's time so that he and M.N.L. could attend a Father-Daughter Dance in St. Ansgar. (App.236) She also refused to take M.N.L. to her Sunday School Christmas Program in Grafton, the church where M.N.L. started attending with Katie

and her family when she was 3. (Tp59 L.11-60 L.5) Katie also refused to take M.N.L. to her dance performance. (Tp58 L.12-16)

In summary, there is no indication that Katie would support taking M.N.L. to her activities in St. Ansgar since she has been reluctant to do so in the past and this unwillingness will negatively impact M.N.L.'s ability to see and be supported by her father. Most likely some of the inability to attend M.N.L.'s events relate to the fact that Katie is juggling the needs of three children; whereas, Gary just has one. (Tp75 L.13-23) However, the net effect is Gary is better able to support M.N.L. in her activities and has shown a willingness to do so. This is clearly in M.N.L.'s best interest. An example is that he has taken M.N.L. to Riceville softball events and although Katie lives there, she and her husband, Ryan, have had difficulty getting there, to the disappointment of M.N.L. (Ex.244)

Further, Katie underestimates the strength of relationships which M.N.L. has in St. Ansgar and Grafton and assumes, without evidentiary support, that the same type of relationships will be formed in Riceville. A big difference is that even though M.N.L. has lived with her mother in Riceville since early 2019, she has not formed any significant relationships. Her life seems to be centered mostly around the immediate family which is fine. It does not contribute to fostering other relationships. However,

according to the record, M.N.L. has just recently formed some relationships after moving into Riceville with the neighbor who has two elementary-aged children and two junior high-aged children. (Tp34 L.12-20; 114 L.14-22; 77 L.9-15)

On the other hand, in St. Ansgar up to this point, M.N.L. has developed strong relationships with friends. She has friends in dance class. (Tp58 L.25-59 L.10) She has good friends in Sunday School. (Tp59 L.15-23; 60 L.6-10) Katie will not allow M.N.L. to contact her St. Ansgar friends when she is at her house; whereas, Gary allows her to contact them on Messenger Kids, as well as in person. (Tp51 L.10-25) It is also obvious that M.N.L. is attached to her teacher, Mrs. Mogk, and her classmates in St. Ansgar. (Ex.244; Tp127 L.21- 120 L.15)

In summary, as the Trial Court concluded, it is not in M.N.L.'s best interest to change school districts because she is happy where she is; she has a lot of friendships through her activities, her church and her school; and she is doing well academically. Gary is the parent better able to support her in her extra-curricular activities and education because she is his only child and she has not indicated a definitive desire to attend Riceville school. There is no evidence that M.N.L. complains about the bus ride when she rides the bus or the car ride to St. Ansgar. (Tp38 L.3-6; 42 L.15; 43 L.6-13; 58 L.2-8)

CONCLUSION

In conclusion, as indicated by the District Court, Katie has not sustained her burden of proof that there has been a material change in circumstances since the original decree designating St. Ansgar as the school for M.N.L.'s attendance and if she has, she has not shown that it is in M.N.L.'s best interest to change school districts.

REQUEST FOR ORAL ARGUMENT

The Appellee requests that he be allowed oral argument in this appeal.

Certificate of Compliance

This Appellee's Final Brief complies with the type-volume limitation of I.R.App.P. 6.903(1)(g)(1).

This Appellee's Final Brief contains 11,602 number of words, excluding the parts exempted by I.R.App.P. 6.903(1)(g)(1).

This Appellee's Final Brief complies with the typeface requirements of Iowa. R. App. P. 6.903(1)(e) and the type-style requirements of I.R.App.P. 6.903(1)(f) because.

This Appellee's Final Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman 14 point.

Judith M. O'Donohoe

December 15, 2023

Judith M. O'Donohoe