IN THE SUPREME COURT OF IOWA

KATIE VANDEWALKER A/K/A KATIE VENECHUK,	)	
Applicant/Appellant,	)	S.C. NO. 23-0826
vs.	)	WORTH CO. CASE NO. DRCV012527
GARY A. LANDHERR,	)	
Resister/Appellee.	)	

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS' RULING, FILED MAY 22, 2024.

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Questions Presented

1. Did the court of appeals err by wrongly extending *In re Marriage of Frazier* by requiring that all modifications of existing custody orders that already dealt with custodial issues must start as a petition to end joint legal custody and award sole legal custody?

2. Did the court of appeals err by affirming the trial court's refusal to modify the terms of the parties' existing custody order which dictated where their minor child must attend school?

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Statement Supporting Further Review

This case is about a modification of the provisions of an existing custody order that dictated where the parties' minor child must attend school. After a trial, the district court refused to modify that provision. A three-judge panel of the court of appeals reviewed the case. Applying the Iowa Supreme Court's recent opinion in *In re Marriage of Frazier*, 1 N.W.3d 775 (Iowa 2024), the two-judge majority affirmed the district court. (Ct. App. Ruling at 4-5.) In dissent, Judge Langholz concluded that the majority wrongly extends the *Frazier* holding, and argues that the district court should be reversed so the school provision is modified. (*Id.* at 6 (Langholz, J., dissenting).)

This Court should grant further review for two reasons. First, the majority opinion of the court of appeals erred in its improper extension of *In re Marriage of Frazier*, 1 N.W.3d 775, 779-81 (Iowa 2024). The majority wrongly concluded that Petitioner/Appellant, Katie Vandewalker, needed to request not only a modification of the school provision of existing custody order, but also the joint legal

custodial status she had with Respondent/Appellee, Gary Landherr. (Ct. App. Ruling at 4.) Specifically, the majority concluded:

> Because Katie filed a modification action, she met that part of *Frazier's* requirement for invoking the court's authority to address the parties' dispute. However, *Frazier* also dictates that modifying the decree to resolve a dispute over one of the five legal-custody issues requires the party seeking modification to prove not only a material and substantial change of circumstances, but that the filing party should receive sole legal custody. *Id.* at 781-82. The filing party's failure to seek modification to receive sole legal custody "doom[s] any petition at the outset." *Id.* at 782. Here, Katie never sought modification to receive sole legal custody — which she would need to make the school-enrollment decision unilaterally — so her petition is similarly doomed.

(Ct. App. Ruling at 4.) That ruling is in error; therefore, this Court should grant further review because the court of appeals' majority misapplied *Frazier*. *See* Iowa R. App. P. 6. 1103(1)(b)(1) ("The court of appeals has entered a decision in conflict with a decision of the supreme court or the court of appeals on an important matter.").

Second, if *Frazier* is to be expanded to require quarreling parties to petition to modify legal custody whenever they disagree on an existing provision of their custody order, then "the supreme

court [should] extend *Frazier* and make this even bigger change to the statutory and equitable authority of Iowa's courts rather than [the court of appeals] making that leap[,]" as Judge Langholz stated. (Ct. App. Ruling at 6 (Langholz, J., dissenting)); *see* R. 6.1103(1)(b)(2) (providing that further review is justified when the "court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court"); *see also* R. 6.1103(1)(b)(3) (justifying further review when the "court of appeals has decided a case where there is an important question of changing legal principles").)

The key difference in *Frazier* from this case is its procedural posture. In *Frazier*, the supreme court held that the party, a joint legal custodian, who applied for a court ruling on the parties' impasse – a medical decision – failed to file a petition to modify, so the district court lacked authority to consider the applicant's request to be the tiebreaker. *Frazier*, 1 N.W.3d at 788. Here, Katie accomplished that. She filed a petition to modify the key provision of the existing custody order alleging a substantial change in

circumstances existed justifying a modification, and that modification – to permit the child to attend school in a different place than the one specified in the existing order – was in the child's best interests. She served Gary with an Original Notice and the petition, discovery ensued, and a full evidentiary trial occurred. As the court of appeals' majority correctly concluded, Katie properly invoked the "court's authority to address the parties' dispute." (*See* Ct. App. Ruling at 4.) However, "doom[ing]" her petition and appeal because she did not use the magic words of seeking a modification of the parties' legal custodial status – ending joint legal custody and granting one party sole legal custody – wrongfully extends *Frazier* and improperly raises form over substance. (*See* Ct. App. Ruling at 10-11 (Langholz, J., dissenting).)

Everyone involved in this litigation, particularly the parties and the district court, knew the issue – school choice – offered evidence on whether to modify that provision, and argued whether a substantial change occurred justifying a modification of the existing order, and that such a change is in the child's best interests. Katie properly invoked the court's authority to modify

that provision. *See Frazier*, 1 N.W.3d at 779-81. The majority opinion of the court of appeals wrongly extended *Frazier* to affirm the district court. This Court should vacate the court of appeals' decision, reverse the district court, and order that the school provision be modified to permit Katie to enroll M.N.L. in Riceville school district.

Brief

Statement of the Case

In May 2018, the district court adopted the parties' stipulation awarding the parties' joint legal custody of their minor child, M.N.L., while placing M.N.L. in Katie's physical care subject to Gary's visitation rights. (D0048, Decree Approving Stipulation (05-31-2018).) Germane to this current action, the district court ordered:

> 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 change in district, the party desiring to change the school district shall obtain prior court approval.

(D0047, Stipulation re: Custody at 4 ¶1(d)(1) (05-31-2018).)

On July 22, 2022, Katie petitioned to modify the school provision. (D0179, Petition for Modification (07-22-2022).) She then had Gary personally served with the petition and original notice. (D0183, Return of Service (08-08-2022); *see* D0179; D0178, Original Notice (07-22-2022).) In response, Gary filed his formal Answer and denied Katie's request. (D0195, Answer (09-23-2022).) Litigation ensued which included a motion for an emergency hearing, extensive discovery, pretrial filings, and eventually a full evidentiary trial. The trial, held on April 20, 2023, lasted one full day that included the admission of numerous exhibits and six witnesses' testimony in addition to each party's extensive testimony. (D0258, Order Following Mod. Trial (04-24-2023).) In a written order filed four days later, the district court denied Katie's request to modify the school provision. (*Id.*) Based on Katie's posttrial motion, the district court slightly changed its order regarding M.N.L.'s transportation for school. (D0262, Order re: Mot. to Enlarge (05-16-2023).) Katie appealed.

Statement of the Facts

Katie and Gary are the parents of M.N.L., born 2013. The parties never married each other. Katie resides in Riceville with her husband, Ryan. Katie has two children in addition to M.N.L., one older daughter and a younger daughter with Ryan. Katie is employed by her parents' catering business in Northwood, Iowa. Ryan is a deputy sheriff for Howard County which requires him to reside in Howard County. Katie and Ryan live mere steps from the Riceville school where M.N.L. would attend.

Gary resides in St. Ansgar and is a self-employed online electronics salesman and part-time roofer in the summer months. He has visitation with M.N.L. every Tuesday through Wednesday and alternating weekends.

Katie sought a modification of the school provision so she could enroll M.N.L. in Riceville. As some of her several reasons, she cited that attending Riceville would permit M.N.L. to attend the same school as her half-siblings and would reduce to almost zero the time M.N.L. had to spend transporting to school. As the dissent

correctly summarizes, by permitting M.N.L. to attend Riceville school:

> about two-thirds of her schooldays she will be coming or going from Katie's home in Riceville. That trip takes a minute and a half in the car. It's easily bikeable for a child. And it wastes much less time in transit each day than the trek from Katie's Riceville home to St. Ansgar, which takes about twenty-five minutes by car or an hour and fifteen minutes by school bus (and the car-ride to the bus stop). Each way.

(Ct. App. Ruling at 14 (Langholz, J., dissenting).) It is in M.N.L.'s best interests to attend Riceville schools, and enrolling there will not detrimentally affect Gary's parental influence or contact with M.N.L.

Katie litigated her modification case fully, arguing there had been a substantial change in circumstances which warranted a modification of the school district language and that a change in schools would be in M.N.L.'s best interests. The district court erred in denying Katie's modification request. The majority of the court of appeals erred affirming the lower court. This Court should grant further review, vacate the court of appeals' ruling, and reverse the

district court with instructions to modify the existing custody to permit Katie to enroll M.N.L. in the Riceville School district.

Argument

At trial and on appeal, Katie argued there had been a substantial change in circumstances justifying a change in the school provision, and it was in M.N.L.'s best interests to permit M.N.L. to attend Riceville schools. Gary resisted. As mentioned, the district court in denying Katie's petition for modification concluded that the modification standards were not met and that it was in M.N.L.'s best interests to remain in the St. Ansgar school district. (D0258, Order Following Mod. Trial at 4-5 (04-24-2023).) Only Katie appealed.

This Court transferred the case to the Iowa Court of Appeals. On May 22, 2024, the court of appeals affirmed the lower court and in doing so, relied on the recently decided case *In re Marriage of Frazier*. (Ct. App. Ruling at 3-5). It concluded that due to *Frazier*, Katie must have sought to modify legal custody in order for the district court to address and resolve this dispute between joint legal custodians. Katie applies for further review.

1. **Did the court of appeals err by wrongly extending *In re Marriage of Frazier* by requiring that all modifications of existing custody orders that already dealt with custodial issues must start as a petition to end joint legal custody and award sole legal custody?**

The majority opinion of the court of appeals held that, because Katie sought to modify the existing school provision and "decisions affecting the child's … education" is expressly listed as a category in Iowa Code section 598.1(3) which states joint custodians "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", the court of appeals required her to petition to end joint legal custody to seek sole legal custody. (Ct. App. Ruling at 4.) That is incorrect. As the dissent explains, the majority wrongly extends *Frazier* to state that, because Katie wanted to modify language that dealt with a joint legal custody decision, she must also request the court to modify the joint legal custody status she had with Gary.

The *Frazier* holding only dealt with the court's authority to decide the issue based upon the procedural posture of the case. The

Frazier Court did not dictate whether joint custodians must petition to modify their custodial status to modify the provisions of an existing custody order.

Frazier governs the "when" and "how" a dispute between parents is to be resolved. *In re Marriage of Frazier*, 1 N.W.3d 775, 777 (Iowa 2024). As for the "when", the court of appeals acknowledges Katie properly invoked the court's authority in filing her petition for modification of the custody decree. *See* Iowa Code §§ 600B.26, .31A(1), .40(3); *Frazier*, 1 N.W.3d at 779. The court of appeals agrees that the district court had the authority to hear the issue. (Ct. App. Ruling at 3, 4). However, the court of appeals erred when it concluded that Katie had to petition to modify her and Gary's joint legal custody status in order to modify the order's school district language.

Katie and Gary's decree has language governing where the minor child's attends school, so there was something concrete to modify. Judge Langholz's dissent states the point best in saying that under *Frazier*, "it does not necessarily follow that modification of legal custody is the only option for *every* decree or custody order.

Nor does it mean that all modification petitions are 'doom[ed]' if they do not request such a change. [*Frazier*] at 782." (Ct. App. at 8 (Langholz, J., dissenting) (emphasis in original).) Further, requiring a joint legal custodian to petition to modify legal custody over a dispute when reasonable minds may disagree merely because the disagreement concerns a joint legal custody issue, is unreasonable an unjustified high burden on a parent merely seeking the court to serve as a final arbiter over the disagreement. *See Harder v. Anderson*, 764 N.W.2d 534, 538 (Iowa 2009) (court must determine course of medical care when parents cannot agree); *In re Marriage of Comstock*, No. 201-1205, 2021 WL 1016601 (Iowa Ct. App. March 17, 2021) (court must choose schools when parents cannot agree); *see Christy v. Lenz*, 878 N.W.2d 461, 465 (Iowa Ct. App. 2016) (holding that a party "need not show a change in circumstances, material or substantial, in order for the district court to clarify the terms of the joint legal custody provision of the paternity decree").

Judge Langholz correctly states:

> If there were any doubt that *Frazier* does not end the court's power to consider Katie's request to modify the school-district provision, *Frazier* removes it by reaffirming that school-choice decisions, like this one, were "properly before the district court" in similar modification proceedings. *Id.* at 783–84 (citing *In re Marriage of Flick*, No. 20-1535, 2021 WL 2453111, at *5–6 (Iowa Ct. App. June 16, 2021)); *see also id.* at 784 (citing *In re Marriage of Laird*, No. 11-1434, 2012 WL 1449625, at *2 (Iowa Ct. App. Apr. 25, 2012)). The court in *Frazier* also clears away any suggestion that the original order should not have included the school district-setting provision — explaining that "the court is allowed to make decisions in the child's best interest" in "the initial custody decree." *Id.* at 781. Indeed, the court also said such a school-choice dispute "was properly before the district court as part of the parents' dissolution proceedings." *Id.* at 784 (citing *In re Marriage of Bakk*, No. 12-1936, 2013 WL 5962991, at *2 (Iowa Ct. App. Nov. 6, 2013)). And again, that it was proper in a custody proceeding for unmarried parents — like Katie and Gary—under chapter 600B. *See id.* (citing *Gaswint v. Robinson*, No. 12-2149, 2013 WL 4504879, at *1 (Iowa Ct. App. Aug. 21, 2013)) … The supreme court did not disavow any of these unpublished cases — it said they were proper. *Id.*

(Ct. App. Ruling at 8-9 (Langholz, J., dissenting).) Here, the district court in the original 2018 custody order had the legal authority to set the child's school district. *See Frazier*, 1 N.W.3d at 781 ("Beyond the initial custody decree, where the court is allowed to make decisions in the child's best interest …").) Thus, upon Katie's

petition to modify, the district court had the authority to change that existing provision without the extra requirement of modifying the parties' overall legal custodial status.

Frazier sets a procedural requirement, and *Frazier* should be limited to just that. *Frazier* requires a petition for modification to be brought for the district court to have the authority to hear an issue arising from a disagreement between joint legal custodians. The court of appeals was wrong to extend *Frazier* to say that every modification action concerning any of the five legal-custody issues should include a request to modify legal custody. The procedural nature of *Frazier* is one thing, but to impose such a burden on parents, especially when one is seeking to modify existing terms of a decree on one custodial issue, leaves parents with an extremely high burden of proof and no middle ground – the moving party must seek to be appointed have sole legal custody on *all* custodial decisions. *See Frazier*, 1 N.W.3d at 779 (holding that Iowa Code § 598.1(3)'s "definition treats joint custody as an all-or-nothing proposition that 'leaves no room for a parceling of rights.'" (citing *In re Marriage of Makela*, 987 N.W.2d 467, 471 (Iowa Ct. App. 2022)).

For the reasons set forth herein, the Supreme Court should vacate the court of appeals and in doing so, reverse the district court and grant the modification of the school provision to permit Katie to enroll M.N.L. in the Riceville school district.

2. Did the court of appeals err by affirming the trial court's refusal to modify the terms of the parties' existing custody order which dictated where their minor child must attend school?

Prior to *Frazier*, this Court has routinely held that a modification of an existing custody decree should be granted when the moving party shows there has been a substantial change in circumstances and that any change is in the child's best interests. *See In re Marriage of Thielges*, 623 N.W.2d 232m 235 (Iowa Ct. App. 2000); *In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa Ct. App. 1994); *see Frazier*, 1 N.W.3d at 787–88 ("To be clear, we agree with the dissent and other jurisdictions that courts should apply a best-interest standard to resolve disputes between joint legal custodians over important issues affecting the child."). Again, Judge Langholz's dissent highlights this routine procedure and standards previously prescribed. (Ct. App. Ruling at 6-7 (Langholz,

J., dissenting).) Those standards should be used to determine Katie's appeal.[1]

Katie showed there has been a material change in circumstances and showed a modification was in M.N.L.'s best interests. Even though *Frazier* was not filed until long after this case had been started, litigated, and ruled upon in the district court, Katie followed the procedure *Frazier* approved by filing her petition for modification which gave the district court the authority to decide the issue of whether to modify the school district language in the decree. *See Frazier*, 1 N.W.3d at 779-80. Katie had no reason to know that what she believed was the proper pleadings and procedure would render her case "doomed," and thus the improper extension of *Frazier* and the denial of the necessary analysis should be addressed by the Supreme Court.

In 2018, the court granted Katie physical care[2] of M.N.L.,

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[1] The court of appeals' majority did not reach this issue – dismissing Katie's case outright because she procedurally failed to petition to modify legal custody. (Ct. App. Ruling at 4.)

[2] This is not a dispute between two parents who have joint physical care. The difference between joint physical care and one parent having physical care is:

which has remained unchanged. As "the parent with primary physical care, [Katie] has the responsibility to maintain a residence for" M.N.L. *Hynick*, 727 N.W.2d at 579. Extending that principle, the Iowa Supreme Court held that "the parent having physical care of the children must, as between the parties, have the final say concerning *where* [the children's] home will be." *In re Marriage of Hoffman*, 867 N.W.2d 26, 33 (Iowa 2015) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 159 (Iowa 1983) (emphasis added). In an unpublished opinion, the court of appeals held that "when the parties [are] unable to agree on which school, the final say on the subject should be with the parent having physical care of the children." *In re Marriage of Matteson*, No. 16-0401, 2017 WL

> T]he parent with primary physical care has the responsibility to maintain a residence for the child and has the sole right to make decisions concerning the child's routine care. See generally id. § 598.1(7). The noncaretaker parent is relegated to the role of hosting the child for visits on a schedule determined by the court to be in the best interest of the child.

In re Marriage of Hynick, 727 N.W.2d 575, 579 (Iowa 2007); *see* Iowa Code § 598.1(7) (2023).

361999, at *3 (Iowa Ct. App. Jan. 25, 2017). *Matteson* governs this case.

There has been a material change in circumstances. In short, Katie's remarriage and subsequent relocation, as well as M.N.L.'s siblings attending Riceville schools, M.N.L.'s desire to go to Riceville with her siblings, and the transportation difficulties, all support a finding that there is a substantial change in circumstances supporting a modification.

A modification of the decree's school district language is also in M.N.L.'s best interests. That point is argued above, as well as is discussed the Judge Langholz's dissent. In short, it is best for M.N.L. to attend school in Riceville given the geographic proximity to her primary residence, reduction in time she would spend getting to and from school, her half-siblings attending Riceville schools, and attending school in Riceville would afford her the opportunity to develop relationships and ties to the community she spends most of her time living in.

Conclusion

Based on the foregoing, this Court should grant further

review, vacate the court of appeals decision, reverse the district court, and order a modification of the existing decree so that Katie may enroll M.N.L. in the Riceville school district.

Respectfully submitted,

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Certificate of Service

Pursuant to Iowa Appellate Procedure 6.701 and 6.901, the undersigned hereby certifies that on the 9th day of June 2024, the Application for Further Review was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/s/ Andrew B. Howie
Andrew B. Howie

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Century in 14 point, and contains 3599 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a), or

[ ] this [application or resistance] has been prepared in a monospaced typeface using [state name of typeface] in [state font size], and contains [state the number of] lines of text, excluding the parts of the [application or resistance] exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Andrew B. Howie	June 9, 2024
Signature	Date