

**IN THE COURT OF APPEALS OF IOWA**

No. 0-520 / 10-0387  
Filed August 25, 2010

**IN RE THE MARRIAGE OF GAIL CROTTA ROBERTS AND TIMOTHY  
MICHAEL ROBERTS**

**Upon the Petition of  
GAIL CROTTA ROBERTS a/k/a  
GAIL ANN CROTTA,**  
Petitioners-Appellee,

**And Concerning  
TIMOTHY MICHAEL ROBERTS,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Jefferson County, Michael R.  
Mullins, Judge.

A father appeals from the district court order modifying the custody  
provisions of the parties' dissolution decree. **AFFIRMED.**

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

Douglas L. Tindal of Tindal Law Office, P.L.C., Washington, for appellee.

Patricia J. Lipski, Fairfield, guardian ad litem for the child.

Considered by Sackett, C.J., and Potterfield and Tabor, JJ.

**TABOR, J.**

A father asks us to reverse the district court's ruling that modifies the physical care of his now thirteen-year-old daughter by replacing an every-other-week schedule with a grant of physical care to the girl's mother. We decline to do so, affirming the district court's determination that escalating communication difficulties between the parents concerning their daughter's navigation of her early teenage years qualify as a substantial change in circumstances justifying modification of the dissolution decree.

**I. Background Facts and Proceedings**

Timothy Roberts (Tim) and Gail Ann Crotta (Gail) married in 1996 and divorced in 2000. They have one daughter, Kadie, who was three years old when their marriage ended. The original dissolution decree granted Tim and Gail joint legal custody and joint physical care of Kadie. Before Kadie started school, she spent weekdays with her mother and weekends, plus other times during the week, with her father. Since she turned nine, she has alternated between her father's house and her mother's house on a weekly basis. Her parents live within walking distance of one another in Fairfield. Kadie attends the Maharishi School of the Age of Enlightenment and by all accounts is flourishing in academic, extra-curricular, and social activities.

But Tim and Gail have encountered more parenting impasses as Kadie has entered her pre-teen and teen years. Both parents describe their daughter as bright, precocious, and mature for her age. As their daughter has developed a woman's figure, the parents have clashed over what clothes are appropriate for

her to wear. Their views also differ over when Kadie will be allowed to date boys. The conflict which precipitated the modification action was Tim's strong negative reaction to Gail allowing Kadie to participate in a dance class held in another city, which resulted in her being unsupervised for several hours and kept her out late on a school night.

On November 20, 2008, Gail filed a petition seeking to modify the physical care portion of the dissolution decree, citing as changed circumstances that Tim had become "less communicative concerning the child" and was "overly rigid about her activities." Tim originally answered the petition and countered with his own request for physical care of Kadie. By the time of trial, Tim withdrew the counterclaim and asked only that joint physical care of their daughter remain unchanged. After hearing testimony and receiving exhibits on October 8, 2009, the district court granted Gail's request for modification. Tim appeals.

## **II. Legal Standards**

We exercise de novo review in actions to modify child custody or physical care. Iowa R. App. P. 6.907 (2009); *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Because the trial court could see and hear the witnesses, we give weight to its findings regarding credibility and other facts, but are not bound by them. *Zabecki*, 389 N.W.2d at 398.

Iowa courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered, which is more or less permanent and relates to the welfare of the child.

*In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The parent seeking to change the physical care bears the burden to show an ability to offer superior care. *Id.*

### **III. Communication lapse as a substantial change in circumstances.**

The district court succinctly described the substantial change in circumstances justifying modification of the decree as follows:

Although the maturation of Kadie is a circumstance that would have been contemplated by the Court and the parties at the time of the entry of the Decree, the escalating communication difficulties were not. There is now a developing history of conflict between the parents, and their approaches to decisions concerning daily living experiences are becoming more divergent.

A breakdown in the parents' cooperation and communication concerning a shared physical care arrangement may constitute a substantial change in circumstances. *Melchiori v. Kooi*, 644 N.W.2d 365, 367-68 (Iowa Ct. App. 2002). In *Melchiori*, our court recognized discord between parents that disrupts a child's life may warrant modification of the decree to designate a primary physical caregiver, if it appears that the child, by having a primary physical caregiver, will have superior care. *Id.* at 368.

Tim contends the communication breakdown between him and Gail is not permanent and that isolated instances of divergent opinions about appropriate dress, dating, or dance classes do not rise to the level of discord warranting a change in the physical care schedule. Contrary to Tim's contention, the current list of disputes is emblematic of the pitfalls awaiting these parents as they begin to guide their daughter through the turbulent adolescent years. The ability of the parents to communicate is an important factor in determining whether joint

physical care remains in the child's best interests. See *In re Marriage of Hansen*, 733 N.W.2d 683, 698-99 (Iowa 2007) (explaining "[e]ven a low level of conflict can have significant repercussions for children"). The district court noted mid-trial,

Clearly there is a serious lack of communication between Ms. Crotta and Mr. Roberts, and I would guess that everyone in this room agrees that if that issue isn't resolved, Kadie is going to be harmed in the next few years.

The court recognized the parents' communication problem at trial. Tim's argument minimizing the issue on appeal cannot prevail.

#### **IV. Weight given to child's wishes.**

When determining what legal custody arrangement is in the best interest of the child, we must consider, among other factors, whether the arrangement is in accord with the child's wishes, taking into consideration the child's age and maturity. Iowa Code § 598.41(3)(f) (2009). We should give similar consideration to a child's preferences regarding the physical care arrangement. While Kadie's preferences do not control the physical care modification question, they are relevant and should not be ignored. See *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979).

Kadie's wishes support the district court's modification of physical care. The guardian ad litem who interviewed Kadie found her to be insightful and wise

beyond her years. Kadie told the guardian ad litem she loved both her parents and enjoyed spending time with them, but

[I]ike most children who are in split custody situations, she dreads the 'changeover' day, not necessarily because of which parent she's going to see, but because she has to basically 'start over' again at each home, with different rules and a different way of doing things.

Kadie expressed a desire to "live primarily with her mother, and have regular and liberal contact with her father." Kadie told the guardian ad litem she enjoys a close, loving bond with her father, but is less comfortable sharing personal information with him. By contrast, she can "go to her mother with questions about pretty much anything."

On appeal, Tim argues the guardian ad litem's emphasis on the importance of "girl-talk" serves to "cloud the only pertinent issue: the best interest of a child." We do not believe these concepts are mutually exclusive. The best-interests determination includes consideration of which parent is better able to carry on an open dialogue with the child. We do not believe that the district court gave undue regard to the guardian ad litem's report or Kadie's craving for less shifting between households. Our de novo review leads us to the same conclusion reached by the district court: Gail has met her burden to show she has the ability to minister more effectively to Kadie's well-being at this point in time. See *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000) (holding a parent seeking modification must prove an ability to minister more effectively to the child's well-being). The modification is in the child's best interests.

## **V. Gail's spending decisions don't disqualify her as physical caregiver**

Finally, Tim contends the district court erred in concluding that “Gail’s money management and financial decisions did not rise to the level of creating a basis for a custodial decision.” Gail inherited approximately \$500,000 when her mother died in 2007. Tim points out that Gail spent more than \$40,000 of her inheritance on psychic hotlines because they provided “someone you can talk to instantaneously, spontaneously . . . .” Tim urges that such frivolous spending by Gail indicates her lack of “the emotional maturity required to raise a young woman through her teen years.” Having reviewed the record as a whole, we do not find this one example undermines Gail’s ability to provide quality physical care. Gail testified she was surprised she spent so much on those telephone services, but explained that it happened during a difficult time in her life. Gail also testified that the expenditures did not deprive Kadie of financial security because Gail also invested approximately \$100,000 of the inheritance in a fund for Kadie’s college education. The district court aptly rejected Tim’s argument that Gail’s use of her inheritance signaled an inability to be a positive, mature role model for Kadie.

In sum, we agree with the district court that the communication gulf between these parents concerning issues faced by their teenage daughter qualifies as a substantial change in circumstances justifying modification of the physical care portion of the decree. Because that court had the parties before it and was able to observe their demeanor, it was in a better position to measure the rift and evaluate the parents as caregivers. *See In re Marriage of Engler*, 503

N.W.2d 623, 625 (Iowa Ct. App. 1993). Gail has met her burden to prove she can better address Kadie's needs at this stage in her development. And the grant of physical care to Gail with liberal visitation for Tim is in their daughter's best interests.

Costs on appeal are taxed one-half to each party.

**AFFIRMED.**

Potterfield, J., concurs; Sackett, C.J., dissents.



**SACKETT, C.J.** (dissents)

I respectfully dissent. I would reverse the modification.

Ever since Kadie's parents, Gail and Timothy, divorced in 2000 the result of their shared parenting is that Kadie has enjoyed substantial and nearly equal contact with both her parents and it is agreed that she is a good student and a delightful child. The majority has affirmed the district court's decision to sever the shared parenting and place her in the primary care of Gail. I believe Gail has failed to show a substantial change in circumstances and that modification is not in Kadie's interest.

It is important to Kadie's continued successes that Timothy remain one of the two dominate influences in her life. Timothy has been a responsible, engaged, and active parent. He is in tune with his daughter's schedule and friends. He participates in school functions and after school activities and assisted Kadie with a school project that took first prize. He takes Kadie with him when he travels and took her to visit her maternal grandmother in Nevada. Gail does not usually take Kadie when she travels; rather, Timothy keeps Kadie when Gail travels. Timothy's calendar showed that in a 143-week period he had Kadie in his home for eighty-one weeks. It appears to be agreed that Kadie is a good student and has a good personality. Her father's substantial involvement in her life obviously has contributed to this. The majority and the district court opined that the current disputes the parents have are emblematic of the pitfalls awaiting them as they begin to guide their daughter through the turbulent adolescent years. Unlike the majority I cannot presuppose that Kadie shall have turbulent

adolescent years as her early history would suggest otherwise. Additionally, I believe continuing her father as a shared care parent provides the best opportunity for Kadie to avoid turbulent adolescent years; for the evidence suggests to me that he is the more mature and concerned and reasonable of the two parents.

Controversies over a dance class apparently led to the filing of the petition to modify and the majority appears to consider this situation as evidence of the need for modification. A closer look at the controversy reveals that Gail admitted she made arrangements for Kadie to take dance classes in the nearby town of Washington, Iowa, without consulting with Timothy. Timothy only learned of it when Kadie told him about it. To take the class Kadie was to ride with another mother to Washington, arriving by 4:30 in the afternoon. She would then wait with several other of her contemporaries without supervision for three hours for the class to begin at 7:30 in the evening. She would not return to Fairfield until 9:30 in the evening on a school night. Upon learning of the class Timothy went to check it out. The parties were unable to reach a compromise and Kadie did not take the class. In my opinion Timothy acted more responsibly in this situation than did Gail. His concerns about this scheduling were certainly justified and there is no evidence that Kadie's interests were not served, nor that missing the dancing lesson was a serious problem.

The parties disagree on the tops that Kadie should wear. Kadie is mature for her age and Timothy is against her wearing tops that show her cleavage which apparently upsets Gail. There apparently are also problems about Kadie

dating. Timothy prefers that she do things with a group of boys and girls and when Kadie wanted to go alone to a boy's house he called to be sure a parent would be present.

The majority's concerns were not voiced by the guardian ad litem who noted the child has benefited from close contact with both her parents and stated, "If Kadie had not expressed a strong desire to change the current custodial situation, I would have likely recommended it continue." Based on Kadie's wishes the guardian ad litem recommended the change.

Determining a child's custodial arrangement is more than just asking a child where he or she wishes to live. See *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). There are a number of factors we consider. See *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985). Less weight is given to a child's preference in a modification than an original custody determination. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). Considering the factors in *Ellerbroek*, 377 N.W.2d at 258-59, I do not see Kadie's preference to be particularly strong and her major concern is the inconvenience of moving the few blocks every week from one home to the other.

Timothy is the stronger, more grounded, and more involved parent. He supports Gail's relationship with the child. Gail has an older daughter who Gail sent to live with the girl's father when the child became unruly. While Gail contends she will do a better job with Kadie, past parenting needs to be considered. See *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007).

Kadie is well grounded and I believe that continuing shared care is in her best interest.