

**IN THE COURT OF APPEALS OF IOWA**

No. 6-197 / 05-1629  
Filed June 28, 2006

**Upon the Petition of  
JUSTIN W. WOHLERT,**  
Petitioner-Appellee,

**And Concerning  
KATHLEEN R. TOAL,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

Kathleen R. Toal n/k/a Kathleen R. Kaplan appeals the district court's modification of physical care placing the child with the child's father, Justin Wohlert, after her relocation. **AFFIRMED.**

Daniel Bray and Lori Klockau of Bray & Klockau, P.L.C., Iowa City, for appellant.

John Wood, Waterloo, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

**HUITINK, J.**

***I. Background Facts and Proceedings.***

Justin Wohlert and Kathleen Kaplan are the parents of Charly, born in January 1998. On November 19, 2002, the district court granted Justin and Kathleen joint custody of Charly. Kathleen was awarded physical care, subject to Justin's visitation rights. In addition, the district court conditioned Charly's physical care on Kathleen's move back to Black Hawk County by December 31, 2002. The trial court ordered Kathleen to give Justin sixty days advance notice of her intent to move outside of Black Hawk County or outside of the State of Iowa.

On appeal, we vacated the portion of the trial court's custody decree requiring Kathleen to reside in Black Hawk County. *Wohlert v. Toal*, No. 02-1981 (Iowa Ct. App. Aug. 27, 2003). We, citing Kathleen's history of abrupt moves of great distances with little or no notice to Justin, affirmed the decree's provisions requiring Kathleen to provide Justin sixty days notice of her intent to move outside of Black Hawk County or the State of Iowa. *Id.*

On October 26, 2004, Kathleen gave Justin written notice of her intent to move to California. Justin filed an application to modify the custodial decree on December 22, 2004. On February 14, 2005, the trial court entered an order stating:

1. Within two weeks, Petitioner and the parties' minor child shall move back to Black Hawk County and continue with the visitation schedule presently existing or the child shall be returned to the Petitioner who shall have temporary physical placement until final hearing with visitation to be by agreement or further court order.

Kathleen moved back to Iowa and continued to provide for Charly's physical care pending resolution of Justin's modification request. Kathleen and Earl have since married, and their daughter, Sunny Sky, was approximately five months old at the time of trial.

The matter was reached for trial in September 2005. The court's resulting decree included the following provisions:

This Court can find no security in any assertion made by Kathleen that if Charly is moved to California she will make any attempt to involve Justin in Charly's life or that she will encourage or support Justin's role as a parent.

Based upon the foregoing, the Court is persuaded that custody of the minor child, Charly, should be transferred to Justin. The Court finds that a substantial change of circumstances has occurred as Kathleen's relocation to California with Charly significantly disrupts the relationship, visitation schedule and opportunity for continuing contact between Justin and Charly. The Court also finds that Justin can offer Charly superior care as he will be able to provide her with both emotional and environmental stability through her continuing contact with him, with her school, with her friends and extracurricular activities and her extended family in Iowa.

Based on these findings and conclusions, the district court modified physical care and placed Charly with Justin. The district court awarded Kathleen visitation for six weeks during the summer and not more than two times per month, if Kathleen is present in Iowa. Kathleen was awarded visitation during alternating Thanksgiving breaks and Christmas holidays. Kathleen was ordered to pay \$309 per month in child support.

On appeal, Kathleen argues the following:

- I. The trial court failed in its duty to find facts and make its decision relative to Charly's best interests.
- II. The trial court erred in modifying physical care because Justin failed to prove the existence of a substantial and material change in circumstances that would justify

modification of physical care based on Kathleen's relocation to California.

- III. Physical care of the parties' child should have remained with Kathleen because petitioner failed to prove a superior ability to minister to the parties' child; Justin's visitation should have been modified to the reality of the relocation.
- IV. Evidence and testimony admitted at trial should be limited to matters arising after the entry of the original decree.

## **II. Standard of Review.**

Our review in this equity action is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues presented for review. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). "We accord the trial court considerable latitude in resolving disputed claims and will disturb a ruling 'only when there has been a failure to do equity.'" *Id.* (quoting *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996)). We give weight to the trial court's findings of fact, especially when considering the credibility of the witnesses but are not bound by them. Iowa R. App. P. 6.14(6)(g).

## **III. Merits.**

"The controlling consideration in child custody cases is always the best interests of the children." *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000) (quoting *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998)). "This consideration is interwoven into the modification standards applicable to such cases." *Thielges*, 623 N.W.2d at 235 (citing *In re Marriage of Frederici*, 338 N.W.2d 156, 159 (Iowa 1983)). To modify custody, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that

the child's best interests make it expedient to make the requested change. *Frederici*, 338 N.W.2d at 158.

The parent having physical care of a child must, as between the parties, have the final say where the child's home will be. *In re Marriage of Westcott*, 471 N.W.2d 73, 76 (Iowa Ct. App. 1991). However, a change in residence involving a substantial distance can frustrate the important underlying goal that the children should be assured maximum continuing physical and emotion contact with both parents. A change in residence by the primary caretaker may justify a change in custody if the reasons for the move and the quality of the new environment did not outweigh the adverse impact of the move on the children. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). There are several important factors to consider in determining whether a relocation by a parent should or should not result in a modification of custody, including but not limited to the reasons for relocation, location, distance, comparative advantages and disadvantages of the new environment, impact on the child, and impact on the joint custodial and access rights of the other parent. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 479 (Iowa 1993).

Pursuant to Iowa Code section 598.21(8A) (2003), a court may consider a move of 150 miles or more, by itself, to be a substantial change in circumstances. However, the court is not required to find a move of 150 miles or more a substantial change in circumstances. *Thielges*, 623 N.W.2d at 237. The parent requesting the change in physical care has the burden to prove by a preponderance of the evidence the change in circumstances is substantial. *Id.* A parent requesting modification of physical care "must also prove he has an ability

to minister more effectively to the [child]'s well-being." *Id.* The question is not which parent is now the preferred physical care provider, but whether the party seeking modification has met the heavy burden to warrant a change in physical care. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). Once physical care of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Melton*, 256 N.W.2d 200, 205 (Iowa 1977).

We, like the trial court, find Kathleen's relocation to California and the resulting disruption of Justin's visitation rights and joint custodial role constitutes a substantial change of circumstances. The remaining question is whether Justin has met his heavy burden to prove that he can provide superior care for Charly.

Kathleen's stated reasons for relocation include her remarriage to Earl Kaplan, the birth of their daughter, Sunny Sky, as well as the economic and lifestyle advantages incident to residing in Malibu, California. The record indicates that Charly's material, educational, and social needs will be more than adequately met if she continues to reside in Kathleen's physical care. Additionally, Charly's continued placement in Kathleen's physical care will preserve the only primary care relationship she has ever known, as well as her relationship with her sister, Sunny Sky.

The importance of preserving Charly's relationship with Kathleen and Sunny Sky was a point of emphasis made by Dr. Brenda Payne, a child psychologist who interviewed Charly to assess Charly's relationship with Kathleen. At trial Dr. Payne testified:

Q. What were your conclusions from your interviews and testing of Charly and her mother? A. Um, well, Charly is a bright girl, and I think that needs to be taken into account in terms of her

educational planning. And I would imagine that as she gets into upper grades, and I don't know – every school district is a little bit different about how they do this, but she should be considered for gifted programming, at least that should be explored for her based on how well she did on that test that I gave.

I found her to be very attached to her mother and infant sister. She does I think continue to suffer because of the ongoing conflict between her parents. However, I think that she – in my interaction with her, showed a source of strength and resiliency and I think she's coping as best she can under difficult circumstances.

To me, she definitely reported a positive view of California. And in her talk with me about peers and about academics, she saw herself as having the potential to be successful there, whereas that's not how she conveyed her view of going to school in this community . . .

Q. Before you go on in your conclusion I'd like to back up to point 2 in your report? A. Uh-huh.

Q. It says that she considers her mother to be her primary care-giver. A. Yes.

Q. Would you explain what you determined in that regard? A. Um, just in the informal interview process with Charly – and with any child when I'm doing this kind of work with them, I'm talking with them about who they see as a source of support. Who they see as being involved. Who they feel comfortable with. That through all of my talk with her, you know, it was clear to me that that's how she saw things.

Q. Do you see any psychological or emotional harm or other harm to Charly if her mother ceased to be the primary care-giver, based on your observations and testing of her? A. Um, I do think that that would be, based on my limited interaction of her, a difficult thing for her to cope with. In my observation in talking with her it was very clear that she's attached to her mother and very much views her mother as her primary source of emotional support.

Justin nevertheless contends that Charly's best interests are better served if her physical care is transferred to him. At trial Justin testified:

Q. Have you petitioned the court to modify the physical placement of Charly which is common with Kathleen? A. Yes.

Q. What precipitated that decision? A. I was given a 60-day notice that – by Kathleen, that she wanted to move to Malibu. And I understood it was my right, and I understood it and felt that it was my only way of maintaining my relationship with Charly, is that I have – that I have the modification looked at by a court, as Kathleen did not discuss, or would not discuss how we were going to deal with her move or her want to move to Malibu.

Q. Were there other issues that concerned you about wanting to change physical placement, other than the move?

A. Yes. Kathleen has never – has never been supportive or respectful of me as Charly's father. She's continuously said and done things and made actions to hurt Charly's relationship with me and my family, including the accusations to having Charly keep secrets from me specifically.

Justin's brief includes the following list of factual findings made by the trial court in support of his claim that he can provide superior care for Charly:

Among the findings of fact made by the trial court are the following: (1) Kathleen's residence is in controversy and uncertain; (2) Charly had excessive absence from school while under Kathleen's physical care; (3) Justin regularly and routinely exercised his weekend, mid-week, and holiday visitation with Charly; (4) Justin participated in school events at Lincoln School and took Charly to extra-curricular activities; (5) Charly's visitation with Justin included contact with his extended family including grandparents, aunts, uncles, and cousins; (6) Justin has contributed to Charly's development and growth through his consistent exercise of visitation and contact; (7) Kathleen withdrew Charly from her school in Cedar Falls without notifying the school; (8) Kathleen provided no information to Justin about moving to California at the conclusion of his Christmas visitation, but rather lied to Justin stating that Charly would be returning to start school in Cedar Falls in January 2005; (9) Kathleen moved Charly to California in a secretive and evasive manner; (10) Kathleen resisted the return of Charly to Iowa, despite the court's clear Order; (11) Upon returning to Iowa, Kathleen moved to a different school district than previously attended by Charly, causing Charly's school location to be somewhat up in the air, including the possibility she would be required to start in a different school (which would have been her third school in seven weeks); (12) Kathleen became pregnant within a matter of weeks of resuming a relationship with the man she had not been together with for several months; (13) When Kathleen learned she was pregnant in late summer or early fall, the father of her unborn child had already moved to California; (14) Nearly immediately after learning of her pregnancy, Kathleen decided to make her home in California without involving Justin in the decision; (15) Kathleen has made multiple statements that Justin is incapable of meeting Charly's day-to-day needs, even though the court has repeatedly found Justin capable of doing so; (16) Kathleen has engaged in a long-standing course of conduct designed to alienate or reduce the role played by Justin in Charly's life; (17) Many of Kathleen's actions



since the Custody Order of November 19, 2002 have been nothing but a furtherance of Kathleen's pattern of alienation; (18) Kathleen has enrolled Charly in therapy without involving Justin, and only advised him of the therapy reluctantly; (19) Kathleen has continued a pattern of hasty and self-interest driven decisions, including traveling to California with Charly prior to giving Justin notice of her intention to move with the intention to check into housing, the school system and doctors in California; (20) Kathleen has placed greater importance on resuming her relationship with Mr. Kaplan than on the impact of moving Charly from consistent contact with Justin; (21) Kathleen placed greater importance on resuming her relationship with Mr. Kaplan than on the impact of moving Charly from the home, friends, activities, and school he [sic] had enjoyed for two years; (22) Kathleen's move in secrecy was confusing and hurtful to Charly; (23) That based on the secretive and evasive manner of her move, Kathleen knew her actions would be construed as not in Charly's best interests; (24) Kathleen's secretiveness over her move extended beyond Justin to Charly's school and to Kathleen's good friend, Rhonda; (25) Kathleen's actions in moving Charly in such a hasty manner resulted in Charly transferring schools twice within a span of eight weeks; (26) Kathleen unilaterally took Charly to a psychologist in Iowa City for psychological testing without notice to Justin; (27) Kathleen refused to voluntarily submit to a custody evaluation done on all parties, and informed Justin that a custody evaluation was unnecessary in this case, despite having Charly secretly evaluated in the context of custody and physical placement litigation; (28) Kathleen displayed disregard to the court's Orders and looked for opportunities not to comply with the court's prior rulings; (29) Kathleen continued her attitude toward previous rulings of the court to the very brink of going to trial, by filing motions that were a continuing blatant disregard for the rulings of the trial court; and most significantly, as set off by separate paragraph in its Order: (30) "This court can find no security in any assertion made by Kathleen that if Charly is moved to California she will make any attempt to involve Justin in Charly's life or that she will encourage or support Justin's role as a parent." (Emphasis omitted.)

Based on our review of the record, we find abundant evidentiary support for the trial court's findings of fact and adopt them as our own. These findings also implicate the trial court's in-person perspective on the credibility of the parties' conflicting versions of the facts, and we defer to that assessment. Additionally, we find nothing in the record which diminishes our confidence in Justin's ability to

provide for Charly's primary care. Although Justin's financial circumstances are far less secure than Kathleen's, he nevertheless has the means to adequately provide for Charly's subsistence needs.

Because Justin has demonstrated a greater interest and ability to support Kathleen's relationship with Charly, we find he is the parent who can provide superior care for Charly. We hold Charly's best interests are better served by transferring her physical care to Justin. *See, e.g., In re Marriage of Manson*, 503 N.W.2d 427, 429 (Iowa Ct. App. 1993) (ability of each parent to support other parent's relationship with the child is an important factor in determining physical care). We have carefully considered all of the issues raised on appeal and find they are controlled by the foregoing or are without merit. We affirm on this issue.

#### ***IV. Appellate Attorney Fees.***

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party, the ability of the other party to pay, and whether the requesting party was defending the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We determine Justin was required to and successfully defended the trial court's decision on appeal. We accordingly award Justin \$3000 in appellate attorney fees. Costs of this appeal are assessed to Kathleen.

**AFFIRMED.**