

**IN THE COURT OF APPEALS OF IOWA**

No. 6-586 / 06-0302  
Filed August 23, 2006

**IN RE THE MARRIAGE OF ROBERT O. BURLEY  
AND HEATHER L. BURLEY**

**Upon the Petition of**

**ROBERT O. BURLEY,**  
Petitioner-Appellee,

**And Concerning**

**HEATHER L. BURLEY,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Calhoun County, William C. Ostlund, Judge.

Heather Burley appeals from the custody provisions of the decree dissolving her marriage to Robert Burley. **AFFIRMED.**

Michael D. Tungesvick of Kruse & Dakin, L.L.P., Boone, for appellant.

Erin E. McCullough of Law Offices of Erin E. McCullough, Lake View, and A. Eric Neu of Neu, Minnich, Comito & Neu, P.C., Carroll, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

**VOGEL, P.J.**

Heather Burley appeals from the portion of the dissolution decree which allocated to her former husband, Robert Burley, the physical care of their daughter, Hailey. Upon our de novo of the record, we agree with the district court and affirm.

**Background Facts and Proceedings.**

Heather and Robert were married in June of 1996 and Hailey was born in April of 1997. Even before the marriage, Heather, who is originally from Florida and who still has family there, had expressed to Robert her desire to move to North Carolina to be closer to her family. At one point this caused the couple to separate. Eventually they reunited and were married, although Heather continued to express her desire to move to North Carolina.

Heather worked outside the home until Hailey was born. For the first two years of Hailey's life, Heather stayed home and provided the primary care for Hailey. Robert, who is a farmer, continued to work long hours. After Robert's hog operation began to lose a great deal of money, Heather returned to the workforce as a secretary. When Hailey was three, Heather enrolled in college to improve her employment prospects, but continued to work part-time. In May of 2004, Heather received her B.S. degree in nursing. In the summer of that year, Heather obtained employment as a nurse, working three ten-hour shifts per week.

As Heather pursued her education and career, Robert assumed an increased role in caring for Hailey. He became actively involved in her schooling and enrolled her in such activities as dance lessons, piano lessons, and

horseback riding. In addition, Robert took an active role in parenting Brandon and Stephen, Heather's two sons from a previous marriage.

After obtaining her degree, and with Robert's knowledge, Heather posted her resume on the internet with hopes of finding a new job. As a result, she received contacts from recruiters all over the country. In April of 2005, Heather again asked Robert if he would consider a move to North Carolina. After this conversation, unbeknownst to Robert, Heather interviewed and secured a position at a nursing home in Hendersonville, North Carolina. This job pays more than her Iowa job and provides her with insurance and other benefits. The hours she was offered were 7:00 a.m. to 4:00 p.m., Monday through Friday. After Robert became aware Heather had interviewed for this position, he filed a petition for dissolution.

Following a trial on the petition, the court dissolved the parties' marriage. It granted Hailey's physical care to Robert and visitation rights to Heather, including an uninterrupted eight-week block of summer vacation. Heather appeals from this ruling, contending the court erred in awarding physical care of Hailey to Robert. In the alternative, she believes the court should have granted her more extensive visitation rights.

#### **Scope of Review.**

We review this matter de novo. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). We "accord the trial court considerable latitude in making [a custody] determination and will disturb the ruling only when there has been a failure to do equity." *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996).

**Physical Care.**

“The controlling consideration in child custody cases is always what is in the best interests of the children.” *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998). The objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa Ct. App. 1993). We consider the factors detailed in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

We begin by noting that both Robert and Heather have proven records of being involved, nurturing, and successful parents. It is clear they both deeply love Hailey and are attentive to her welfare. As the district court appropriately found:

The Court does not consider this a case of either parent being unable to properly care for Hailey. Both seem sincere in their love of the child and their passion to look after her interests.

In this respect, Hailey is fortunate indeed. Consequently, we do not find ourselves necessarily weighing the relative merits of the parties' respective parenting abilities.

In situations where the suitability of each parent is essentially in equipoise, we believe the district court's findings on physical care are entitled to particular weight. We afford that deference because the district court had the parties before it, was able to observe their demeanor, and was in a better position to evaluate them as custodians. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993).

Upon our review of the record, and affording due deference to the district court's superior position to observe the parties, we affirm its decision to grant Hailey's physical care to Robert. Certain factual considerations have guided us in this decision.

One of our tasks is to consider how continuing or disrupting a custodial arrangement will affect a child. *Winter*, 223 N.W.2d at 166-167. The record supports that while living in Iowa, Hailey has flourished both academically and personally. She reportedly does "excellent" in the classroom and ranks highly among her classmates. She is quite involved in extracurricular activities. In addition, she is quite close to Robert's extended family, many of whom live in the Lake City, Iowa, area. She has frequent contact with them and gains much from these relationships. Accordingly, all indications are that Hailey is thriving in her current physical and familial setting. It would not be in her best interests to move her to a new setting, far from her familiar surrounding, family, and friends, all in the hope that should could continue to prosper in a similar fashion.

The manner in which Heather interviewed and accepted employment in North Carolina also concerns us.<sup>1</sup> Heather did not inform Robert that she had interviewed for the North Carolina position, and he only learned of the job when he listened to a phone message left by a recruiter. The best interests of Hailey demand that parents communicate openly and honestly about important issues affecting her. Heather's secretive actions surrounding her move to North Carolina do not comment favorably on her ability to do this.

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<sup>1</sup> Heather accepted the position in a letter dated September 15, 2005, stating she could begin employment on November 7, four days after the scheduled trial in this matter.

Upon our de novo review, and after consideration of all arguments advanced by Heather on appeal and the custody factors enumerated in Iowa Code section 598.41(1) (2005), we find no reason to disagree with the disposition ordered by the district court, and we therefore affirm the custody provisions of the parties' dissolution decree.

In addition, we affirm that portion of the decree which concerned Heather's visitation rights. Iowa Code section 598.41(1) requires that visitation be established to assure "maximum continuing physical contact with both parents." Here, the court granted visitation of one-half of the Christmas vacation and for eight uninterrupted weeks during the summer. In addition, the court ordered that Heather shall be entitled to alternating holidays and weekend visitation on any occasion that she should travel to Iowa and it encouraged the parties to consider additional visitation upon Heather's request. Considering Heather's move to North Carolina and the logistical and practical problems attendant to such a move, we believe the court's visitation order is reasonable and accounts for the reality of the parties' situation. We therefore affirm the visitation award.

**AFFIRMED.**