

**IN THE COURT OF APPEALS OF IOWA**

No. 7-380 / 07-0083

Filed July 25, 2007

**IN RE THE MARRIAGE OF HAMID KAKAVANDI AND NARENDJ VAKILI-KAKAVANDI**

**Upon the Petition of  
HAMID KAKAVANDI,**  
Petitioner-Appellee/Cross-Appellant,

**And Concerning  
NARENDJ VAKILI-KAKAVANDI,**  
Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Page County, Greg W. Steensland,  
Judge.

Narendj Vakili-Kakavandi appeals from an order modifying the child custody and child support provisions of a marriage dissolution decree. Hamid Kakavandi cross-appeals. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

John K. Vernon of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellant.

Bryan Swain and J.C. Salvo of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

**EISENHAUER, J.**

Narendj Vakili-Kakavandi appeals from an order modifying the child custody and child support provisions of a marriage dissolution decree. Hamid Kakavandi cross-appeals. We affirm in part and reverse in part.

**BACKGROUND FACTS AND PROCEEDINGS.**

Hamid and Narendj were married on May 15, 1991. They have two children, a son Rezza Kakavandi, born on August 27, 1992, and a daughter Rojahn Kakavandi, born on January 24, 1995. Their marriage was dissolved on April 6, 2005. The decree granted the parties joint legal custody and placed physical care of both children with Narendj with liberal visitation rights to Hamid.

Problems in the relationship between Narendj and the children, especially Rezza, began to surface after the decree was entered. Rezza and Narendj engaged in frequent verbal and physical conflicts. After a fight on May 20, 2006, Rezza jumped out of his bedroom window and ran to Hamid's house. He has been staying there since.

On April 3, 2006, one year after the dissolution was finalized, Hamid filed an application to modify the decree requesting physical care of the children. Hamid's application was heard by the district court on October 12, 2006. The court entered an order of modification on November 2, 2006, changing Rezza's physical care from Narendj to Hamid, and changing Rojahn's physical care from Narendj to joint physical care. The order also reduced the amount of child support and awarded attorney fees to Narendj. Narendj appeals, arguing that the district court erred in: (1) modifying the children's physical care, (2) not permitting the attorneys to be present and ask questions during examination of the children,

and (3) determining child support. She also seeks reasonable attorney fees for the appeal. Hamid filed a cross-appeal, claiming the district court erred in: (1) failing to place physical care of Rojahn with him, (2) not retroactively reducing his child support, and (3) ordering Hamid to pay Narendj's attorney fees and the court costs.

Our Scope of review in custody modification proceedings is de novo. Iowa R. App. P. 6.4; *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). At the same time, we recognize the virtues inherent in listening and observing the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

#### **ISSUE I: PHYSICAL CARE**

Our primary consideration in determining the appropriate child custody and visitation is the best interest of the child. *In re Marriage of Wessel*, 520 N.W.2d 308, 309 (Iowa Ct. App. 1994). Once physical care of a child has been established by a final decree, it should not be disturbed unless there has been a substantial change of circumstances since the time of the decree, not contemplated by the court when the decree was entered. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change must be more or less permanent and relates to the welfare of the child. *Id.* In addition, the parent seeking a change in custody has a heavy burden to prove by preponderance of evidence that he or she has an ability to render superior care. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998).

In the present case, the district court did not make specific finding as to what change of circumstances warranted the modification of the physical care. Hamid asserts the following changes: (1) Narendj has been physically and emotionally abusive to the children, (2) the relationship between Narendj and the children has deteriorated, (3) Narendj has failed to support the children's relationship with Hamid, and (4) the children want to live with him.

***Physical Care of Rezza.*** The record reveals many incidents of conflicts between Narendj and Rezza. However, the district court found that, despite the conflicts, Narendj was not physically abusive to the children. The district court stated there was plenty of blame to pass around and Rezza was just as responsible as his mother. We find the record supports this finding. Many of the fights occurred when Narendj attempted to set rules and discipline the children. There is also evidence Rezza initiated some of the conflicts in the hope of having his physical care transferred to his father.

Hamid alleges Narendj's yo-yo-like mood swings and all-or-nothing attitude caused confusion to the children and hurt them emotionally. Narendj's personality and psychological suitability to take care of the children was already considered by the district court when determining the physical care of the children in the original decree. In that proceeding, the court found Narendj was able to nurture and support the children. In the modification action, the court once again found Narendj to be a kind, caring and loving mother who was nurturing to her children. Although her tendency to live by the "letter of law" caused her to be inflexible when it came to the children, we do not find Narendj to be emotionally abusive.

However, the frequent conflicts between Narendj and Rezza indicate a significant breakdown of their relationship. They also reflect Rezza's strong preference to have his physical care changed to Hamid. Ordinarily, a child's preference in a modification proceeding is not to be given as much weight as in the original action. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). In this case, however, Rezza, age fourteen at time of trial, is a very intelligent child with a strong will. His determination to live with his father was a significant factor leading to the deteriorating relationship with his mother. Rezza testified his relationship with Narendj had improved since he started living with Hamid. We find Rezza's preference and the breakdown of the relationship between Rezza and Narendj constitute a substantial change of circumstances.

Hamid has been getting along well with Rezza. Rezza testified he became more physically and emotionally stable since moving in with his father. He also stated he was able to socialize better at school since he did not have to worry about his relationship with Narendj. We conclude that Hamid is capable of providing superior care to Rezza in that he provides Rezza with a more stable and peaceful family environment. The district court did not err in transferring the physical care of Rezza to Hamid.

***Physical Care of Rojahn.*** We do not find a substantial change of circumstances as to Rojahn. Different from Rezza, Rojahn expressed a much stronger affection towards Narendj. There was little direct confrontation between Rojahn and Narendj. Under Narendj's care, Rojahn performs well academically and has many friends at school. Narendj will be able to provide the care and assistance Rojahn needs as she enters her teenage years.

Even if we found a substantial change in circumstances, joint physical care would not be proper in this case. Joint physical care is beneficial to the children only if parents respect each other, and are able to cooperate and communicate. *In re Marriage of Hansen*, \_\_\_N.W.2d\_\_\_, \_\_\_ (Iowa 2007). “Where the parties’ marriage is stormy and has a history of charge and countercharge, the likelihood that joint physical care will provide a workable arrangement diminishes.” *Id.* The original decree rejected the option of joint physical care because of the acrimony and lack of adequate communication between Hamid and Narendj. That situation has not improved. Joint physical care is not in Rojahn’s best interest.

We recognize the long-established presumption that siblings should not be separated except for good and compelling reasons. This is one of the cases where there are compelling reasons for the separation. The factors that warrant the modification of Rezza’s physical care are not present with Rojahn. It is in Rojahn’s best interest to stay with Narendj with very liberal visitation to Hamid.

## **ISSUE II: COURT’S EXAMINATION OF THE CHILDREN**

DeShawne Bird-Sell functioned as a guardian ad litem by agreement of the parties. At trial, she suggested the district court judge talk to the children individually. With approval of the parties, the district court judge interviewed the children outside the presence of the attorneys. The interview was reported. The district court stated in the modification order that the children’s testimony was the “most compelling evidence received by this Court.”

On appeal, Narendj argues that the counsel should have been present at the interview. She claims that even though the trial court made a record, counsel

did not have access to the record during the trial to know what questions the court asked; what responses the children made and what inconsistencies there were between the testimony of the children and the parents. She requests the case be remanded to give the parties an opportunity to produce evidence in light of the children's testimony.

No objection was made at trial to the examination of the children. Likewise no request was made by either party for a transcript of the children's testimony. No post-trial motion was filed seeking to have the children's testimony disregarded. Error was not preserved. *In re Marriage of Tjaden*, 199 N.W.2d 475, 477 (Iowa 1972) (holding the issues on appeal are limited to those propositions raised and error, if any, preserved in the course of the trial proceedings).

### **ISSUE III: CHILD SUPPORT**

The trial court reduced Hamid's child support amount from \$2,092 per month to \$1,000 per month beginning December 1, 2006. Narendj challenges the amount ordered because little information was provided to the court about the income of the parties and no child support guidelines worksheets were provided. The trial court made no findings as to the income of the parties and did not address medical insurance. For these reasons and because we are reversing the joint physical care decision we remand on this issue. The district court should consider relevant evidence and compute the amount of child support using the child support guidelines.

Hamid requests retroactive modification of child support based on Iowa Code section 598.21C(4) (Supp. 2005). Section 598.21C(4) states that "child

support awards . . . may be retroactively modified only from three months after the date of the notice of the pending petition for modification is served on the opposing party.” Hamid’s petition for modification was served on Narendj on March 31, 2006. By July 1, 2006, three months had past and Rezza had been living with Hamid for over a month. Hamid claims that his child support obligation should have been reduced retroactively beginning July 1, 2006.

The application of retroactive modification is not mandatory but at the district court’s discretion. We do not find the district court abused its discretion in refusing to grant retroactive modification. In addition, our cases have consistently held that, although the support may be retroactively increased, it may not be retroactively decreased. *In re Marriage of Baker*, 600 N.W.2d 321, 323-24 (Iowa 1999). Hamid’s claim has no merit.

#### **ISSUE IV: ATTORNEY’S FEES**

The district court ordered Hamid to pay \$2,500 toward Narendj’s attorney fees and all the court costs. Hamid argues that Narendj should be required to pay her attorney fees and one-half of the court costs. An award of attorney fees rests in the court’s discretion, and we do not find the district court abused its discretion in awarding Narendj attorney fees.

Narendj requests appellate attorney fees. An award of appellate attorney fees rests within the discretion of the appellate court. *Spiker v. Spiker*, 708 N.W.2d 347, 360 (Iowa 2006). In making the determination, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996).



In the present case, Narendj is attending school and has no income except the alimony and child support. Hamid, on the other hand, has substantial income and more ability to pay. The record justifies awarding appellant attorney fees to Narendj. We award \$5,000. Costs are assessed to Hamid.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**