

IN THE COURT OF APPEALS OF IOWA

No. 7-899 / 07-0169
Filed January 30, 2008

**IN RE THE MARRIAGE OF VINCENT J. GOODLIFFE
AND REBECCA E. GOODLIFFE**

**Upon the Petition of
VINCENT J. GOODLIFFE,**
Petitioner-Appellant,

**And Concerning
REBECCA E. GOODLIFFE,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

A father appeals a district court order denying his request for modification
of physical care and legal custody provisions of dissolution decree. **AFFIRMED.**

Judy Johnson and Eric Borseth of Borseth Law Office, Altoona, for
appellant.

Angela Gruber-Gardner of Marks Law Firm, Des Moines, for appellee.

Heard by Eisenhauer, P.J., and Baker, J. and Nelson, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BAKER, J.

This case involves two people who agreed to split custody of their two children. Both children are doing well in their respective homes. The problem arises because one of the parties moved approximately an hour-and-a-half away, requiring a modification of the prior agreement. Both sought to modify physical care and, at a minimum, visitation required change based on the move.

I. Background and Facts

Vincent and Rebecca were married on November 18, 1991. Two children were born of this marriage, Andrea in October 1992, and Alisa in March 1998. During the marriage, the couple lived in the Des Moines area. Approximately two months after the decree was entered, Vincent moved to Afton.

Andrea is a good student who was enrolled in the talented and gifted program in the Des Moines Public School District. She continues to be a good student and currently participates in volleyball, band, chorus, and other activities in her new school.

Alisa is also a good student. Dr. Sheila Pottebaum, Ph.D., has diagnosed Alisa with attention deficit disorder and Asperger's Syndrome, a form of autism which is characterized by difficulty with changes and a preference for sameness. Alisa has been involved in the special education program at her elementary school in the Des Moines Public School District and has had the same special education teacher since kindergarten. The Des Moines schools have a specialized autism team to work with Alisa. She initially required an associate, but no longer needs one. Although she now spends the majority of her day in the regular classroom, she continues to have difficulty with social interaction and

behavior. These difficulties require continued contact with her special education teacher. Dr. Pottebaum, who has treated Alisa since 2002, does not recommend any change for her regarding her school placement or home routine.

The couple separated in 2004. A stipulated decree of dissolution of marriage was entered on March 18, 2005. The decree provided for joint legal custody of the children. Vincent was awarded physical care of Andrea, and Rebecca was awarded physical care of Alisa. A detailed visitation schedule was entered whereby Vincent had visitation with Alisa every Thursday night and weekend, and Rebecca had visitation with Andrea every Monday and Wednesday from 5:00 a.m. until 3:30 p.m. the following day, and every Friday from 5:00 a.m. until 9:00 a.m. Saturday morning. At the time of the decree, Vincent and Rebecca lived in close proximity, and both children attended school in Des Moines.

On June 5, 2005, Vincent moved to Afton, which is approximately one-and-one-half hours from Des Moines to live with Tami, who he married on February 14, 2006. Tami has three children from a previous marriage who reside with Vincent, Tami, and Andrea in Afton.

On February 17, 2006, Rebecca married David. They have one child together, born July 13, 2006. David has four other children from a previous marriage. When David exercises his visitation (every other weekend and holidays), David's children stay with Rebecca, David, Alisa, and the baby.

Rebecca and Vincent were Jehovah's Witnesses during their marriage and raised their children accordingly. Both have been disfellowshipped. Vincent no

longer believes in nor practices the Jehovah's Witnesses doctrine. Rebecca remains loyal to the doctrine and continues to raise her children in the religion.

Rebecca has been diagnosed with multiple sclerosis (MS). During the marriage, she was hospitalized several times, and for limited times was confined to a wheelchair, due to the disease. She has also sought treatment for depression. Both her MS and depression have improved since the dissolution.

Since Vincent's move to Afton, which made the visitation arrangements as established in the decree unworkable, the parties have experienced conflict, especially related to where Andrea would attend school. In June 2005, Vincent initiated an investigation by the Iowa Department of Human Services (DHS) alleging David's child was sexually abusing Alisa. DHS investigated the claim and concluded the abuse allegations were unfounded. Dr. Pottebaum expressed concern with Vincent's handling of the incident, and stated "Alisa has been clear in our office that the concerns occurred in the father's home."

On August 8, 2005, Rebecca filed a petition for relief from domestic abuse. Among her complaints were allegations that Alisa was being sexually abused by a child in Vincent's home, that he was using an unregistered babysitter, and that he had removed Andrea from her school. Following an August 18, 2005 hearing, the petition was dismissed because Rebecca had "failed to prove that [Vincent] committed domestic abuse assault" upon her.

Despite Rebecca's objections, Vincent enrolled Andrea in the East Union School District. Vincent also wrote a letter to the school stating Rebecca was not to visit with or take Andrea from the school without his permission because he had primary custody and "the schedule that was made . . . is no longer in effect

due to the fact that it creates both an unstable and unrealistic environment.” The letter further advised the school that Vincent had contacted the sheriff’s office, and the school was to call the sheriff’s office if they had “any trouble” with Rebecca. Andrea started school at East Union on August 22, 2005. Rebecca drove to Afton to get Andrea because Vincent had not returned her pursuant to the visitation agreement. Vincent refused to allow Rebecca to see or talk to Andrea. When Rebecca went to the school, school officials and the Union County Sheriff would not allow her to leave with Andrea. They requested she leave the school, and Rebecca complied.

On August 24, 2005, Rebecca reported to law enforcement officials that Vincent broke into her home, held a knife to her throat, and told her that if she did not drop the child custody issue, she would never see the children again. Police investigation revealed that, at the time Rebecca claimed Vincent was at her home, he was with co-workers on his way to work. On August 31, 2005, Rebecca filed a petition for relief from domestic abuse regarding the alleged incident, which was dismissed for failure to present sufficient evidence to enter a protective order. Rebecca was charged with filing a false report to law enforcement and ultimately entered an Alford plea to the charge.

On November 30, 2005, Rebecca filed a petition to modify decree of dissolution, seeking physical care of Andrea due to Vincent’s move to Afton. Vincent filed an answer seeking sole legal custody and physical care of both Andrea and Alisa. The district court denied the parties’ petitions to modify the decree and ordered liberal and reasonable visitation to be agreed upon by the parties. (In the event they were unable to agree upon a visitation schedule, the

court ordered visitation every other weekend and alternating weeks during summer break.) Vincent appeals, contending the district court erred by failing to modify custody to award him physical care of Alisa, and by failing to award him sole legal custody of both children.

II. Merits

Our review in equity cases is de novo. Iowa R. App. P. 6.4. We are not bound by the district court's findings of facts, but we give them deference because the district court had a firsthand opportunity to view the demeanor of the parents and evaluate them as custodians. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998); see also Iowa R. App. P. 6.14(6)(g). When we determine physical care, our primary consideration is the best interests of the children. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

To change custodial provisions of a dissolution decree, the petitioner must prove by a preponderance of the evidence conditions since the decree was entered have so materially and substantially changed the children's best interest make it expedient to make the requested change. The party seeking to take custody from the other must also prove an ability to minister more effectively to the children's well being.

In re Marriage of Rierson, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995) (internal citations omitted).

A "substantial change in circumstances" involves changed conditions which are material as opposed to trivial, permanent or continuous as opposed to temporary, "and must be such as were not within the knowledge or contemplation of the court when the decree was entered." *In re Marriage of Pals*, 714 N.W.2d 644, 646-47 (Iowa 2006) (citations omitted). "This heavy burden stems from the principle that once custody of children has been fixed it should be disturbed only

for the most cogent reasons.” *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

The district court found, and the parties do not dispute, that “Vincent’s relocation with Andrea constituted a substantial change in circumstances sufficient to modify the custodial and visitation provisions of the parties’ decree.” The question on appeal, therefore, is whether Vincent has met the heavy burden of proving that he can more effectively minister to the children’s well being.

Factors a court must consider to determine what child custody arrangement is in the children’s best interests include:

- a. Whether each parent would be a suitable custodian for the child.
- b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
- c. Whether the parents can communicate with each other regarding the child’s needs.
- d. Whether both parents have actively cared for the child before and since the separation.
- e. Whether each parent can support the other parent’s relationship with the child.
- f. Whether the custody arrangement is in accord with the child’s wishes or whether the child has strong opposition, taking into consideration the child’s age and maturity.
- g. Whether one or both the parents agree or are opposed to joint custody.
- h. The geographic proximity of the parents.
- i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.
- j. Whether a history of domestic abuse, as defined in section 236.2, exists.

Iowa Code § 598.41(3)(a-j) (Supp. 2005).

A. Physical Care

Vincent contends the district court erred by failing to modify custody to award him physical care of Alisa because he proved he has a superior ability to

minister to her needs. He argues that the record raises concerns about Rebecca's ability to provide Alisa with the care and supervision that she requires.

"The characteristics of each child, including age, maturity, mental and physical health" is an important consideration in child custody determinations. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The district court conducted a careful analysis of Alisa's needs, specifically noting Dr. Pottebaum's recommendation that her parents refrain from changing Alisa's school placement or home routine. We agree with the district court's conclusion that

Rebecca's home provides Alisa with greater stability and predictability than Vincent's home. The effect on Alisa of removing her from her mother's home and her school would be severe due to her Asperger's Syndrome. Alisa received special education at Morris Elementary which has substantially aided her in handling her disorder. While the East Union school officials testified that they could manage Alisa's special needs, there are no personnel specifically trained to address Asperger's Syndrome.

Alisa's unique characteristics, including the severe effects of removing her from her home and school and disrupting her routine, weigh heavily in favor of Alisa remaining in Rebecca's physical care.

Vincent next argues that the characteristics of both parents require more attention than was given by the district court. See *Winter*, 223 N.W.2d at 166 (noting the "characteristics of each parent, including age, character, stability, mental and physical health" as a factor to be considered in determining child custody). He contends that, "[g]iven Rebecca's ongoing battle with MS, the Court should question what type of environment she is providing for the children." The district court specifically noted Rebecca's treating physician's statement that her MS "does not result in her inability to care for her children." The court also

noted that she has sought treatment for her depression and her condition has improved. Upon our de novo review of the record, we agree with the district court's conclusion that Rebecca's "physical condition does not prevent her from being able to care for her children."

Vincent also contends there are issues with Rebecca's household that warrant concern. Specifically, he asserts that when David's children visit, there are seven children in the home, and the "emotional environment in Rebecca's home is also lacking." While Rebecca's home may be crowded at times, if Vincent were awarded physical care of Alisa, she would be the fifth child living in his home on a regular basis. The district court specifically noted that Rebecca is able to be home with the children during the week because she works primarily on weekends, she administers well to Alisa's needs, and Alisa has thrived in Rebecca's care as evidenced by her improvement at school. We agree with the court's conclusion that Rebecca's home offers relative advantages for Alisa. Vincent has failed to demonstrate he can provide a superior home.

Vincent also contends the district court erred in not according proper weight to Rebecca's attempted alienation. "In determining custody we can give great weight to a parent's attempt to alienate a child from her other parent if evidence establishes the actions will adversely affect a minor child." *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992) (citation omitted). Vincent points specifically to Rebecca's claim to police that he broke into her home and threatened her, for which she was charged with filing a false report to law enforcement, as evidence of her attempted alienation. Rebecca counters that Vincent attempted to alienate the children from Rebecca by filing a child abuse

complaint with DHS. We agree with the district court that “[s]ince their separation and divorce, the parties have engaged in actions which cause this court to question their judgment to effectively parent.” A careful review of the record reveals that both parties have done things to undermine the children’s relationship with the other parent. Neither parent has demonstrated a superior ability to support the other’s relationship with the children. See Iowa Code § 598.41(3)(e); see also *Winter*, 223 N.W.2d at 166-67 (“Determining what custodial arrangement will best serve the long-range interest of a child frequently becomes a matter of choosing the least detrimental available alternative.”).

Vincent also argues the district court’s ruling prevents significant emotional and physical contact between the children. Split physical care occurs when each parent has physical care of one child. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). It is generally disfavored because it deprives siblings of the benefit of continuous association with each other. *Id.* Split physical care is appropriate, however, where it promotes the long-range best interests of the children. See, e.g., *id.* at 245-46 (approving split physical care where the siblings were separated for fifteen months and the “situation [did] not appear to have been detrimental to the children”).

In this case, the district court noted that, despite living in separate households, the girls share a close bond. Further, the district court’s order did not create a split physical care arrangement—the parties stipulated to the arrangement at the time of the dissolution. The change in circumstances, i.e., the move, was of Vincent’s own making. *Cf. Ellis v. Ellis*, 262 N.W.2d 265, 268 (Iowa 1978) (denying modification of support obligation where the party’s

inability to pay was voluntary). Given his prior agreement to the arrangement, and the fact that it was his move to Afton that made the established visitation arrangements unworkable, we find Vincent's current concern that split physical care deprives Alisa of frequent contact with Andrea to be simply disingenuous.

For the foregoing reasons, we conclude the district court properly denied Vincent's petition to modify custody and award him physical care of Alisa.

B. Legal Custody

Vincent further contends the district court erred by failing to modify custody to award him sole legal custody of both children. He argues that the intense hostility between him and Rebecca and their inability to communicate effectively precludes an award of joint custody.

Joint legal custody is favored whenever it is reasonable and in the children's best interests. Iowa Code § 598.41(1); *In re Marriage of Brainard*, 523 N.W.2d 611, 614 (Iowa Ct. App. 1994). "Hostility between parents and their inability to effectively communicate, however, may preclude an award of joint custody." *Marriage of Brainard*, 523 N.W.2d at 614 (citation omitted). A court may award sole legal custody where there is clear and convincing evidence that "joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed." Iowa Code § 598.41(2)(b).

"The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances." *Marriage of Winnike*, 497 N.W.2d at 173. While the record contains numerous examples of Vincent and Rebecca's hostility toward

each other and their inability to communicate, we find the circumstances of this case are not sufficiently compelling to justify setting aside joint custody in favor of awarding Vincent sole custody of the children. We hope the parties recognize the need to decrease their hostility, improve their communication, and work together in their daughters' best interests.

For the foregoing reasons, we conclude that the district court properly denied Vincent's petition to modify custody to award him sole legal custody of both children. We also affirm that portion of the order.

C. Attorney Fees

Rebecca requests an award of 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 parties' respective abilities to pay, and whether the requesting party was defending the district court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We determine Rebecca was forced to defend the district court's decision and was successful in her defense. We therefore award her \$1000 in appellate attorney fees.

III. Conclusion

Having considered all issues presented on appeal, we find the custody and placement provisions set forth by the district court are appropriate.

AFFIRMED.