

**IN THE COURT OF APPEALS OF IOWA**

No. 8-179 / 07-1075  
Filed June 25, 2008

**IN RE THE MARRIAGE OF NATHAN LUETHJE  
AND STACY LUETHJE**

**Upon the Petition of  
NATHAN JON LUETHJE,**  
Petitioner-Appellee,

**And Concerning  
STACY NICOLE LUETHJE,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Warren County, Gregory D. Hulse,  
Judge.

Stacy Luethje appeals the district court's order modifying the child custody provisions of the decree dissolving her marriage to Nathan Luethje. **AFFIRMED.**

Katherine Daman and Rod Powell of the Powell Law Firm, P.C., Norwalk,  
for appellant.

Mason J. Ouderkirk of Ouderkirk Law Firm, Indianola, for appellee.

Heard by Huitink, P.J., Mahan, J., and Schechtman, S.J.\*

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

**MAHAN, J.**

Stacy Luethje appeals the district court's order modifying the child custody provisions of the decree dissolving her marriage to Nathan Luethje. We affirm.

**I. Background Facts and Prior Proceedings**

Nathan and Stacy had a son in November 1999 and were married in April 2001. Stacy gave birth to their second son in November 2001 and a daughter in May 2003. In October 2004 the court entered a dissolution decree ending their marriage. Pursuant to this decree, both parents had joint legal custody of the children. Stacy was awarded physical care. The court also set forth a very liberal visitation schedule for Nathan. In essence, Nathan had the children on weekends and Stacy had the children during the week. Plus, Nathan had the children for six weeks during the summer. Following the divorce, Stacy and the children lived with Stacy's parents.

Stacy abused alcohol after the divorce. She also began to date men who Nathan believed to be dangerous. One of these men, Tim, moved in with Stacy at her parents' home. Nathan knew Tim and knew that he had recently been released from prison. Nathan told Stacy that he did not approve of Tim living with his children. Stacy continued to live with Tim, and Stacy gave birth to Tim's son. This child was born with severe birth defects. The child is paralyzed, has a shunt to remove liquid from his brain, and requires constant supervision.

In the spring of 2006, during a visitation a member of Nathan's family observed the daughter disrobe a doll, spread its legs, and lick its crotch. Nathan

told Stacy he was concerned about the incident, but Stacy minimized the situation.

In September 2006 Stacy found Tim and her three-year-old daughter in the bedroom. Stacy felt like something did not seem right, so she questioned her daughter. The daughter indicated Tim had touched her genitals. She also said they were watching a "Barbie" movie where the women were touching each other's genitals. Stacy confronted Tim and he admitted he had been watching a pornographic movie and had not realized the daughter was in the room. Tim denied touching the daughter.

Two days later, Stacy told Nathan about the incident. Nathan immediately contacted the police. Stacy and Tim spoke with a detective and child protection authorities. Everyone agreed that the children would not be removed so long as Tim did not have any more contact with Nathan's three children.

Ten days later, an investigating officer made an unannounced visit to Stacy's residence and found Tim there with the children. Sometime during the next month, the children also told Nathan that Tim had come back to Stacy's house and given them a gift. Nathan contacted the authorities, and the Iowa Department of Human Services began removal proceedings.

On October 17, 2006, Stacy signed a form consenting to the removal of all four children. In this removal, she admits that she and her parents had allowed Tim contact with Nathan's children even though she had agreed not to allow him to have contact with the children. She also admitted she was unable to protect

the children and follow guidelines that were established to keep the children safe from further abuse. The court placed Nathan's three children in his care.<sup>1</sup>

The State filed a petition alleging the children were in need of assistance on October 18, 2006. On December 12, 2006, the juvenile court issued an order adjudicating all four children as children in need of assistance (CINA). A subsequent dispositional hearing on January 12, 2007, confirmed the adjudication. The court granted concurrent jurisdiction, and Nathan filed the present petition to modify the dissolution decree. Tim eventually pled guilty to related charges and was sentenced to prison.

After a hearing, the court entered a ruling modifying the dissolution decree. The court found there had been a substantial change in circumstances since the original decree in that Stacy failed to provide a safe environment for the children and failed to properly supervise them, resulting in a sexual assault on the daughter by Stacy's live-in boyfriend. The court then ordered that the children be placed in Nathan's physical care with a set visitation schedule for Stacy. The court stated that Stacy would have visitation on alternating weekends, beginning at 5:00 p.m. Friday evening and ending at 7:00 p.m. on Sunday evening. The court also stated that Stacy would have two, two-week periods of visitation during specific weeks of the summer.<sup>2</sup>

Stacy now appeals, claiming the court erred in (1) finding that there was a change in circumstances that warranted a change in custody, (2) awarding

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<sup>1</sup> Stacy's fourth child was placed in foster care.

<sup>2</sup> In its modification ruling, the district court decided a joint physical care arrangement was not appropriate because both parties could not communicate with one another. On appeal, neither party challenges the court's ruling on the issue of joint physical care. Accordingly, we will not address this issue on appeal.

primary physical care to Nathan, and (3) setting forth a visitation schedule that “drastically” limits the amount of time she has with the children. Nathan resists and also requests that we award him reasonable appellate attorney fees.

## **II. Standard of Review**

We review modification proceedings de novo. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). Our overriding consideration is the children’s best interests. *Ford*, 563 N.W.2d at 631.

## **III. Merits**

A party seeking modification of a dissolution decree must establish there has been a substantial change in circumstances since the entry of the decree. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). To change a custodial provision of a dissolution decree, the applying party is required to establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the child’s best interests make it expedient to grant the requested change. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the child, *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002),

and to minister more effectively to the child's well-being. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). 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. *Mikelson*, 299 N.W.2d at 671.

We find it clear from the record that there has been a substantial change in circumstances since the original decree. Stacy's decision to live with Tim placed the children at significant risk. Once it was discovered that Tim had abused the daughter, Nathan, Stacy, and the child protective authorities all agreed that Tim would have no more contact with the daughter. However, ten days later an investigating officer found Tim in the house with Stacy and the children.<sup>3</sup> Because Stacy was unable to protect her children from Tim, the children were adjudicated CINA, removed from her care, and placed with Nathan. The children have not been returned to Stacy's care. They have remained in Nathan's care since October 2006. We, like the district court, find this constitutes a substantial change in circumstances.

We now turn to the issue of whether Nathan proved himself able to provide superior care for the children. Stacy claims the court should not have modified the physical care arrangement because she remedied the safety issue in her home—Tim is now in prison. She points to testimony from the in-home provider associated with the CINA case which described her as a "very effective" parent. Stacy also points out that she has progressed to unsupervised visitations with Nathan's children and that her fourth child has been returned to her care.

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<sup>3</sup> Stacy contends Tim was only there briefly and was not allowed in the house. Upon our de novo review of the evidence, we find Stacy's testimony describing the event is not credible.

Finally, Stacy claims the court's modification ruling is not appropriate because Nathan cannot set aside his resentments towards her and does not promote her continuing physical and emotional contact with the children. See Iowa Code § 598.4(1)(c) (2007) ("The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.").

Nathan claims Stacy's battle with substance abuse should be a significant factor in our physical care analysis. He argues her previous role as the primary caretaker of the children has been negated because (1) the children were removed from her care due to her failure to protect the children from harm and (2) he has been the children's primary caretaker since October 2006. He points out that the children are thriving in his care and that there are absolutely no safety concerns regarding his ability to parent the children. Finally, he notes that the daughter's psychiatrist testified at the hearing and recommended that the daughter not be returned to Stacy's care at the present time.

The critical issue in deciding physical care is not which parent possesses the greater right to the children; rather, the controlling consideration is the best interests of the children. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the children. *Id.* Our objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Id.* Greater primary care experience is one of many factors the court considers, but it does not ensure an

award of physical care. See *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995).

The children have spent a larger portion of their lives in Stacy's physical care. However, the amount and quality of that physical care is subject to dispute. First, Stacy had a very loose parenting style with few rules for the children. For example, the children did not have bedtimes. The record also reveals that Stacy's mother cared for the children while Stacy left the home to drink. Up until three weeks before trial, Stacy did not have a driver's license because of a prior conviction for operating a vehicle while intoxicated. Prior to the commencement of the CINA proceeding, she associated with men with prior criminal histories. Stacy's unpredictable behavior also often interfered with Nathan's visitation privileges. Sometimes, Nathan was not able to find Stacy so that he could return the children to her care after his scheduled visitation. In these circumstances, he would either leave the children with Stacy's parents or, if they were nowhere to be found, just keep the children an extra night.

Stacy claims she no longer abuses alcohol or drugs and that she still attends a substance abuse class.<sup>4</sup> However, she also admits that she still drinks alcoholic beverages. There is no corresponding concern that Nathan abuses or has abused alcohol or other substances. We find this factor indicative of the overall stability he would be able to provide for the children. Nathan is married, owns his own home, and works at a full-time job. He and his wife have arranged

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<sup>4</sup> Stacy admits that she has "experimented" with methamphetamine, cocaine, marijuana and other "hard" drugs.



their work schedules so one of them is always home with the children. Stacy, on the other hand, does not have a job and lives at home with her parents.

Because the dissolution decree set forth a very liberal visitation schedule and Stacy was often willing to give him extra visitation, the children spent nearly half of the time in Nathan's care. This, when coupled with the fact that they have remained in Nathan's physical care since October 2006, minimizes any concern that a change to their physical care arrangement would have a negative impact on the children. We also find that neither parent has demonstrated the ability to communicate effectively with the other. We find no reason to attribute this communication problem solely to Nathan, and therefore reject Stacy's claim that she would be the one more likely to promote the children's continuing physical and emotional contact with both parents.

Upon our de novo review of the record, we conclude the district court properly awarded Nathan primary physical care because he has proven he possesses the ability to provide superior care for the children and he is the parent most likely to bring them to a healthy, physical, mental, and social maturity. See *Kunkel*, 555 N.W.2d at 253. We also find the visitation schedule set forth by the district court is appropriate.

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

Nathan requests appellate attorney fees for his defense of this appeal. Appellate attorney fees are not a matter of right, but rather rest in the court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the needs of the party making the request, the ability of the other party

to pay, and the relative merits of the appeal. *Id.* After considering these factors, we decline to award Nathan appellate attorney fees. Costs on appeal are assessed to Stacy.

**AFFIRMED.**