

**IN THE COURT OF APPEALS OF IOWA**

No. 8-289 / 07-1790  
Filed October 1, 2008

**KOREY K. WILKER,**  
Petitioner-Appellee,

**vs.**

**CHRISTINA BUSE,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Dallas County, Gary G. Kimes,  
Judge.

A mother appeals from a district court ruling modifying the physical care  
provision of the decree establishing custody of the parties' minor child.

**AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des  
Moines, for appellant.

Jeffrey A. Kelso of Howe, Cunningham & Lowe, Urbandale, for appellee.

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

**MILLER, J.**

Christina Buse appeals from a district court ruling modifying the physical care provision of the decree establishing custody of the parties' minor child. We affirm the judgment of the district court.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Christina Buse and Korey Wilker are the parents of Kody, born in November 1998. The parties were never married. A 1999 administrative order established Korey as the father of Kody and ordered him to pay child support. An August 2003 district court order placed Kody in the parties' joint legal custody and in Christina's physical care. The order also established a visitation schedule for Korey and increased his child support obligation.

Korey filed a petition to modify the custodial order in November 2006, alleging Kody should be placed in his physical care due to the imprisonment of Christina's husband, Stuart Buse, and her intent to reunite with him upon his release from prison. The petition came before the district court for trial in August 2007.

At the time of the modification trial, Christina was twenty-eight years old and employed as a claims adjustor at Allied Insurance earning approximately \$35,000 per year. She has lived in Adel, Iowa, with Kody since he was born. Christina married Stuart in May 2000. They have one child together, Caleb, born in November 2000. In 2001, Stuart injured his back and was unable to work for a period of time. He became addicted to prescription pain medications and started abusing alcohol. Christina and Stuart's relationship began to deteriorate in 2003. They argued with one another weekly and separated several times. Christina

admitted to hitting Stuart with a belt on one occasion after learning he had been unfaithful to her.

Stuart filed for divorce from Christina in 2004. They sold their home, and Christina, Kody, and Caleb began living with her parents who also resided in Adel. In March 2005, an intoxicated Stuart called Christina at around two in the morning wanting to talk about their marriage. Christina went to his apartment where they began arguing. She attempted to leave but was prevented from doing so by Stuart. He held her against a wall, punched, and choked her. He then forced her to have sexual intercourse with him against her will. Stuart was arrested and a no contact order was entered prohibiting him from having any contact with Christina. Christina sought and participated in counseling following the assault.

In June 2005, Stuart pled guilty to sexual abuse in the third degree, false imprisonment, and domestic abuse assault. He received a suspended sentence of ten years in prison on the sexual abuse charge, along with five years of probation, and was ordered to serve 360 days in jail on the remaining charges. The sentencing court allowed him to serve his jail sentence while on work release and continued the no contact order. Stuart violated the no contact order in August 2005, which resulted in revocation of his probation and imposition of the original sentence imposed in June of that year. The earliest Stuart could be released from prison is March 2010.<sup>1</sup>

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<sup>1</sup> Stuart has completed substance abuse treatment and an anger management class during his incarceration. He also voluntarily attends a weekly AA meeting offered through the prison. However, before Stuart can be released from prison, he must complete a twelve to eighteen month sex offender treatment program, which he had yet

Christina has actively sought Stuart's release from prison since his incarceration. She wrote a letter to the judge who sentenced Stuart, requesting that he reconsider that sentence. She later wrote a letter to the parole board, seeking Stuart's early release. Christina has additionally sought and obtained modification of the no contact order on several occasions. She ultimately succeeded in canceling the no contact order in March 2006. Christina has also promoted Stuart's relationship with both Kody and Caleb since his incarceration, and she has allowed the children to visit him in prison, although she told Kody that Stuart was "at school for being mean to me."

Korey was twenty-nine years old and employed as laborer earning approximately ten dollars per hour at Wilker Custom Homes, a business owned by his wife, Melissa, at the time of the modification trial. He and Melissa live in St. Olaf, Iowa, which is over two hundred miles from Adel. Korey did not have regular contact with Kody until after the district court order establishing custody and visitation was entered in August 2003. He then began having visitation with Kody every other weekend.

Korey feels that he and Kody have a positive relationship. Kody is comfortable in Korey's home, and he enjoys helping Korey and his grandpa farm. Korey does not, however, have much contact with Kody beyond the visitation schedule set forth in the custodial decree. He does not call Kody in between visits, and he is not actively involved with Kody's schooling or extracurricular activities. Christina did not inform Korey about Stuart's attack on her and his

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to begin at the time of the modification trial. He will be required to register as a sex offender upon his release from prison.

subsequent imprisonment, and Korey did not learn about these events until the fall of 2006, when he heard about them from Christina's father.

Prior to the trial, the district court ordered Christina and Korey to obtain a custody evaluation. They retained Susan Gauger, a clinical social worker for the state of Iowa, to perform the evaluation. She has over twenty-seven years of experience in her field and has frequently testified as an expert witness in custody proceedings. After meeting with the parties and Kody on several occasions, Gauger recommended that physical care of Kody be placed with Korey "[i]f Christina's decision is to reunite with [Stuart]."

Following the trial, the district court entered a ruling granting Korey's petition to modify the physical care provision of the August 2003 custodial order. The court was concerned by Christina's efforts to obtain Stuart's early release from prison and by her desire to reunite with him upon his release from prison given the domestic abuse that had occurred during their relationship. The court found Christina "has not appreciated the consequences of Stuart's actions and how they affect Kody." The court further found she "placed her relationship with Stuart over Kody's safety and well-being." The court accordingly determined there had been a substantial and material change in circumstances since the decree was entered, that Korey would provide superior care for Kody, and that it would be in the Kody's best interest to be placed in Korey's physical care.

Christina appeals. She claims the district court erred in modifying the physical care provision of the parties' custodial decree because Korey did not establish a substantial change in circumstances or the ability to provide superior

care for Kody. She also claims that placing Kody in Korey's physical care is not in his best interests because he will be separated from his half-brother, Caleb.

## **II. SCOPE AND STANDARDS OF REVIEW.**

Our review in this equity matter is de novo. Iowa R. App. P. 6.4; *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). We give weight to the fact findings of the district court, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). Our overriding consideration is always the child's best interests. Iowa R. App. P. 6.14(6)(o).

## **III. MERITS.**

### **A. Physical Care.**

To modify a physical care provision of a decree, the applying party is required to establish by a preponderance of the evidence that a substantial change in circumstances has occurred since entry of the decree, or any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief, and that the change was not within the contemplation of the district court when the prior decree was entered. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). The change must be more or less permanent and relate to the child's welfare. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). Here, unlike an original physical care determination, the question is not which home is better, but whether the parent seeking the change has demonstrated he or she can offer superior care and minister more effectively to the child's well being. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). 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. *Id.* at 214.

Christina initially claims the court erred in finding that Stuart's imprisonment and her desire to reconcile with him after he is released from prison constitute a substantial change in circumstances warranting modification of Kody's physical care. We reject this claim based upon our de novo review of the record.

Christina and Stuart had a turbulent marriage, which culminated with Stuart's brutal assault on Christina in March 2005. Christina testified that Stuart moved out of the parties' home on several occasions. They argued with one another weekly. Christina testified that she hit Stuart with a belt after learning he had been unfaithful to her and that she might have hit him on other occasions. Sarah Armstrong, who lived next door to Christina and Stuart, testified that she once saw Stuart attempting to drive away from the house with Caleb in the car while Christina "was standing on the running board of [the] truck." Kody was inside the house, watching them and crying.

Domestic abuse is a factor in determining the custodial parent. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997); *see also In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa Ct. App. 1996) (stating the criteria for determining child custody in an original proceeding are also applied in a modification). "This stems from the ravaging and long-term consequences of domestic abuse on children." *Daniels*, 568 N.W.2d at 54-55. "Children raised in homes touched by domestic abuse are often left with deep scars, revealed in the form of increased anxiety, insecurity and a greater likelihood for later problems in

interpersonal relationships.” *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994). In addition, children who witness “domestic abuse may develop a low self-esteem and achieve less academic success.” *Id.*

Christina asserts that her abusive relationship with Stuart and his sexual assault of her were not detrimental to Kody because, by all accounts, he is “healthy, well-behaved, and generally a ‘good kid.’” She further asserts that Kody’s safety and well-being is not endangered by her desire to reconcile with Stuart because “Stuart never harmed Kody,” and he “did not commit his crime against Christina in Kody’s presence.” We do not agree.

“Domestic abuse is, in every respect, dramatically opposed to a child’s best interests.” *Daniels*, 568 N.W.2d at 55. In determining whether Korey demonstrated the ability to provide superior care and minister more effectively to Kody’s well-being, Kody’s best interests remain our polestar. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998) (“The best interests of the children is the first and governing consideration in determining the primary care giver of the children.”). “[I]f a parent seeks to establish a home with another adult, that adult’s background . . . becomes a significant factor in a custody dispute.” *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003); see also Iowa Code § 598.21C(g) (Supp. 2005) (stating remarriage of a party is a factor for the court to consider in determining whether there has been a substantial change in circumstances). This is so “because the type of relationship the parent has sought to establish and the manner he or she has established it is an indication of where that parent’s priority for his or her children is in his or her life.” *Decker*, 666 N.W.2d at 179.



The custody evaluation completed by Gauger in this case stated that Christina's "decision to actively pursue reunification with her husband in the face of many obstacles and concerns raises serious red flags." Gauger noted that Christina's psychological evaluation revealed significant concerns, including "denial, repression, and a naïve trust in others," which "could cloud her judgment when it comes to others who have contact with her children." She seriously questioned Christina's "judgment in continuing a relationship with a man who so seriously injured her and jeopardized her children's future."

However, Gauger recognized, and the record demonstrates, that Christina shared a "positive, loving relationship" with Kody. Gauger observed that Kody was "strongly bonded" to his mother, stepfather, and little brother and could not "imagine life outside their home." His relationship with Korey, on the other hand, was not as strong, according to Gauger. She stated it was clear "Korey hasn't established a solid relationship with Kody and needs significant work on his relationship" with him. Gauger predicted that "mov[ing] Kody to his father's care would be tremendously difficult and emotionally devastating to him" due to Korey's lack of active involvement in Kody's life. Christina relies on these observations in arguing that Korey did not establish that he possessed the ability to provide superior care for Kody and to minister more effectively to his well being.

Gauger, however, ultimately opined that it was in Kody's best interests to be placed in Korey's physical care should Christina reunite with Stuart, although she testified at trial that this was a "very, very difficult call." We agree. Spousal abuse, particularly of the violent nature present in this case, discloses a serious

character flaw in the batterer. *Daniels*, 568 N.W.2d at 55. As Gauger testified, “if someone can lose control to the point of where they can hurt another individual . . . they are capable of hurting others as well.” Indeed, in *Brainard*, we stated “domestic abuse places children at a greater risk of being physically abused.” 523 N.W.2d at 615. It is estimated child abuse is present in one-half of homes where spousal abuse is present. *Id.* at n.2. We believe that Christina’s plan to reunite with Stuart after he serves his sentence for the violent crimes he committed against her diminishes her ability to minister effectively to Kody’s well being. See *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998) (stating that when determining the best interests of children, we consider the emotional and environmental stability offered by each parent).

Christina argues that the district court afforded Gauger’s recommendation “too much weight” due to Christina’s testimony at trial that she “was, at best, unsure whether she should reunite with Stuart.” See *Rosenfeld*, 524 N.W.2d at 215 (“We give opinion testimony the weight we consider it deserves after considering, among other things, the expert’s education, experience, familiarity with case, reasons given for the opinion, and interest, if any, in the case.”). We find Christina’s attempts at trial and on appeal to minimize her intent to reconcile with Stuart to be disingenuous in light of her active efforts to cancel the no contact order and procure Stuart’s release from prison.<sup>2</sup>

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<sup>2</sup> The district court found that Christina’s testimony at trial was “somewhat evasive.” We give considerable deference to the district court’s credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Moreover, our own review of the record leads us to agree with the court’s assessment of Christina’s credibility. She often could not recall details of events that would cast her in a poor light. For example, when asked whether she talked to Stuart when he called her cell phone while the no contact

Christina wrote a letter to the judge who sentenced Stuart, requesting that his sentence be reconsidered and stating, “I am not saying that I condone his actions, what I am saying is that I want to get through this with him. . . . [I]t is very important to us to try to rebuild our family.” She was subsequently successful in canceling the no contact order, which allowed her to visit Stuart in prison.<sup>3</sup> She also allowed Kody to visit Stuart in prison, disregarding the objections Korey voiced once he learned about the visits. Christina told Gauger that “she and Stuart definitely planned to reunite as a family.” Stuart likewise testified that it was his intention to begin living with Christina, Kody, and Caleb upon his release from prison. He further testified that he would rather not have Korey be involved in Kody’s life.

We are troubled, as the district court was, by Christina’s efforts to “build and maintain a close relationship between Kody and . . . Stuart, even while Stuart is in prison” and her lack of effort in fostering the same type of relationship between Kody and Korey. See Iowa Code § 598.41(3)(e); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659 (Iowa Ct. App. 1991) (stating in an appeal from a modification proceeding that a statutory factor to be considered in determining custody is whether each parent can support the other parent’s relationship with the child). Christina refers to “the family as being she and Stuart, Caleb, and Kody” and to “both boys as being Stuart’s sons.” Korey

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order was in place, Christina answered, “Maybe a few times. I don’t recall the specifics.” She similarly stated that she could not “remember specifics” as to any “in-person” contact she had with Stuart in violation of the no contact order.

<sup>3</sup> Christina testified at trial that she was able to have visitation with Stuart beginning in May 2007. However, she told Gauger, who conducted her custody evaluation in July and August 2007, that she was “in the process of trying to nullify the No-Contact Order so that she can visit Stuart in prison.” A search performed on Iowa Courts Online indicates the no contact order was actually canceled in March 2006.

testified that Christina often did not inform him about Kody's schooling, extracurricular activities, and medical care. He further testified that he stopped calling Kody at Christina's home because his calls were not answered and his messages were not returned.

After considering the parties' arguments on appeal and reviewing the evidence anew, we ultimately agree with the district court's decision to modify the custodial order and place Kody in Korey's physical care. In close cases such as this, we give careful consideration to the district court's findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995). We accordingly affirm the district court's decision to place physical care of Kody with Korey.

In doing so, we recognize the presumption that siblings should not be separated. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). This presumption applies equally to half-siblings. *Id.* Christina contends the district court erred in failing to apply this presumption properly. The presumption is not "ironclad." *Will*, 489 N.W.2d at 398. However, good and compelling reasons must exist for a departure from the presumption. *Id.* Our primary concern remains the long-range best interests of the child. *In re Marriage of Brauer*, 511 N.W.2d 645, 647 (Iowa Ct. App. 1993). For the reasons detailed throughout this opinion, we conclude the circumstances presented by Stuart's imprisonment and Christina's intention to reunite with him after he is released from prison support a departure from this presumption in order to better promote Kody's long-range best interests. *See In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996) ("[C]ircumstances may arise which demonstrate that separation may better promote the long-range best interests of children.").

**B. Appellate Attorney Fees.**

Korey requests an award of appellate attorney fees. However, he does not cite to any statute or applicable authority authorizing an award of attorney fees in a proceeding to modify an order establishing custody and visitation under Iowa Code section 600B.40.<sup>4</sup> Subject to a “rare exception” not applicable in this case, a party generally has no claim to attorney fees in the absence of a statute or contractual provision allowing such an award. *Hockenberg Equip. Co. v. Hockenberg’s Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993). We therefore deny Korey’s claim for appellate attorney fees.

**IV. CONCLUSION.**

We affirm the district court ruling modifying the physical care provision of the decree establishing custody of the parties’ minor child. Based upon our de novo review of the record, we find Korey established a substantial change in circumstances occurred since the entry of the decree that was not within the contemplation of the district court when the prior decree was entered. We further find Korey demonstrated he could offer superior care and minister more effectively to Kody’s well being and that it is in Kody’s best interests that his physical care be placed with Korey, notwithstanding his separation from his half-brother. Korey’s claim for appellate attorney fees is denied.

**AFFIRMED.**

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<sup>4</sup> We recognize that section 600B.25(1) does grant the district court discretion to award reasonable costs, including attorney fees, in certain circumstances. However, that section appears to apply only to original paternity determinations made pursuant to section 600B.24. Moreover, the cases cited by Korey in support of his appellate attorney fee claim govern an award of attorney fees in an action to modify a dissolution decree. See, e.g., *Maher*, 598 N.W.2d at 568. Such attorney fees are statutorily authorized. See Iowa Code § 598.36.