

IN THE COURT OF APPEALS OF IOWA

No. 8-490 / 07-2107
Filed July 16, 2008

**IN RE THE MARRIAGE OF JAN L. CARMAN
AND SHANE A. CARMAN**

**Upon the Petition of
JAN L. CARMAN,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
SHANE A. CARMAN,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Story County, Michael J. Moon,
Judge.

A father appeals from the district court's order declining his request for
modification of the physical care provisions of his dissolution decree.

AFFIRMED.

Michael Lewis of Lewis Law Firm, P.C., Cambridge, for appellant.

Scott Hippen of Pasley & Singer Law Firm, L.L.P., Ames, for appellee.

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

VAITHESWARAN, J.

Shane Carman and Jan Chance are the parents of Jordan, born in 1994. When the parents divorced in 1997, they stipulated that Jan would have physical care of Jordan and Shane would exercise liberal visitation “to be agreed upon between the parties.” The schedule the parents implemented afforded Shane visitation every other weekend, every Tuesday evening, and every other Thursday evening. The parents followed this arrangement for approximately ten years.

In 2007, Jan applied for a modification of Shane’s child support obligation. Shane countered with an application to modify the physical care arrangement. The district court denied Shane’s counterclaim for physical care of Jordan and granted Jan’s application for an increase in child support.

Shane appealed.¹ On appeal, our review is de novo. Iowa R. App. P. 6.4.

I. Modification of Physical Care

A. Substantial Change of Circumstances

Modification of a physical care arrangement is appropriate only when there has been a substantial change of circumstances since the time of the original order that was not contemplated when the order was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). These changes must be more or less permanent and relate to the child’s welfare. *Id.*

¹ Jan filed a notice of cross-appeal. However, she did not pursue her cross-appeal issues.

Shane maintains there were two changes of circumstances warranting a modification of the physical care arrangement: (1) Jordan's emotional and behavioral problems while living with Jan, and (2) Jordan's desire to live with him.

With respect to the first claimed change, the record supports Shane's assertion that Jan and Jordan occasionally had a tumultuous relationship. Some of the difficulties could be attributed to teenage angst. Jordan's grandmother, for example, testified that "as [Jordan's] gotten older she's gotten at times argumentative and she wants and needs to be independent" Similarly, a family friend characterized Jordan as "a typical teenager," who "has her moments"

Other difficulties could be attributed to the pending litigation. Jan stated that Jordan was stressed by the fact she "was taking her dad back to court for more money."

Difficulties also were triggered by Jordan's separation anxiety dating back to her childhood, and oppositional behavior, noted a few years before the modification application was filed. Jordan was receiving treatment for both. While Shane maintained that Jordan did not manifest these behaviors at his home, he did not care for her on a full-time basis.

On our de novo review, we cannot conclude that these emotional difficulties amounted to a substantial and permanent change of circumstances. Jan sought support from friends and family for age-related problems, attempted to resolve her child support dispute without litigation, and obtained treatment for Jordan's emotional conditions.

Turning to Jordan's preference, her wishes are not controlling but should be considered along with other relevant factors. Iowa Code § 598.41; *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Shane and his wife testified that Jordan had been asking to live with them for two years. Jordan's grandmother provided a different perspective about Jordan's preference. She stated,

sometimes if she's mad at her dad she will say . . . I want to stay with mom. If she's mad at her mom she will say I'm going to go live with my dad but she—she knows how to work one against the other, I think, and she knows how to manipulate.

Jordan, who testified outside the presence of her parents, characterized her relationship with them as follows:

My mother has done a good job and my dad when I'm there does an excellent job, too. They both are great parents and I wouldn't say that living there or living at my mom's is a bad thing

Based on this record, we conclude Jordan's preference does not amount to a substantial change of circumstances.

B. Superior Care

The party seeking a change of custody must also prove an ability to render superior care. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Although Shane showed himself to be a loving and devoted parent, he did not show that he was the superior caretaker. Jan served as physical caretaker for most of Jordan's life and, with the help of her mother, provided consistent and stable care. She communicated effectively with Shane about all aspects of Jordan's life, including her emotional well-being and her educational progress. She also facilitated regular and extensive visitation between Shane

and Jordan for more than a decade. While there is no question Jan experienced some frustration in parenting Jordan, there is scant if any evidence to establish that Shane could have done better. Under these circumstances, we conclude this prerequisite to modification was not established.

II. Appellate Attorney Fees

Jan asks that we order Shane to pay her \$1500 appellate attorney fee bill. An award of appellate attorney fees rests in the court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). The parties' incomes are not so disparate as to warrant an award. Accordingly, we decline the request.

AFFIRMED.