

**IN THE COURT OF APPEALS OF IOWA**

No. 9-1012 / 09-0559  
Filed February 24, 2010

**IN RE THE MARRIAGE OF  
ANGELA MICHELLE STOCKDALE  
AND JOSHUA DANIEL STOCKDALE**

**Upon the Petition of  
ANGELA MICHELLE STOCKDALE  
n/k/a ANGELA MICHELLE PATTEE,**  
Petitioner-Appellant,

**And Concerning  
JOSHUA DANIEL STOCKDALE,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Pocahontas County, Joel E. Swanson, Judge.

A mother appeals from the district court's order denying her application to modify physical care of her children. **REVERSED AND REMANDED.**

Dani Eisentrager, Eagle Grove, for appellant.

David Roth, Waterloo, for appellee.

Heard Vogel, P.J., Eisenhauer, J., and Mahan, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**VOGEL, P.J.**

Angela Stockdale (n/k/a Angela Pattee), appeals from the district court's order denying her application to modify physical care of her and Joshua Stockdale's two children.<sup>1</sup> We reverse and remand.

**I. Background Facts and Proceedings**

Angela and Joshua are the parents of two boys, born in 1997 and 1998. The initial dissolution of marriage decree entered in 2000 gave the parties joint legal custody, but physical care placed with Angela. In October 2005, the parties stipulated to modify the decree to provide Angela and Joshua with joint physical care of the boys. In November 2005, Joshua became involved in soliciting sexual activity from two under-aged females from an internet site. Although he made arrangements to meet with the young girls, prior to any in-person contact, he learned the two "girls" were in fact law enforcement officials, and he had been caught in a sting operation. He pled guilty to charges in November 2007, which required him to be placed on the sexual offender registry. He was also placed on probationary status for four years.<sup>2</sup> His whereabouts continue to be monitored through the use of an electronic ankle device by the Department of Correctional Services. Angela did not learn of the charges, convictions, nor that Joshua was placed on the sexual offender registry until sometime in 2008.

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<sup>1</sup> We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. See Iowa R. App. P. 6.905(7)(c).

<sup>2</sup> Specific information regarding his convictions was not included in the record on appeal; however, his probation officer testified, and Joshua admitted, he "was convicted of two counts of enticing and two counts of prostitution, all were aggravated misdemeanors." He testified that he received a deferred judgment on two of the charges.

Based on this newly acquired information, and citing a substantial change in circumstances, Angela filed a petition for modification in May 2008, requesting “sole legal custody of the boys.”<sup>3</sup> In July 2008, Angela sought and was granted a temporary injunction requiring Joshua’s contact with the boys to be limited and supervised by his mother. After a September 19, 2008 hearing, the district court denied Angela’s request to change the joint physical care of the boys to physical care with her. She appeals.

## **II. Standard of Review**

We review child custody orders de novo. *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, 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 Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). The controlling consideration in child custody cases is always what is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

## **III. Physical Care**

Angela contends a substantial and material change in circumstances occurred since October 2005, warranting modification of physical care from joint to sole physical care to her. To change the custodial provisions of a decree, the party seeking modification must establish by a preponderance of evidence that

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<sup>3</sup> Based on her argument as a whole, we believe Angela was requesting “physical care” of the boys, not “sole legal custody.” See Iowa Code § 598.41(5).

conditions since the decree was entered have materially and substantially changed. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The burden to modify a custody provision is a heavy one. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). The parent seeking to change physical care of the child must prove an ability to minister more effectively to the child's well being than the current physical care parent can render. *Frederici*, 338 N.W. 2d at 158.

Angela states she presented evidence of numerous factors, which when combined, created a substantial change in circumstances warranting a change from joint physical care to physical care with Angela. Angela's primary argument for modification was Joshua's 2007 convictions for sex-related crimes, his placement on the sexual offender registry, and being on probation. An outgrowth of Joshua's criminal activity was his withholding information from Angela, or giving her misleading information with regards to his residence, and hence the location of the boys when they were in his care.

While the district court called Joshua's offense "incredibly bad judgment," it found "no credible evidence to suggest Joshua Stockdale does not have the best interests of his sons when he has physical care." We disagree.

Following the 2005 modification, Angela maintains she noticed behavioral changes in the boys; they were disrespectful, demanding, used foul language, failed to complete schoolwork, and were frequently overly tired. One son suffers from anger issues and violent outbursts, and had been in therapy for about one and one half years prior to the hearing. He was diagnosed in August 2008 with anxiety and depression and prescribed an antidepressant. Joshua refused to

acknowledge the diagnosis and hence has refused to administer the medication to his son.

In addition, Angela asserts communication between her and Joshua completely broke down prior to her learning of his conviction, primarily attributed to the fact he was keeping pertinent information regarding the boys from her. See *In re Marriage of Hansen*, 733 N.W.2d 683, 698 (Iowa 2007) (explaining that the ability of spouses to communicate is a key in determining whether joint physical care is in children's best interests); *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002) ("A breakdown in communication may amount to a substantial change of circumstances justifying modification of a physical care ruling.").

As a convicted sex offender, Joshua was required to register and did so in Palo Alto County, as he was renting a house and temporarily staying in Graettinger, in spite of representing to Angela that he was living in a home he owned in Humboldt. Angela would drop off the boys for visits at Joshua's house in Humboldt, unaware Joshua had a residence in Graettinger, until the boys informed her in early 2008. Prior to trial, Joshua moved again, to Fort Dodge, without telling Angela.

Very troubling was Joshua's withholding information inconsistent with joint physical care. It is apparent Joshua failed to put the best interests of his sons first by neglecting to share with Angela where he and the boys were living. Joshua moved the boys from Humboldt to Graettinger to Fort Dodge; he consistently lied to Angela about the boys' whereabouts. These lies were the result of his withholding information regarding his criminal convictions, placement

on the sexual offender registry, and being on probation with the Department of Corrections for four years. Even when ordered in the temporary injunction ruling to notify Angela of a contact number for each visit with the boys, as well as the location where the visit would take place, Joshua failed to comply with the court's order.

The district court found that while Angela had multiple concerns about Joshua's parenting, "other than the Sex Offender Registry, [those concerns] would never amount to a material and substantial change in circumstances which would require the Court to consider a change in the custodial arrangement."

However, there is evidence of behavioral changes in the boys, including the younger child's diagnosis of anxiety and depression. Both boys exhibited poor behavior upon their return to Angela's house after staying with Joshua. One son displayed increased behavioral outbursts while he stayed with Joshua, but his behavior improved significantly during the months prior to trial when Angela had physical care. She attributed the prior outbursts to the instability involved in frequently moving between parents, as well as Joshua keeping the boys' whereabouts secretive.

Joshua's unwillingness to share critical information with Angela raises legitimate child safety issues. Joshua will remain on the sexual offender registry for ten years. See Iowa Code § 692A.106(1). This will affect interactions he is allowed to have with the boys, their friends, attending social activities, and where he can live; as he must remain 2000 feet from any school or daycare.<sup>4</sup> In

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<sup>4</sup> Joshua testified that he was appealing his need to register as a sexual offender, as he did not actually make contact with the under-aged girls, but with undercover agents.

addition, Joshua was diagnosed with Dysthymic Disorder in October 2006, but discontinued his therapy in February 2007 without having completed his sessions.

Joint physical care is premised on the parents' ability to communicate and show mutual respect, the degree of conflict between them, the degree to which they generally agree in their approach to daily matters, and the historical care-giving arrangement for the children. *Hansen*, 733 N.W.2d at 697-99. We resolve physical care based upon what is in the best interests of the boys, so that they are in an environment that is most likely to bring them health, both physically and mentally, and to social maturity, not based upon perceived fairness to Angela and Joshua. *Id.* at 695.

The record makes clear the obvious disconnect in communication between Angela and Joshua, and in turn lack of mutual respect. Most apparent from Joshua's concealing his criminal convictions from Angela is the resulting secretive behavior, not conducive to effective co-parenting. *Id.* at 698 (stating that disagreement among parents is a significant risk factor that must be considered in determining whether joint physical care is in the best interests of the children, even a low level of conflict can have significant repercussions for children).<sup>5</sup> On our review of the record, we find Angela did prove that since

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<sup>5</sup> The four factors to be considered when determining whether a joint physical care arrangement is in the best interests of the children are (1) "approximation"-what has been the historical care giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) "the degree to which the parents are in general agreement about their approach to daily matters." *Hansen*, 733 N.W.2d at 697-99.

October 2005 there has been a material and substantial change sufficient to warrant a change from joint physical care to physical care with Angela.

Therefore, we reverse the decision of the district court denying a modification of physical care. We remand to the district court to determine the appropriate child support Joshua will pay to Angela, as well as set forth a visitation schedule, and other matters consistent with this opinion.

Angela also requests appellate attorney fees. An award of attorney fees is not a matter of right but rests within the court's discretion and the parties' financial positions. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). 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 trial court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). After considering the appropriate factors, we determine Joshua should pay \$3000 in appellate attorney fees. Costs on appeal assessed to Joshua.

**REVERSED AND REMANDED.**