

**IN THE COURT OF APPEALS OF IOWA**

No. 9-336 / 08-1318  
Filed July 2, 2009

**IN RE THE MARRIAGE OF RALPH E. MARASCO, JR. AND CASSANDRA L. MARASCO**

**Upon the Petition of**

**RALPH E. MARASCO, JR.,**  
Petitioner-Appellee,

**And Concerning**

**CASSANDRA L. MARASCO**  
Respondent-Appellant.

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

Cassandra Marasco appeals from the district court order modifying the child custody provisions of the decree dissolving her marriage to Ralph Marasco, Jr. **AFFIRMED.**

Joseph W. Seidlin of Culp, Doran, Seidlin & Genest, P.C., Des Moines, and Lora L. McCollom-Sinclair of Skinner, Nielsen & McCollom, P.L.C., West Des Moines, for appellant.

Matthew Boles and Jane White of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

**EISENHAUER, J.**

Cassandra Marasco appeals from the district court order modifying the child custody provisions of the decree dissolving her marriage to Ralph Marasco, Jr. She contends the court erred in concluding a substantial change in circumstance warranted modification. She also contends the court erred in determining Ralph can provide superior care to their son. She requests an award of her appellate attorney fees. We affirm.

*I. Background Facts and Proceedings.* Cassandra and Ralph were divorced in December 2003. They have one child, Dominic, who was born in 2001. The decree dissolving the marriage granted Cassandra physical care of Dominic, but provided a graduated visitation schedule that culminated with the parties' alternating care of Dominic on a weekly basis by the time he reached five years of age in December 2006. Dr. Sheila Pottebaum, a child psychologist, was to assist the parties in any parenting disputes they were unable to resolve.

In February 2007, Ralph filed an application to modify the custody provisions of the decree. An amended application was filed in November 2007 alleging a substantial change of circumstances warranted modification because (1) Cassandra had attempted to thwart his visitation with Dominic and (2) Cassandra was abusing prescription drugs. Following a May 2008 hearing, the court entered its ruling, finding Ralph had proven a substantial change in circumstances warranted modification and he was able to provide Dominic with superior care. The court granted Ralph's application to modify, granting him physical care of the child. Cassandra appeals.

**II. Scope and Standard of Review.** Our scope of review in custody modification proceedings is de novo. Iowa R. App. P. 6.4; *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). We give weight to the fact findings made by the trial court, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

**III. Analysis.** We first address Cassandra's argument that the trial court's findings of fact are not entitled to weight because the court adopted Ralph's proposed findings. It is true we do not encourage the practice of adopting verbatim the proposed findings and conclusions submitted by one of the parties. *In re Marriage of Siglin*, 555 N.W.2d 846, 848 (Iowa Ct. App. 1996). However, we note the district court did not simply sign Ralph's proposed findings and conclusions. A review of the court's order shows that although the court adopted some of the language supplied by Ralph, it made substantial edits, redacting large sections of his proposed findings and conclusions and rewriting other portions. Regardless, in equity actions such as this we review the evidence anew, disconnected, ultimately, from the trial court findings. *Id.*

We turn, then, to Cassandra's contention the court erred in concluding a substantial change of circumstances exists warranting modification. A modification of child custody is appropriate only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577

N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the child. *Id.*

We reject Cassandra's assertion "very little" has changed since the decree was entered in 2003. The record demonstrates Cassandra made frequent attempts to frustrate Ralph's relationship with Dominic. Most notably, in December 2006, Cassandra contacted the Department of Human Services (DHS) after discovering a bruise on Dominic's arm. The ensuing child abuse investigation of Ralph as the possible perpetrator was determined to be unconfirmed. However, the allegations Cassandra made in the course of the investigation are concerning; she claimed Ralph (1) was spanking Dominic and had slapped him, (2) had pulled Dominic out of his classroom at school and screamed at him, (3) was abusing his pet dog, (4) had an anger problem, and (5) was physically abusive to her during their marriage.<sup>1</sup> Cassandra made these allegations just as Dominic was turning five years old and the visitation schedule was to be increased to allow Ralph to care for Dominic half of the time. Cassandra even noted to the DHS worker a provision in the dissolution decree stating visitations could be suspended if there was any concern about abuse.

There is no question these parents cannot communicate effectively with one another regarding Dominic. An inability to cooperate and communicate in dealing with a child is an impediment to a shared care agreement warranting modification of custody. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002); *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

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<sup>1</sup> These claims were contradicted by other witnesses and observations made by the DHS worker.

Although the original decree speaks of Cassandra having physical care, in reality the parties have shared care since Dominic turned five. Ralph has met his burden of proving modification is necessary.

If a substantial change in circumstance is found, the court must then consider whether a change in custody is warranted. See *In re Marriage of Whalen*, 569 N.W.2d 626, 629 (Iowa Ct. App. 1997). The parent seeking to change the physical care from the primary custodial parent to the petitioning parent has a heavy burden and must show the ability to offer superior care. *Melchiori*, 644 N.W.2d at 368.

We conclude Ralph has met the burden of proving he is able to offer superior care to Dominic. Dr. Pottebaum's testimony establishes Ralph is better able to adapt to change, can provide more structure for Dominic, and is better able to support Dominic's relationship with his mother. Conversely, it appears Cassandra has taken action to alienate Dominic from his father. In addition, this court has concerns about Cassandra's use of prescription drugs and apparent drug-seeking behaviors.

Because Ralph has shown an ability to provide superior care, we affirm the district court order modifying child custody to grant Ralph physical care of Dominic.

**IV. Appellate Attorney Fees.** Cassandra requests an award of her appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We are to 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 district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We decline to award Cassandra her appellate attorney fees.

**AFFIRMED.**