

IN THE COURT OF APPEALS OF IOWA

No. 9-950 / 09-1001
Filed February 10, 2010

**IN RE THE MARRIAGE OF JONATHAN P. THOMPSON
AND STACY L. THOMPSON**

**Upon the Petition of
JONATHAN P. THOMPSON,**
Petitioner-Appellant,

**And Concerning
STACY L. THOMPSON, n/k/a STACY L. LONNING,**
Respondent-Appellee.

Appeal from the Iowa District Court for Dickinson County, Patrick M. Carr,
Judge.

A father appeals a district court's modification of a dissolution decree in
which physical care of two children was transferred to the children's mother.

AFFIRMED AS MODIFIED.

Jane White of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry &
Fisher, L.L.P., Des Moines, and Dani Eisentrager, Eagle Grove, for appellant.

Meghan Sloma and James Clarity of Clarity Law Office, Spirit Lake, for
appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

We must decide whether the district court acted equitably in transferring physical care of two children from their father to their mother.

I. Background Facts and Proceedings

Jonathan and Stacy Thompson (now known as Stacy Lonning) divorced in 2001. At the time of the divorce, they stipulated that Jonathan would assume physical care of their two children. The district court approved the stipulation.

Both parents remarried. Although, at the time of the modification trial at issue here, Jonathan was seeking a dissolution from his second wife, Kim. In 2005, Jonathan was deployed to Iraq. During his absence, Kim cared for his children, subject to visitation with Stacy. On his return, Jonathan again assumed physical care of the children.

In 2007, Jonathan had a stroke while participating in a local military exercise. He underwent rehabilitation and, with minor exceptions, physically recovered from the effects of the stroke. His mental recovery was less clear; there was indication that, as a result of the stroke, Jonathan was more prone to frustration and had greater difficulty controlling his anger.

Stacy petitioned to modify the physical care provision of the dissolution decree. The district court issued a temporary order placing the children with their mother pending trial. Following trial, the district entered a modification decree that transferred physical care of the children to Stacy, ordered Jonathan to pay child support, and granted Jonathan visitation, including two weeks of summer visitation. In a post-trial order, the court clarified that Jonathan was entitled to a

total of two weeks of summer visitation rather than two weeks per summer month. Jonathan appealed.

II. Analysis

A. Physical Care

Jonathan asserts that Stacy failed to meet her “high burden” of proving that a modification of physical care is warranted. Her burden is indeed high. See *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). A parent petitioning for custody modification is required to show a material and substantial change in circumstances since the entry of the decree that was not contemplated by the parties and is more or less permanent. *Id.* The party seeking modification must also show superior care taking ability. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994).

1. Substantial Change. Stacy cited two factors as evidence of a substantial change of circumstances: Jonathan’s stroke and a child abuse report issued by the Department of Human Services.

With respect to Jonathan’s stroke, the district court found “that the stroke, alone, is not disabling or disqualifying.” The court noted, however, that

[t]he effect of the stroke . . . appears to have made the Petitioner’s rigid and strict personality even more so. As he struggles with the residual disabilities still existing as a result of the stroke, he becomes frustrated and can be loud, angry, and threatening.

The court determined that “his current ability to parent has been impacted negatively by the event of the stroke as described in the Court’s findings.”

On our de novo review, we agree with these findings. Physical and mental changes as a result of an accident can constitute a substantial change for

purposes of modifying physical care. See *In re Marriage of Bergman*, 466 N.W.2d 274, 276 (Iowa Ct. App. 1990). Stacy and the children testified about changes in Jonathan's demeanor after his stroke. Stacy said his emotional stability concerned her and the older child stated that his father appeared more aggressive after the stroke. The child indicated that his father "would get like mad and start yelling" when the child asked him to help with homework. He also said that his father threatened to hit him with a board on one occasion and "had a fist balled up" and "almost punched" his step-mother on another occasion.

We recognize that Stacy had an opportunity to influence the children's testimony, as they were in her care pending trial. However, the district court credited their testimony and we defer to that credibility finding, as we are constrained by a paper record. See *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

We turn to the child abuse report. The district court acknowledged Jonathan's belief that Kim was the person who complained to the department about his conduct. The court also recognized that the report relied almost exclusively upon Kim's rendition of events. Finally, the court noted that Jonathan was appealing the report. Based on these findings, the court stated,

If [the report] stood alone, it would not be considered an insurmountable impediment to the Petitioner's status as primary caregiver. It does, however, lend some credence to the theme advanced by the Respondent and supported by Alex and Sydney, that following his stroke, the Petitioner has become less able to control his anger, resulting in demeaning and scary outbursts.

We agree with the district court's treatment of the report. The timing of the complaint that triggered the report lends credence to Jonathan's assertion that

the report was Kim's means of gaining leverage in her own custody battle with Jonathan. Nonetheless, Jonathan agreed he committed the underlying physical act that precipitated the report. Although he stated that the act did not result in the claimed injury, his acknowledgment that it occurred provides another indication that Jonathan had difficulty controlling his anger.

Based on this record, we conclude that Stacy established a substantial and material change of circumstances. While Jonathan asserts that the district court failed to give adequate weight to the testimony of his mental health expert, we are more persuaded by the direct evidence of changes in Jonathan's behavior than by a qualified expert opinion that Jonathan "appears to" have good self-control.

2. Superior Caretaking. This brings us to the question of whether Stacy established superior caretaking ability. See *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). In our view, the evidence of Jonathan's inability to control his anger which supported a finding of a substantial change of circumstances also supports a finding that Stacy was the superior caretaker.

We recognize that the older child's grades fell after the move to Stacy's home. As the district court stated, this is less a reflection of poor care on Stacy's part than "continuing emotional upset attributable to both parents."

We also recognize that Jonathan made significant strides in meeting his academic and professional goals following the stroke. While his accomplishments are commendable, they do not alter our conclusion that Stacy established herself as the superior caretaker.

B. Summer Visitation

Jonathan next contends that the district court acted inequitably in failing to award him more than two weeks of summer visitation with the children. Stacy made no written argument on the merits to support the court's limited visitation order and, at oral argument, her attorney conceded that expanded summer visitation would be appropriate. The absence of argument and this concession lead us to conclude that Jonathan should be allowed a total of six weeks of summer visitation. Accordingly, we modify the summer visitation provision of the district court's order to provide that Jonathan shall have two weeks of visitation in each summer month (June, July, and August), subject to the other, existing terms and conditions of the district court's order regarding summer visitation.

C. Child Support

Stacy argues that the district court acted inequitably in imputing a salary based on her earning capacity rather than her actual income. Jonathan responds that Stacy was obligated to file a cross-appeal on this issue. As this was an entirely separate issue from the issues raised by Jonathan, we agree that a cross-appeal was required. See *In re Marriage of Novak*, 220 N.W.2d 592, 598 (Iowa 1974). In the absence of a cross-appeal, we decline to consider this issue.

III. Disposition

We affirm the district court's modification of the physical care arrangement. We modify the visitation provision to provide for a total of six weeks of summer visitation. Costs are taxed to the appellant.

AFFIRMED AS MODIFIED.