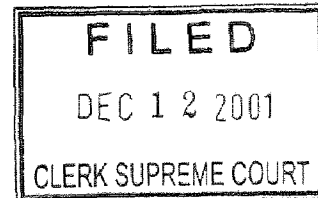


IN THE COURT OF APPEALS OF IOWA

No. 1-487 / 01-0116
Filed December 12, 2001

Upon the Petition of
RONALD STEVEN CLAUDE,
Petitioner-Appellant,

And Concerning
SHARON KAY HALE,
Respondent-Appellee.



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

The petitioner appeals the district court order granting the respondent's
petition to modify the visitation provisions of a paternity decree and denying his
request for primary physical care. **AFFIRMED AS MODIFIED.**

Kristine M. Fasano, Des Moines, for appellant.

Michael M. Sellers of Sellers Law Office, West Des Moines, for appellee.

Heard by Sackett, C.J., and Mahan and Hecht, JJ.

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SACKETT, C.J.

Petitioner-appellant Ronald Steven Claude appeals challenging the district court's modification of the custody provisions of a paternity order concerning his son, Derek Claude, born January 24, 2000. Respondent, Sharon Hale, the mother of Derek, had primary physical care. She took a job outside of Iowa after the paternity decree was entered. The district court modified Ronald's visitation at Sharon's request and denied Ronald's request to be named the primary custodian. Ronald contends the modified visitation provisions do not allow him adequate time with his son and that he should be named primary care parent. We affirm as modified.

At the time of the hearing Ronald was thirty-four and Sharon was thirty-nine. Neither parent has been married to anyone. Derek is the only child born to either of them. Derek was born in Clarion, Iowa, at which time both parents lived in the Clarion area. The relationship Ronald and Sharon had with each other terminated shortly after Derek's birth.

In June of 2000 the parties were both living in Iowa when Ronald filed the paternity petition asking the court to (1) establish that he was the father of Derek, (2) award him and Sharon joint legal custody, and (3) name him as the parent having primary physical care. Following the filing of the petition the district court ordered a custody evaluation. The evaluator spent considerable time on an assessment of the parties' abilities as parents. She interviewed both parties and considered, among other things, documents they each submitted before recommending the parties have joint custody and that Sharon be granted primary

physical care. The report noted that Ronald, a farmer, and Sharon, a physician, each have productive and dependable work histories. It further recited that Sharon and Ronald acknowledge they each love Derek and have confidence that the other will provide nurturing daily care for him.

The evaluator further noted Sharon resisted Ronald having primary physical care of Derek. It was Sharon's opinion she offered Ronald ample opportunities to spend the time with Derek necessary so the two would form a father and son bond and that she wanted Ronald to spend time with Derek in a way that he would not be traumatized by her absence and unfamiliar surroundings. The evaluator disagreed with Sharon's opinions as to the time Ronald should spend with Derek and recommended that Ronald's time with Derek be increased from what existed at the time of the evaluation. The evaluator said, among other things, that it was in Derek's interest to have his parents live in a 150-mile radius so he could have time with both parents.

On October 20, 2000, the district court approved an agreement made by the parties to resolve the paternity action. They were given joint legal custody and Sharon was named the primary custodian. A complicated visitation schedule provided for Ronald to have Derek for three hours every Wednesday and on certain weekends and holidays. It was further provided that the parent picking Derek up would go to the home of the other parent. There were additional specific requirements for how the child should be exchanged.

Sharon resigned her job, which was to become effective December 31, 2000, on September 29, 2000, seventeen days after the stipulation was entered on the record and before the original order was entered on October 20, 2000.

On December 12, 2000, Sharon filed an application to modify the visitation provisions agreed to by the parties and ordered by the court. Sharon stated her three-year employment contract with the medical group for which she worked expired on December 31, 2000, and she intended to accept a position in the state of Texas beginning on February 1, 2001. Sharon contended the change would dictate a modification of the visitation schedule.

Ronald answered Sharon's petition contending that he agreed to the custodial arrangement based on Sharon's representation that she had no plans to change her job or where she lived. He also asked for primary physical care.

The matter came before the district court in January of 2001. The court denied Ronald's request for primary physical care but modified the visitation provisions. The court provided Ronald should have visitation with Derek in Texas one weekend a month and Sharon should pay Ronald up to \$300 of his transportation expenses. Ronald was further given two weeks summer visitation in one-week periods with at least one intervening week. The visitation period increases to three weeks divided in one-week intervals when Derek reaches the age of five and to six weeks divided into two three-week periods when Derek is ten years old.

This is a modification action. Both parties seek a modification of the original decree. We review de novo. The burden to modify a dissolution decree is a heavy burden. *See In re Marriage of Frederici*, 338 N.W.2d 156, 161 (Iowa 1983). The parent seeking to change the physical care has a heavy burden and must show the ability to offer superior care. *See In re Marriage of Mikelson*, 299

N.W.2d 670, 671 (Iowa 1980). The burden to change visitation is less. See *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985).

The Iowa courts had historically not changed custody on the basis of a parent's move from the area where both parties reside absent other circumstances. See *In re Marriage of Urban*, 359 N.W.2d 420, 425 (Iowa 1984); *Frederici*, 338 N.W.2d at 161. These cases pre-date legislative changes providing if the parent having physical care or sole legal custody is to relocate the residence of a minor child to a location one hundred fifty miles or more from the residence of the minor child at the time custody was granted, the court may consider the relocation a substantial change in circumstances. See Iowa Code § 598.21(8A) (2000). If the court determines that the relocation is a substantial change in circumstances, the court shall modify the custody order to, at a minimum, preserve as nearly as possible the existing relationship between the minor child and the nonrelocating parent. *Id.* This legislative change is compatible with other legislative changes in the past decade focusing on the opportunity for substantial parental involvement in a child's life by both parents when the parents are no longer a part of the same family unit. See *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998).

Sharon's decision to leave Iowa and move to Texas is a substantial change of circumstances. Ronald contends the move was made to limit his time with Derek and this coupled with Sharon's difficulty concerning visitation supports his being named the primary care parent.

Sharon contends the move was not contemplated at the time the custody order was entered. She argues she will earn more money in Texas and Derek will have the opportunity to become better acquainted with her extended family.

Sharon and Ronald adequately care for Derek. Both will have a need for childcare providers if he is in their primary physical care. Sharon uses her mother as her childcare provider. Sharon is absent some times as much as twelve hours a day. Ronald's job is not as demanding and he would be in the home more each day except during the planting and harvest season.

Sharon grew up in Texas and attended college there. She came to Iowa to attend Des Moines University. She was working in Wright County, Iowa at the time the parties met. After Derek was born Sharon's mother lived with her and cared for Derek. Sharon has relatives in Texas. Ronald grew up in the area where he now lives. He has a farm home very near his mother's. He has extensive extended family in the Wright County area.

Being a parent imparts responsibilities that frequently alter a parent's life choices. Parents have a duty to assure that their child is cared for and supported. If they do not chose to establish a home with the child's other parent, they also have a responsibility to cooperate with the other parent to assure that both have a substantial part in their child's life. The result is that parents may have residential and or job restrictions that did not exist prior to the child's birth. We recognize there are cases where one parent does not seek to support a child or be a part of his or her life or may be incompetent to care for a child and in that case different rules may apply. Here, however, we have two decent people who

love their son and are able to give him more than adequate care. Sharon's move away from the place where she and Ronald met and the place where Derek was born cannot be made with the freedom of movement she would have enjoyed had she not had a child.

Society is mobile and families move. Yet a move of some distance while motivated by the most worthy reasons generally decreases the child's contact with the noncustodial parent. A move in whole or part motivated by a desire to decrease the other parent's contact with the child is looked at with disfavor in a modification action based on the move.

Our review of the record convinces us that Sharon at least in part decided to move to limit Ronald's contact with his son. The move followed too closely an agreed custodial arrangement that provided Ronald with weekly visitation and frequent overnight visits no longer possible with Sharon living in Texas. For the first time Ronald was exercising overnight visits with Derek while Sharon continued to be opposed to overnight visits because in her opinion they were detrimental to Derek.

Sharon is educated as a physician and has firm opinions about the need for the child to bond with the mother in order to bond with others and for young children not to be away from their mother's environment overnight. Philosophies about what is good and not good for children are hardly well defined. In custodial matters parents seek to structure the custodial arrangement to meet their ideas of child raising. And while their arrangements are well intentioned, the court must still consider the entire situation in arriving at a good arrangement, not just the opinions of one parent. Parents who do not share a family unit and even

those who do must accommodate their notions of child rearing with those of the other parent.

Derek is the only child of either of the parties. Sharon naturally is protective and intent on imposing her ideas on the custodial care arrangement. While we understand her concerns, Ronald too has concerns about the child that must be balanced with Sharon's. Furthermore, Ronald's position in enforcing visitation from a noncooperative mother becomes more difficult because of her decision to leave the state.

A parent unwilling to be reasonable about the noncustodial parent's place in a child's life has in some cases lost primary physical care. See *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Leyda*, 355 N.W.2d 862, 865-67 (Iowa 1984); *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 216 (Iowa Ct. App. 1994); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659-60 (Iowa Ct. App. 1991).

Although Sharon seems to advance that locating another job was necessary because her contract was not renewed, it was not a case of her being fired, rather a case of her being less than happy about some of the provisions in a renewal. Additionally, there is no evidence she sought work at a location closer to Ronald. Rather she insisted that had there been other jobs available her group would have let her know about them.

The custody evaluator testified, "Sharon said she wants to be in court because she doesn't agree with the overnight visits, that if she moves further away than 150 miles the contact would be more limited than it is now."

While we have disapproved of Sharon's attitude towards Ronald's visitation, Ronald has not met the heavy burden necessary for modification of primary physical care. We affirm the district court on this issue.

The modification order the district court entered restricted Ronald's visits to once a month where Derek lived, reduced Ronald's summer visits from three weeks to two and eliminated holiday visits, although it did give Ronald \$300 a month for travel. The order did not preserve as nearly as possible the existing relationship between Ronald and Derek and it imposed on him substantial travel for a short time with his son and severely limited the time Derek will have with Ronald's extended family. See Iowa Code § 598.21(8A) (2001).

We therefore modify the decree to increase Ronald's visitation. He shall have in addition to the monthly visitation in Texas, five days to include Easter in even number years and ten days to include Christmas in odd numbered years, and his summer visitation shall be increased to four consecutive weeks until Derek turns ten at which time the visitation shall be increased to six consecutive weeks. As to Easter, Christmas and summer visitation, Ronald shall be responsible for picking up Derek from Sharon's home and Sharon shall be responsible for Derek's return transportation. The cost of this transportation shall be the responsibility of the party responsible for transporting the child. Sharon shall continue to be responsible for up to \$300 of Ronald's monthly visitation expense.

Ronald has challenged evidentiary rulings by the district court. Modifications are tried in equity and reviewed de novo on appeal. See *In re Marriage of Whelchel*, 476 N.W.2d 104, 106 (Iowa Ct. App. 1991). Evidence

should be received by the district court without ruling on objections. See *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa Ct. App. 1993). We have examined the challenges made by the parties and the offers of proof and have considered only that evidence we deem admissible.

Costs on appeal are taxed one half to each party. We award no appellate attorney fees.

AFFIRMED AS MODIFIED.