

IN THE COURT OF APPEALS OF IOWA

No. 7-183 / 96-1822

**IN RE THE MARRIAGE OF SARA J. WEARMOUTH
AND JAN F. WEARMOUTH**

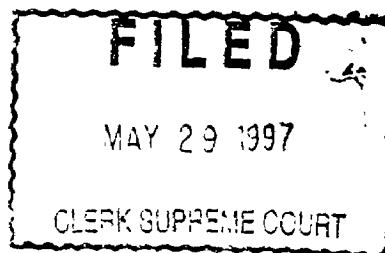
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**Upon the Petition of
SARA J. WEARMOUTH,**

Petitioner-Appellee,

**And Concerning
JAN F. WEARMOUTH,**

Respondent-Appellant.



Appeal from the Iowa District Court for Jasper County, David L. Christensen,
Judge.

Jan Wearmouth appeals from a district court order denying his petition to
modify the parties' dissolution decree. **REVERSED AND REMANDED.**

C. Jean Pendleton of Charnetski, Olson, Lacina, Pendleton & Garland, L.L.P.,
Grinnell, for appellant.

Terry R. Rickers of Matthias, Campbell, Tyler, Nuzum, Greta & Rickers,
Newton, for appellee.

Heard by Habhab, C.J., Sackett, P.J., and Streit, J., but decided en banc.

SACKETT, P.J.

Appellant Jan Wearmouth appeals from a district court order denying his petition to modify the custody provisions of the 1993 decree dissolving his marriage to appellee Sara J. Wearmouth. Jan contends the district court should have modified the decree to award him primary physical care of the parties' child, Jacob, born in December 1990. We reverse and remand.

In the decree dissolving the marriage, the trial court approved the parties' stipulation that agreed they be awarded joint legal custody of Jacob with Sara having primary care. Jan was ordered to pay \$64 per week in child support. The parties were encouraged by the trial court to agree to visitation, but a schedule was set in case they could not agree.

On April 21, 1996, Jan filed a petition for modification asking that he be awarded primary physical care of Jacob and that Sara be required to pay child support. The petition alleged in the dissolution decree the district court retained jurisdiction on child custody matters and it was not necessary to show a substantial change of circumstances for the custody provisions to be modified. The petition also alleged there had been substantial changes of circumstance for Jan was now Jacob's primary caretaker, and Sara's move from the Newton area where the parties had lived when married changed the visitation provisions of the original decree.

After the petition to modify was filed, the parties agreed and the trial court ordered William Pearce to do a custody evaluation. Pearce holds a bachelors degree and a masters degree in sociology from Drake University. He does custody investigations and adoption home studies. He serves as a truancy officer for the Ankeny school system. He also has a contract with the court to provide juvenile intakes for the Ankeny Police Department. Pearce filed a report recommending Jan be made the primary caretaker finding Jan has been the primary caretaker, Jacob clearly wants to live with his father, and Jan has exhibited greater stability in his life than Sara since the original decree was entered. Pearce also testified at trial and gave the same opinion.

At the time of the modification hearing, Sara was twenty-five years old and Jan was thirty-four. Sara lived with her husband of a little more than one year, Philip Squire, in Des Moines. Before marrying Philip, Sara had unsatisfactory live-in relationships with two other men. Sara works at Karen Acres Care Center from 6:00 a.m. to 2:30 p.m. weekdays plus every other weekend.

Jan lives in Newton in the home where the parties lived. He works Friday, Saturday, and Sunday from 11:00 a.m. until 11:00 p.m. at Certainteed in Grinnell. He has been dating Becky. Becky was married before and has a child. She and Jan see each other frequently. They do not live together and do not plan to unless they are married.

At trial, Pearce recommended Jacob be placed in Jan's primary physical care. He believed the transfer of custody was necessary because Jan had assumed Jacob's primary physical care, Jacob had bonded more closely with Jan than Sara, Jacob expressed a strong desire to live with Jan, Becky was a plus in Jan's favor, and Sara and Philip were less than candid on some issues.

At the conclusion of the hearing, the district court entered an oral ruling denying the petition for modification finding Jan had failed to carry his burden of showing a change of circumstances had occurred. A written ruling denying the modification followed. The trial court consequently did not reach the issue of whether Jan could provide superior care.

Jan appeals. He contends the district court should not have based its decision solely on a finding of no substantial change of circumstances, but should have made a determination of the child's best interest. He also contends he has shown both a substantial change of circumstance and that he can give Jacob superior care.

Our review is de novo. Iowa R. App. P. 14(f)(7). This court has a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). Weight must be given to the fact findings of the trial court, especially when considering the credibility of witnesses, but the court is not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value with respect to custodial issues, and the court must

make its decision on the particular circumstances unique to each case. *In re Marriage of Anderson*, 522 N.W.2d 99, 101 (Iowa App. 1994).

Jan advances he has been Jacob's primary caretaker. He contends Jacob has been in his care seventy percent of the time. Sara does not refute that Jacob has been in Jan's care for substantial periods since the dissolution. She contends, however, Jan had not been Jacob's caretaker in excess of fifty percent of the time. Pearce found Jan to be the actual, though not legal, primary caretaker since the dissolution. We agree with Pearce's finding that Jan has had the primary and greater share of Jacob's care.

To change custodial provisions of a dissolution decree, the petitioner must prove by a preponderance of the evidence conditions since the decree was entered have so materially and substantially changed the child's best interest makes it expedient to make the requested change. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). Jan, the party seeking to be named as the new physical custodian, has the burden to prove an ability to minister more effectively to the child's well being. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). We disagree with Jan that we should review the trial court's decree under another standard.

Unlike the trial court, we find there have been substantial changes in Jacob's custody arrangement since the dissolution of the marriage. First, after the decree was entered, Jan assumed primary care. We have found the record supports Pearce's

finding Jan has been Jacob's primary caretaker. We consider this factor as it supports Jan's claim there has been a substantial change over what was contemplated in the original decree. In *In re Marriage of Spears*, the fact the father, not the custodial parent under the decree, had assumed primary physical care was considered a factor in modifying the decree and awarding him physical care. *In re Marriage of Spears*, 529 N.W.2d 299, 301-02 (Iowa App. 1994).

Second, Sara's change of residence will change Jacob's primary care provider. A change in residence is one factor which must be considered in determining whether there has been a substantial change in circumstances. *See* Iowa Code § 598.21(8)(f) (1995). Where the distance is not substantial, as is here, the change in location is generally more a reason to change visitation than custody. *See In re Marriage of Howe*, 471 N.W.2d 902, 903 (Iowa App. 1991). But because it changes Jacob's primary care arrangement, we consider Sara's change in location a substantial factor. *See Spears*, 529 N.W.2d at 301-02.

Another change is Sara's remarriage. *In re Marriage of Rierson* 537 N.W.2d 806, 807 (Iowa App. 1995).

Taken together, these factors show there has been a substantial change of circumstances. *Id* The question is whether Jan has shown he has the superior ability to minister to Jacob's care.

Jan advances his life has been more stable since the dissolution. This, too, is a conclusion reached by Pearce. Sara is now in her third serious relationship since

the dissolution. She is currently married and claims a good relationship with her current husband. Jan has been dating but shows more maturity in his attitude towards accepting another relationship.

While Sara claims Jacob has an excellent relationship with his stepfather, a review of the evidence does not support this conclusion. Children need a stable and caring home environment. *See, e.g., In re Marriage of Carrico*, 284 N.W.2d 251, 254 (Iowa 1979). Sara's relationship is currently stable, but this has not always been the case. Sara had problems finding a stable relationship since the dissolution. One of her paramours drank to excess and was abusive. Philip, Sara's current husband, had substance abuse problems in the past. Sara counters this argument by advancing it was she, not her companions, who ended the other two relationships and they had no effect on Jacob. We do not accept the argument the relationships had no effect on Jacob. We consider the number and nature of the relationships as they relate to Sara's maturity and ability to make good judgments. Jan has been dating, but has shown more care and maturity in establishing relationships than Sara has.

Sara asks that we give Pearce's recommendation little credence in that she contends he spent little time interviewing either party and there are inaccuracies in his report. We give opinion testimony the weight we consider it deserves after considering, among other things, the expert's education, experience, familiarity with the case, reasons given for the opinion, and interest, if any, in the case. *In re*

Marriage of Rosenfeld, 524 N.W.2d 212, 215 (Iowa App. 1994); *see also In re Marriage of Scheffert*, 492 N.W.2d 203, 205 (Iowa App. 1992).

Sara further contends while Pearce reported Jacob exhibited and said he wished to live with his father, a five-year-old child is not capable of making such choices. While Jacob's preference is relevant, we consider his age and the fact this is a modification, not an original custody determination, in assessing the weight it be given. *See In re Marriage of Ellerbroek*, 377 N.W.2d 257, 259 (Iowa App. 1985).

Sara contends Jan only filed the modification action when she insisted he keep current on his child support obligation. Jan contends Sara had not pushed him for support in a period of low employment because of all the time he had Jacob in his care and paid his expenses. He is current with his support and any failure to be current was temporary and came at the time when we have found he assumed the greater portion of Jacob's care.

We consider Jan's acceptance of primary care, his maturity in seeking other relationships, Pearce's recommendation, and to a lesser extent Jacob's wishes in modifying the decree and awarding Jan primary care. We remand to the district court to determine Sara's child support obligation.

REVERSED AND REMANDED.

All judges concur, except Habhab, C.J. and Cady, J., who dissent.

I respectfully dissent. The trial court correctly denied Jan's application to modify and properly left Jacob's primary care with Sara. Under the facts and circumstances of this case and the law as it applies to modification of dissolution decrees, I would affirm.

The marriage of Sara and Jan was dissolved in 1993. Jacob is their only child. In the decree of dissolution, the parties agreed that Sara was to have primary physical care of Jacob and Jan was to pay child support in the sum of \$64 per week.

The decree granted Jan reasonable rights of visitation "as the parties may hereafter agree," and if the parties could not agree, Jan was granted visitation three days per week commencing at 10 a.m. and ending at 10 p.m. In addition, the parties were to alternate visitation during the major holidays, and Jan had visitation with Jacob on Father's Day, on Jacob's birthday, and two consecutive weeks during the summer months.

This particular arrangement of liberal visitation between Sara and Jan began shortly after the marriage was dissolved and continued through and including the modification proceedings. The arrangement was satisfactory for almost two and one-half years and, as set forth later in this opinion, in all likelihood would have continued if Sara had not sought to strictly enforce Jan's child support obligation.

Jan now claims, as his primary ground for modification, he should be awarded Jacob's custody for he has been his primary caretaker. Sara does not deny that Jacob has been with Jan for substantial periods of time and on occasions even beyond those

set forth in the dissolution decree. She does, however, strongly deny that Jan has been Jacob's primary caretaker and asserts in balance Jacob has been with each parent about an equal amount of time. She concludes by arguing she is now and has been since Jacob's birth his primary caretaker.

Jacob is indeed the ultimate benefactor of this arrangement. He has had the love, guidance, and attention of both of his parents. Sara and Jan are indeed commended for working out a visitation arrangement that not only compliments their work schedules but also affords Jacob the maximum opportunity to be with his parents. Surely Sara should not now be denied custody of Jacob merely because she abided by the long-standing rule of this court and pertinent Iowa statutes that liberal visitation rights, where appropriate, should be allowed when in the best interests of the child. Iowa Code 598.41(1); see *In re Marriage of Muell*, 408 N.W.2d 774 (Iowa App. 1987).

Returning for a moment to Sara's desire to strictly enforce the child support provisions of the dissolution decree, I agree with her that had she not done so it is not likely this modification action would have ever been brought. Since separation, Jan has been delinquent in his child support obligations. He testified his child support delinquency was the result of periods when he was laid off from work. However, there is further testimony on the part of Jan that the temporary layoffs caused him to miss work for only three weeks. At the time the court ordered a mandatory wage assignment, Jan was more than \$1200 delinquent in his child support obligations. Jan was asked at trial, "Is it fair to say that you first got serious about seeking

modification when Sara started to more vigorously enforce the child support provisions of the decree? Is that true?" His reply was, "At about that time, yes."

Nor do I agree Sara's moving from Newton to Des Moines constitutes a material change in circumstances. At trial, Jan conceded Sara's move from Newton to Des Moines made good sense. As we stated in *In re Marriage of Howe*, 471 N.W.2d 902 (Iowa App. 1991), "the moving of the children a mere distance of forty-two miles, standing alone, is not the type of change in circumstances contemplated either by statute or case law."

Sara's past relationships with men are hardly commendable, but that is part of the past. She has now remarried and even Mr. Pearce, whose report in my opinion should be given only limited weight for he spent as little as one hour and fifteen minutes in Sara's home and not much more than that in Jan's home, acknowledges Jacob is a happy and well-adjusted child and that Sara exercised sound judgment in terminating her prior relationships when it was apparent they would not fulfill either her or Jacob's needs. Certainly the fact she has remarried is not a change in circumstance, for it is equally clear that Jan contemplates remarriage.

The trial court had all of the parties before it and was better able to judge the credibility, sincerity, and demeanor of the witnesses. It concluded, as I do, not only has there not been a substantial change of circumstances but Jan has not been able to carry his burden of proving he has the superior ability to minister to Jacob's needs.

I would affirm.

Cady, J., joins in this dissent.