

IN THE COURT OF APPEALS OF IOWA

No. 7-702 / 97-0556

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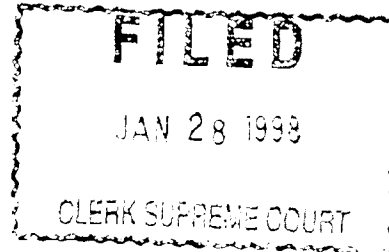
IN RE THE MARRIAGE OF SUSAN AVESING
AND THOMAS AVESING

Upon the Petition of
SUSAN AVESING,

Petitioner-Appellant,

And Concerning
THOMAS AVESING,

Respondent-Appellee.



Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden,
Judge.

Susan Avesing appeals from a district court ruling modifying the parties' dissolution decree by awarding primary physical care of the parties' two children to their father, Thomas Avesing. **AFFIRMED.**

Robert DeKock, Muscatine, for appellant.

James D. Hoffman of James D. Hoffman, P.C., for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ.

MAHAN, J.

Susan Avesing appeals the ruling of the district court modifying the parties' dissolution decree to award primary physical care to Thomas Avesing. We affirm.

In the March 14, 1994, decree of dissolution the district court granted joint legal custody and joint physical care of the parties' two minor children, Kristen and Josh. The decree stated modification of the primary physical care and visitation provisions was subject to modification upon application to the court by either party.

When it modified the custody provision on March 12, 1997, the district court stated it did not need to find a significant change in circumstances because of the provisions of the original decree. Even so, the district court stated there had been a significant change in circumstances because the joint physical care arrangement was no longer working and would become detrimental to the children in the near future if it was not already.

I. STANDARD OF REVIEW. We review a district court's modification of a dissolution decree de novo. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1997). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. MODIFICATION OF PHYSICAL CARE. The district court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. *Courtade*, 560 N.W.2d at 37. Normally, to change custodial provisions of a dissolution decree, the party seeking change must prove by a preponderance of the evidence conditions since the decree was entered have so materially and substantially changed, the children's best interests make it expedient to make the requested change. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa App. 1995). The party seeking to take custody from the other must also prove he or she will render superior care. *In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa App. 1994).

However, the decree of dissolution provided the primary physical care and visitation provision could be modified upon application to the court by either party. Although stopping short of completely forbidding the practice, the supreme court has discouraged retention of jurisdiction to modify dissolution decrees without a showing of a change of circumstances. *In re Marriage of Schlenker*, 300 N.W.2d 164, 165 (Iowa 1981). District courts should make final disposition of cases on circumstances then existing. *Id.* Only when a decree unequivocally provides for later district court review without the necessity of showing change of circumstances will we say this was the district court's intent. *Id.* Even if the district court did unequivocally intend such a departure from the normal standard of review, we have determined we will not

allow the provision unless there are facts justifying the departure. *In re Marriage of Hoag*, 380 N.W.2d 8, 9 (Iowa App. 1985). We find it is unnecessary to determine whether the district court intended to allow for modification without a showing of substantial change in circumstances. The district court stated there had been a substantial change in circumstances, and we agree.

The record reveals both parties love the children and have provided good homes for them during the course of the shared custody arrangement. Neither parent is a bad parent. In fact, the district court recognized both parents are above average. However, each of the parents and their respective homes are different and this appears to be the cause of conflict between Thomas and Susan, and often Susan and the children. We, like the district court, believe the shared custody arrangement is no longer working and custody should be modified. The children will benefit from one consistent living environment. We affirm the award of the children's physical care to Thomas. He was the children's primary caretaker prior to the dissolution and has attempted to foster a good relationship between children and Susan. Fewer normal and special visitation problems will be likely to arise if Thomas has physical care of Kristen and Josh.

We believe the district court was in the best position to observe each parent's credibility with respect to the various issues which arose at trial. We affirm the decision to award the children's primary physical care to Thomas.

III. ATTORNEY FEES. Thomas also requests appellate attorney fees. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We determine the request for appellate attorney fees should be denied.

AFFIRMED.