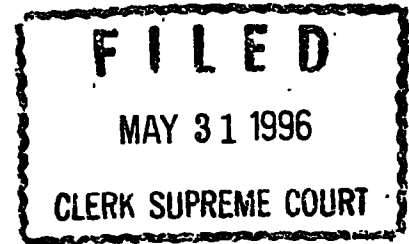


IN THE COURT OF APPEALS OF IOWA

No. 6-208 / 95-1592



**IN RE THE MARRIAGE OF TERI LOIS DAVITT
AND JOSEPH MARTIN DAVITT**

Upon the Petition of
TERI LOIS DAVITT,

Appellant,

And Concerning
JOSEPH MARTIN DAVITT,

Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Appeal from district court order dissolving a temporary injunction and refusing to prohibit custodial parent from moving parties' children out of state. **AFFIRMED.**

Mark R. Schuling, Douglas F. Staskal, and Thomas J. Levis of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, Des Moines, for appellant.

Robert H. Laden and Gregory D. Brandt of Hyland, Laden & Pearson, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

This is an appeal from the district court's decision to dissolve a temporary injunction. The appellant claims the district court erred in dissolving the injunction and in refusing to modify the dissolution decree. We affirm.

I. Temporary Injunction. On June 8, 1995, a decree of dissolution was entered for the marriage of Terri and Joseph Davitt. They have two children, Joseph, born March 30, 1984, and TJ, born May 26, 1986. Pursuant to the decree and the parties' stipulation, Joseph was granted the primary physical care of the children. Terri received liberal visitation, and from the time of the dissolution until mid-August 1995, she and Joseph equally divided the care of the children.

On August 14, 1995, Joseph informed Terri he was moving with the children to Arkansas. On August 16, 1995, Terri filed an application for a temporary restraining order pursuant to Iowa Rule of Civil Procedure 321. She sought to enjoin Joseph from moving the children out of the state. The district court granted the request for a temporary restraining order and scheduled an August 23 hearing on the request for a permanent restraining order. Following the hearing, the district court dissolved the temporary injunction.

On appeal, Terri argues the trial court erred in dissolving the injunction because the dissolution decree provided for de facto divided physical care. She contends that if the parties had shared physical care Joseph could not be accorded the privilege of

determining where the children will reside. See *In re Marriage of Frederici*, 338 N.W.2d 156, 159 (Iowa 1983) (parent with physical care has final say concerning where home of children will be).

The dissolution decree clearly awarded Joseph the primary physical care of the children. We reject the argument Terri's liberal visitation with the children gave rise to de facto divided physical care. See *State ex rel. Lara v. Lara*, 495 N.W.2d 719, 721 (Iowa 1993) (court rejected argument the parties had effectively agreed to joint physical custody where father had visitation 54% of the time). As the parent with primary physical care, Joseph had the final decision as to where the children would reside, and he should not be enjoined from making this decision.

Terri also argues the district court erred in dissolving the injunction because the decree prohibited the removal of the children from the state of Iowa. The decree contains no prohibition on moving the children out of the state. The only provisions remotely related to the relocation of the children refer to a change in school districts and extended out-of-town visitation. Neither provision can be read to prohibit the custodial parent from moving the children outside the state.

"The grant or denial of injunctive relief is largely within the sound discretion of the trial court under the facts of the particular case." *In re Marriage of Knight*, 507 N.W.2d 728, 731 (Iowa App. 1993). We can find no abuse of discretion in the district court's decision to dissolve the temporary injunction.

II. Modification. Terri argues this court should view her application for a temporary restraining order as a request for a modification of the decree to prohibit the removal of the children. She and Joseph both cite *In re Marriage of Lower*, 269 N.W.2d 822 (Iowa 1978), in advocating this interpretation of her application. Assuming, without deciding, *Lower* supports this position, we find Terri has failed to carry her burden in proving the need for modification of the decree.

A party seeking to modify a dissolution decree must establish 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. *Frederici*, 338 N.W.2d at 158. The changed circumstances must relate to the welfare of the children. *Id.*

Terri requests the decree be modified to prohibit Joseph from removing the children from Iowa. We find she has failed to carry her heavy burden in support of modification. Nothing in the record indicates the children's best interests warrant the requested modification. We affirm the decision of the district court.

AFFIRMED.