FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-468 / 89-163

**IN RE THE MARRIAGE OF REID A. HEMMINGSEN AND REBECCA L. HEMMINGSEN**



Upon the Petition of

**REID A. HEMMINGSEN,**

Petitioner-Appellee/Cross-Appellant,

And Concerning

**REBECCA L. HEMMINGSEN,**

Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Pottawattamie County, Keith Burgett, Judge.

Petitioner appeals the trial court's denial of her application to modify her dissolution decree to award her sole physical care of two children of the marriage. **AFFIRMED.**

Frederick J. Kraschel, Council Bluffs, for appellant/cross-appellee.

Scott H. Peters, Council Bluffs, for appellee/cross-appellant.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

**SACKETT, J.**

The issue is whether the trial court was correct in its refusal to modify a 1984 dissolution decree that placed joint legal custody of two children with both parents and provided the children alternate two-week periods with each parent. Under the circumstances of this case, we affirm the trial court.

Respondent-appellant Rebecca L. Hemmingsen and petitioner-appellee Reid A. Hemmingsen were married in 1975. Their two children are boys born in 1977 and 1982. The parties' marriage was dissolved in May 1984. Reid and Rebecca stipulated to the economic and custodial issues in their dissolution, including the physical care provision. Rebecca now seeks to modify their dissolution decree, which incorporated and approved the provisions of their stipulation.

In 1987 Rebecca filed for a modification, contending the decree should be modified and she should have sole physical care. The trial court refused to modify the decree but ordered the parties to submit to counseling for six months to help work out their problems.

Rebecca appeals, contending physical custody of the children should have been granted to her. She also contends counseling will not work. Reid asks for affirmance of the trial court order and maintenance of the status quo. He expresses a willingness to comply with the trial court's counseling order.

As a joint custodian, Rebecca is benefited when seeking sole custody by the inference she has met the joint custody tests of In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979). In re Marriage of Leyda, 355 N.W.2d 862, 864 (Iowa 1984). She carries, however, a burden similar to that imposed on a parent seeking a change of custody. Leyda, 355 N.W.2d at 864. Rebecca has a burden to establish, by a preponderance of evidence, that conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests makes it expedient to transfer their sole custody and care to her. Id. at 865; In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

Our major concern is the best interests of the children. See In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982). We are always guided by the best interests of the child and would not generally affirm such a physical care arrangement if it were contested on appeal from an initial decree. See In re Marriage of Muell, 408 N.W.2d 774, 776 (Iowa App. 1987) (modifying trial court order dividing physical custody of children on weekly basis to grant physical care to one parent). This, however, is a custody arrangement agreed to by the parties and approved by the trial court in the dissolution decree. The parties both agreed to it and neither party appealed from the initial decree. The arrangement provided maximum contact with both parents, an important factor in any custody

determination. See In re Marriage of Fortelka, 425 N.W.2d 671, 672 (Iowa App. 1988); In re Marriage of Jerome, 378 N.W.2d 302, 305 (Iowa App. 1985).

While it may not have been the arrangement we would have approved in the initial case, we recognize the rights of responsible and caring parents to make custodial care decisions for their children. When parents agree, we need not interfere with their good faith efforts to arrange schedules for custodial care that work with their jobs and lifestyles. Once such an agreement is entered into, and approved by the court, it cannot be modified merely because it is not an ordinary arrangement. We will modify the arrangement only if Rebecca has shown a superior ability to minister to the children's needs.

The children, according to the testimony of most witnesses, have adjusted well to the situation and desire to maintain this type of contact with both parents. Rebecca contends the children have not made a good adjustment.

Reid has shown himself to be a loving and caring parent. He has assumed and carried out his duties as a custodial parent well. We are impressed by the fact that he agrees to counseling to relieve tension. We are disappointed by Rebecca's reluctance to use counseling to resolve these differences. Both parties have an obligation to put aside their differences. See Fortelka, 425 N.W.2d at 673. We recognize Rebecca's lifestyle is more

structured and disciplined than Reid's. Reid contends it may be too much so. We believe both parents provide the children with a good home. We agree with the trial court.

Reid contends the trial court should have awarded him attorney fees. We affirm the trial court on this issue. See In re Marriage of Dahl, 418 N.W.2d 358, 360 (Iowa App. 1987). Reid requests attorney fees on appeal. We award attorney fees of $500.

**AFFIRMED.**