FILED
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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 5-286 / 94-1436

**IN RE THE MARRIAGE OF MICHELLE FOX AND TERRY R. FOX**

Upon the Petition of
**MICHELLE FOX,**
Petitioner-Appellee/Cross-Appellant,

And Concerning
**TERRY R. FOX,**
Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Adair County, James W. Brown, Judge.

Respondent appeals from a district court order modifying the parties' shared child custody arrangement and awarding primary physical care of their minor children to petitioner. **REVERSED AND MODIFIED.**

Kermit Dunahoo of the Dunahoo Law Firm, Des Moines, for appellant.

David L. Jungmann of David L. Jungmann, P.C., Greenfield, for appellee.

Heard by Donielson, C.J., and Sackett and Huitink, JJ.

**SACKETT, J.**

Respondent-appellant/cross-appellee Terry R. Fox appeals from a decree modifying his dissolution decree placing physical care of his three children with their mother petitioner-appellee/cross-appellant Michelle Fox. Terry contends he should have physical care but, if he does not, his child support obligation should be modified. Michelle has cross-appealed contending the trial court improperly deviated from the child support guidelines in fixing child support. Michelle further contends she should have had an additional award for attorney fees for her trial attorney, and she should be awarded attorney fees on appeal. We reverse and modify.

Terry and Michelle were divorced in December 1992. They made an agreement, approved as a part of their dissolution decree, their three children born in 1986, 1987, and 1989 would divide their time between Terry and Michelle in a shared custody arrangement. Terry continued to live in the family home, and the children stayed there overnight except when they stayed with Michelle. Michelle had the children overnight one week night each week, every other weekend and on alternate holidays. Initially,

Michelle worked from three p.m. to eleven p.m. Terry worked from eight a.m. to five-thirty p.m. Terry took the children to Michelle's just before eight and, except when the oldest was in school, the children stayed with her until a quarter to three when Michelle left for work. Michelle took the oldest child to Terry's work place and the younger two children to day care where Terry picked them up after he concluded his work and the three children stayed overnight with him.

In January 1994, Michelle changed her work schedule to work from eleven p.m. to seven a.m. In April 1994, Michelle filed an application for modification contending the relationship between she and Terry did not make the shared custody workable. She asked for primary physical care of the children. Terry cross-petitioned for sole physical care.

The parties have conceded the shared-custody arrangement does not work. The focal issues before the trial court were who should be physical custodian and child support.

There was a four-day trial and the trial court modified the decree to make Michelle physical custodian

and Terry to remain joint legal custodian with liberal visitation. The trial court further ordered Terry to pay child support of $661 a month for three children to decrease to $567 a month for two children and $425 a month for one child. The support was in accord with the child support guidelines. Terry was found to have net monthly earning of $1890 and Michelle $1630. The child support abated one-half during the summer months. Terry was given the income tax exemption for the two youngest children and ordered to pay one-half of the medical expenses not covered by insurance.

Terry has appealed contending he should be the physical custodian. Michelle has cross-appealed challenging the visitation schedule.

The first issue is which parent should have been awarded physical care. Our review is de novo. *In re Marriage of Kalvig*, 460 N.W.2d 189, 190 (Iowa App. 1990). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision

primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

Generally to change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially changed that the children's best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. *Id.* at 158; *see also, In re Marriage of Gravatt*, 371 N.W.2d 836, 838-40 (Iowa App. 1985). Terry argues he should benefit from this presumption because the children, after the dissolution for all practical purposes, were in his physical care. Terry contends under the circumstances his continual presence in the family home and the fact the children lived there with him for two years supports his being awarded physical care.

Michelle contests this contending the trial court made no finding one or the other parent acted as the

primary custodian and therefore our inquiry should be that of an initial custody determination.

We give consideration to the fact the children remained in the family home with Terry following the dissolution as a factor in his favor in assessing the issue of physical care. Because both parties are seeking to change the shared-custody arrangement, the issue here is more akin to a determination of physical care in an original dissolution action. There, the critical issue is which parent will do the better job of raising the children. *See In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). We therefore look to see from the evidence which parent has the ability to do the better job of raising the children during their minority to determine which parent should be granted physical care. *See In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984).

Since the dissolution, Michelle married a self-employed carpenter. Terry married a local high school teacher. Neither of their spouses has children. Both families live in the same school district.

The trial court found both Terry and Michelle to be able, competent, loving, and caring parents and found the

children would be well cared for in either household. On our review of the record, we agree with this finding.

Terry contends there have been instances where Michelle has been less than attentive to the children and his home presents a more wholesome atmosphere. We agree with Terry's arguments that there are instances where Michelle was less than attentive to supervision of the children.

Michelle contends since his remarriage Terry and his wife have excluded Michelle from contact with the children and have made disparaging remarks about Michelle in front of the children. We agree with Michelle and the trial court that there have been several instances where Terry's wife has been less than cooperative with Michelle. We also agree with Michelle that the court seriously frowns on such situations.

In determining custody, it is important to place the children with a parent who has shown an ability to cooperate with the other and who does not try to interfere with the other parent's relationship with the children. *See In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa App. 1988). An award of custody should take into

consideration which parent is better able to put their personal feelings aside to permit the parties' children to develop a relationship with the other parent. *In re Marriage of Bolin*, 336 N.W.2d 441, 447 (Iowa 1983). The court has a duty to place children where a satisfactory relationship between them and both parents will most likely be accomplished. *Downing*, 432 N.W.2d at 694. When a parent attempts to isolate or alienate children from the other parent, this is a factor that must be considered in making a custody award. *See id.* We have long said children of a dissolution need to maintain relationships with both parents. *In re Marriage of Hopkins*, 453 N.W.2d 232, 235 (Iowa App. 1990).

However, the fact the children have since the dissolution made their chief point of operation in the family home with Terry, coupled with the excellent care he has provided to them and the education credentials of his current wife, cause us to disagree with the physical care award made by the trial court. We determine Terry should be awarded physical care. In making this modification, we are mindful of the less than ideal attitude Terry's current wife has exhibited as to Michelle's time with the

children and we caution her to assure she is open and solicitous of Michelle's involvement with the children.

Having modified physical care, we need not address Terry's challenges to the child support award except to consider whether the trial court properly considered his bonus income of $5000 that he had received in each of the past three years in computing child support obligations. The trial court did not abuse its discretion in considering it. See *In re Marriage of Lalone*, 469 N.W.2d 695, 698 (Iowa 1991).

We modify to provide Michelle shall pay child support of $570.50 a month for three children, $489 a month for two children, and $366.75 a month for one child. Terry shall be responsible for health insurance for the children. Terry and Michelle each shall pay one-half of uncovered medical expenses. Michelle shall be granted the income tax exemption for the oldest and youngest child in all years her support is current. Terry shall execute necessary consents for her to claim the exemptions. The support obligation shall not abate during visitation periods.

We provide Michelle the same visitation Terry was awarded in the decree appealed from except we decrease her summer visitation to six weeks.

We award no attorney fees on appeal. Costs on appeal are assessed one-half to each party.

**REVERSED AND MODIFIED.**