

IN THE COURT OF APPEALS OF IOWA

No. 9-218 (1999-63) / 98-1822

**IN RE THE MARRIAGE OF BRIAN S. MUSSMAN
AND BARBARA J. MUSSMAN**

Upon the Petition of
BRIAN S. MUSSMAN,
Appellant,

And Concerning
BARBARA J. MUSSMAN,
Appellee.

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

Brian Mussman appeals from a district court order refusing to modify the primary physical care provisions of the parties' dissolution decree. **AFFIRMED.**

William E. Davis, Davenport, for appellant.

J. David Zimmerman of Pillers, Pillers & Zimmerman, P.C., Clinton, for appellee.

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

HUITINK, P.J.

Brian Mussman appeals from a district court ruling denying his petition for modification of the physical care provisions of the parties' dissolution decree. We affirm.

I. Background Facts and Procedure.

Brian and Barbara Mussman were divorced in June 1994. By stipulation, the parties were awarded joint legal custody of their three children, Alicia, age thirteen, Zachary, age ten, and Kelsey, age eight. Barbara was granted primary physical care of the children subject to liberal visitation by Brian.

These proceedings commenced with Barbara's petition to modify the provisions of the parties' dissolution decree dealing with child support, uninsured medical expenses, and terms of visitation. At trial, Brian requested the court modify the decree to provide for a shared physical care arrangement, citing Barbara's inability to properly supervise the children as a result of her full-time and two part-time jobs. The only issue before the court on appeal is the physical placement of the children.

In denying Brian's request to modify the physical placement provisions of the decree, the district court found Brian failed to demonstrate any evidence the children were deprived of any needs as a result of Barbara's caretaking. The court also found Brian failed to establish that a shared physical care arrangement would be in the best interests of the children. The district court held Brian did not carry his burden of

proof that there had been a substantial change in circumstances warranting a modification of physical care.

On appeal, Brian asserts the district court erred in finding no substantial change in circumstances had occurred. He also contends the court erroneously held a shared physical care arrangement would be disruptive to the children. He maintains a shared physical care arrangement is in the best interests of the children.

II. Scope of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). 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).

III. The Merits.

Courts can modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App.1996). The change must be more or less permanent and

relate to the welfare of the children. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The trial 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. *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987)(citing *In re Marriage of Vetterlack*, 334 N.W.2d 761, 762 (Iowa 1983)).

The question is not which home is better, but whether Brian has demonstrated he can offer the children superior care. *See In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Brian must show an ability to minister to the children's needs superior to Barbara. *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the children, custody should not be changed. *Id.*; *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App.1992).

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *In re Marriage of Smiley*, 518 N.W.2d 376, 378-79 (Iowa 1994)(citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

We initially reject Brian's assertion that the burden of proof in a modification action seeking shared physical care is something less than previously recited.

Modifications from exclusive physical care to joint physical care arrangements based on a lesser standard of proof are incompatible with the potential destabilizing impact joint care circumstances may have on the children involved. *See In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa App. 1998).

Traditionally, joint physical care arrangements have been disfavored in Iowa. *See In re Marriage of Roberts*, 545 N.W.2d 340, 342 (Iowa App. 1996); *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa App. 1994); *In re Marriage of Coulter*, 502 N.W.2d 168, 171 (Iowa App. 1993). Our traditional aversion to joint physical custody must, however, be tempered by recent legislative changes which proclaim joint physical care is a viable disposition of a custody dispute if such an arrangement is in the best interests of the children. *See* 1997 Iowa Acts Ch. 175, § 199. In making this determination, we focus on whether an award of joint physical care is in the children's best interests and whether it will preserve the relationship between each parent and the children. *Swenka*, 576 N.W.2d at 617. Our de novo review of the record indicates Brian has failed to establish either of these factors. The parties' inability to cooperate and respect each other's parenting philosophy and lifestyle is incompatible with joint physical care. *See In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998).

Although the demands of Barbara's employment are substantial, she has nevertheless adequately accommodated the children's primary care needs. Brian's

concerns for the children's welfare can be adequately addressed through the diligent exercise of his rights and responsibilities as joint custodian.

We accordingly affirm the district court.

AFFIRMED.

No. 98-1822. [9-218] IN RE MARRIAGE OF MUSSMAN

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.
AFFIRMED. Considered by Huitink, P.J., and Streit and Zimmer, JJ. Opinion by Huitink, P.J. (6 pages \$2.40)

Brian and Barbara Mussman were divorced in June 1994. By stipulation, the parties were awarded joint legal custody of their three children. Barbara was granted primary physical care of the children subject to liberal visitation by Brian. Brian requested the court modify the decree to provide for a shared physical care arrangement, citing Barbara's inability to properly supervise the children as a result of her full-time and two part-time jobs. In denying Brian's request to modify the physical placement provisions of the decree, the district court found Brian failed to demonstrate any evidence the children were deprived of any needs as a result of Barbara's caretaking. The court also found Brian failed to establish that a shared physical care arrangement would be in the best interests of the children. **OPINION HOLDS:** We initially reject Brian's assertion that the burden of proof in a modification action seeking shared physical care is something less than previously recited. Modifications from exclusive physical care to joint physical care arrangements based on a lesser standard of proof are incompatible with the potential destabilizing impact joint care circumstances may have on the children involved. Traditionally, joint physical care arrangements have been disfavored in Iowa. Our traditional aversion to joint physical custody must, however, be tempered by recent legislative changes which proclaim joint physical care is a viable disposition of a custody dispute if such an arrangement is in the best interests of the children. In making this determination, we focus on whether an award of joint physical care is in the children's best interests and whether it will preserve the relationship between each parent and the children. Our de novo review of the record indicates Brian has failed to establish either of these factors. Although the demands of Barbara's employment are substantial, she has nevertheless adequately accommodated the children's primary care needs. We accordingly affirm the district court.