IN THE COURT OF APPEALS OF IOWA

No. 7-179 / 96-1449

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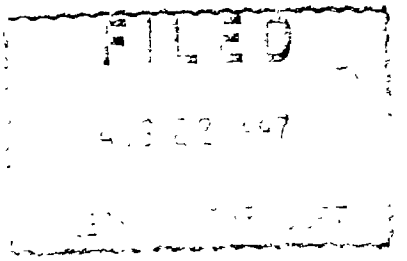
IN RE THE MARRIAGE OF MARK ALAN FORT AND JULIEAN LOUISE FORT

Upon the Petition of
MARK ALAN FORT,

Petitioner-Appellee,

And Concerning
JULIEAN LOUISE FORT,

Respondent-Appellant.



Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, Judge.

Juliean Fort appeals from a district court order modifying the decree which dissolved her marriage to Mark Fort. **AFFIRMED AS MODIFIED.**

Timothy M. Duffy, Des Moines, and Jeanne K. Johnson, Des Moines, for appellant.

Michael J. Winter, Council Bluffs, for appellee.

Heard by Habhab, C.J., and Cady and Vogel, JJ.

HABHAB, C.J.

Mark and Juliean Fort were married on January 26, 1991. They have one son, Cori, born April 2, 1991. The district court entered a decree dissolving the Forts' marriage on March 7, 1995. The decree provided for joint legal custody and awarded primary physical care of Cori to Mark. However, because Juliean would have visitation with Cori almost fifty percent of the time and would be otherwise paying towards his expenses, she was not required to pay child support.

On November 28, 1995, Mark filed a modification application seeking child support from Juliean. He alleged she was not paying other support-related expenses under the decree. He also sought sole custody and a specific visitation schedule. Juliean answered and filed a cross-petition and requested the court vacate the custody provisions of the decree and award primary care of Cori to her.

At the time of the modification hearing, Juliean was twenty-three years old and Mark was twenty-five. Juliean lived in Des Moines and Mark in Council Bluffs. She worked for Iowa Realty and Walmart. Mark worked as a cement truck driver and lived in Council Bluffs in the marital home.

The parties submitted to psychological testing by Dr. Gary Gard before trial. Dr. Gard testified both parties have the necessary skills to parent Cori but recommended Juliean be given primary physical care.

Following the hearing the court entered its modification order. The court considered Dr. Gard's testimony but rejected his custody recommendation. The court ultimately determined Cori's best interest would be served by leaving Cori's physical care with Mark. The court required Juliean to pay child support in the amount of $212.68 per month and granted her liberal visitation.

Juliean appeals. She contends the district court erred in ruling Cori's best interests were served by awarding primary physical care to Mark. She notes that she was the primary care giver prior to the parties' separation and suggests until Mark took his cement truck driving job in April 1996, he actually had very little contact with Cori. She claims the parties had an agreement when the dissolution decree was entered that she would get custody of Cori once she was settled. She argues the court erred in discounting the testimony of Dr. Gard, who she claims was the only unbiased witness.

In an appeal from an action to modify custody, our review is de novo. Iowa R. App. P. 4.; *In re Marriage of Anderson*, 530 N.W.2d 741 (Iowa App. 1995). We give weight to the findings of the trial court, but we 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 before us. *Anderson*, 530 N.W.2d at 741.

Primary Physical Care. As this is a modification action, the question before us is not which home is better for Cori, but whether Juliean has met her heavy burden of demonstrating she can offer Cori superior care.[1] The legal principles governing our review of a modification action are well established.

> 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

Anderson, 530 N.W.2d at 741-42. When both parents are equally competent to minister to the child, custody should not be changed. *See In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App. 1992).

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[1] We note there has been some confusion between the parties as to the appropriate burden to be applied in this case. Mark initially applied to the court for modification of the child support provisions of the decree; Juliean answered and made a "motion to set aside and vacate the judgement entry or modify the decree." She argues the custody and visitation provisions made by the trial court in this matter were comparable to those of an initial decree and thus she was not required to show a substantial change of circumstance warranting a transfer of custody has occurred. We disagree. The order of the trial court is entitled "modification order." The modification order does not set aside or vacate the prior decree. Further, no appeal from the initial decree was made. Thus, we employ a modification standard to the present action.

The record reveals the parties had orally agreed that when Juliean became "stable" she should have primary physical care of Cori. In his testimony at trial, Mark conceded this agreement was entered into prior to signing the divorce decree. He explained he and Juliean did not agree, however, on how to define "settled." In light of the three moves Juliean had made since the separation, he felt her living situation had not adequately stabilized.

The record reveals that upon leaving the marital home in March, 1995, Juliean relocated to Macedonia, Iowa. After a few months she moved to the Des Moines area and lived in an apartment until her present residence became available. It appears from the record Juliean has now established a permanent residence and has no further intention of relocating.

When parties consent to what will establish a "substantial change of circumstance" prior to initiating a modification action, we are not bound to change any provisions of the decree upon a showing that this stipulated change has occurred. *See In re Marriage of Witzenburg*, 489 N.W.2d 34, 36 (Iowa App. 1992).[2] In *Witzenburg*, the parties stipulated a substantial change in circumstance would be

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[2] *See* new subsection 8A of House File 612, p. 117, which adds to Iowa Code section 598.21. Section 8A provides in part:

> (8)A. If a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation a substantial change in circumstances. . .

established if either party relocated to a distance more than sixty miles from Oskaloosa, Iowa. *Id.* at 35. The respondent relocated to the State of Florida and the petitioner made an application to the court requesting primary physical care of the child. *Id.* We affirmed the trial court's denial of the application because, although the petitioner had shown the substantial change of circumstances had occurred, he failed to show a substantial change which related to the child's welfare or that he was a more effective minister to the child's well-being. *Id.* at 36.

In our de novo review of the record, we find Juliean has shown a substantial change of circumstances. As such, we move now to consider whether Juliean has established she can more effectively minister to Cori's well-being. *See id.*

Dr. Gard, clinical psychologist, completed psychological evaluations of both parties. He determined although both parties could adequately provide for Cori, Juliean was more capable of fostering a good relationship between Cori and Mark. In a summary provided to the court, Dr. Gard stated:

> Both parents have the intellectual ability to learn from experience and to meet the responsibilities of parenting. However, Ms. Fort appears more adequately adjusted emotionally. She appears happy, contented and comfortable with herself. . . . Ms. Fort also seems secure, independent, and responsible. In comparison, Mr. Fort appears to have more difficulty coping with his environment. He is very defensive and rigid; his self concept is poor; and he appears to harbor a negative, angry attitude toward his environment. He likely will have more difficulty maintaining deep relationships with others and he currently is not involved in any significant relationships. Mr. Fort also appears to have many more dependent behaviors, and he is prone to rely on other people for direction and support.

Dr. Gard also explained Julian would be more emotionally available to Cori, while Mark has had longstanding problems with hostility and would likely direct that hostility at "whoever is in his environment" when he is upset. He also appears to have a propensity toward depression and problems controlling his anger. Dr. Gard also explained Mark would have more of a problem with adhering to the highly structured, very specific visitation schedule necessary for Cori to maintain healthy relationships with both parents.

Mark and his mother, Charlotte Fort, testified that both parties share good relationships with Cori. They both stated Mark had readily compromised with Julian after the separation regarding visitation and he had no problems with anger or with losing his temper. By Mark's own admission, Julian provided for Cori's primary physical care during the marriage as he worked during the evenings. However, Mark testified he and Julian's friend got into arguments frequently in front of Cori. On one occasion he did have a physical scuffle with Julian's friend in front of Cori during a visitation exchange. We also note during the marriage Mark made several suicidal gestures during arguments with Julian. On one occasion he assaulted Julian during an argument. On another occasion he discovered she had began smoking and punched the windshield of his truck, shattering the glass.

Given that the circumstances present in this case indicate Cori needs to have frequent visits and contact with the non-custodial parent, we are especially concerned

about each parent's ability to support and encourage the non-custodial relationship. In our de novo review of the record, we find evidence supports Dr. Gard's conclusion that Mark's problems with hostility and anger render Juliean the more appropriate primary physical custodian of Cori. Further, we find Juliean has met her heavy burden of showing she is more capable of effectively ministering to Cori's well-being.

We modify the finding of the trial court and award the parties joint custody with primary physical care of Cori to Juliean. We award Mark the visitation set forth in the decree to Juliean.[3] We order him to pay $287.16 per month as child support for Cori with the same conditions provided in the decree. Further, Mark shall be allowed to claim Cori as a dependent upon his state and federal income tax returns in even-numbered years if he is current with his child support obligation by December 31 of the year in which he plans to claim the exemption. Juliean shall claim Cori in the odd-numbered years.

AFFIRMED AS MODIFIED.

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[3] We note Mark should have visitation with Cori on Father's Day and Juliean should have visitation with him on Mother's Day.