

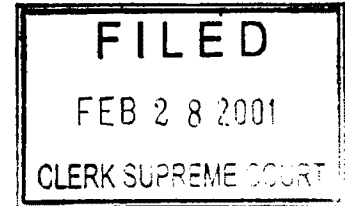
IN THE COURT OF APPEALS OF IOWA

No. 0-790 / 99-1993
Filed February 28, 2001

**IN RE MARRIAGE OF MARTY ALLEN CROW
AND LISA LAYNE CROW**

**Upon the Petition of
MARTY ALLEN CROW,
Petitioner-Appellant,**

**And Concerning
LISA LAYNE CROW,
Respondent-Appellee.**



Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Marty Crow appeals from the district court's dismissal of his modification petition. **AFFIRMED.**

David A. Roth of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

Sara Kersenbrock, Waterloo, for appellee.

Considered by Streit, P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Marty and Lisa Crow divorced after eight years of marriage. Pursuant to the decree, Lisa assumed physical care of the parties' two children: Jordan, born in 1989, and Casey, born in 1995. In 1999, Lisa was arrested and charged with possession of methamphetamine and failure to affix a tax stamp. She entered an Alford plea to the charges and was sentenced to two to five years of probation.¹ Marty applied to modify the physical care ruling based primarily on this arrest. The district court denied the application and Marty appealed. We agree with the district court that Lisa should retain physical care of the children. Accordingly, we affirm.

I. Standard of Review

We review modification proceedings de novo. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50 (Iowa 1999). While we give weight to the district court's fact findings, we are not bound by them. *Id.* The applicant must show there has been a substantial change in circumstances since the decree was entered that was not contemplated by the decretal court. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). "The change must be more or less permanent and relate to the welfare of the children." *Id.* This is a heavy burden. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). It is not sufficient to establish both parents are equally competent to minister to the child. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). The applicant must demonstrate a superior ability to minister to the child's needs.

¹ See *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (upholding guilty plea without admission of guilt).

In re Marriage of Rosenfeld, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). Our foremost concern is the best interests of the children. *In re Marriage of Erickson*, 491 N.W.2d 799, 803 (Iowa Ct. App. 1992).

II. Physical Care

Marty seeks a change in the physical care ruling based on: (A) Lisa's arrest; (B) a founded child abuse report against Lisa; (C) Lisa's boyfriend's drug use and criminal background; (D) Lisa's purported obstruction of visitation; and (E) a belief the district court inappropriately relied on Jordan's stated preference to live with her mother and her half-sisters' stated preference to have Jordan and Casey stay with them.

A. Lisa's arrest. Lisa was arrested outside the bar where she worked after methamphetamine was discovered in her purse. Marty relies heavily on this arrest to support his modification application. At first blush, a transfer of physical care appears warranted on this ground. See *In re Marriage of LeGrand*, 495 N.W.2d 118, 120 (Iowa Ct. App. 1992). Lisa provided the district court with a complex explanation of how the drugs ended up in her purse, an explanation that the court found "simply not credible." We agree. We also agree with the court's finding that Lisa "was certainly in possession of these drugs and knew so at the time." However, despite Lisa's arrest and plea, Marty has not demonstrated superior caretaking ability or a material and substantial change in circumstances that would warrant a transfer of physical care to him.

The parties separated when Casey was just two months old. After the separation, Marty conceded he did not see Casey for nine or ten months. He further conceded he did not exercise visitation with Jordan during this time frame.

Although he contends this was because a no-contact order was in place, his current wife testified Marty could have exercised visitation by making arrangements to have third parties facilitate the visitation. Marty did not begin exercising regular bi-monthly visitation until ten months before trial. Because Marty elected to have minimal contact with the children from November 1995 through December 1998, a period of more than three years, Casey did not develop a bond with his father and Jordan experienced feelings of hurt and loss. In light of his absences, Marty has not established the type of active and sustained interest in the children that would demonstrate superior caretaking ability.

Marty also has not proven the arrest was a material and substantial change in circumstances. Although Lisa is far from a model parent, she was Casey's only caretaker and Jordan's primary caretaker at the time of trial. Marty acknowledged he believed the children should live with Lisa and were safe with her during the pendency of the divorce. He further conceded he was aware of Lisa's drug use and used drugs with her during the marriage. Therefore, under the particular circumstances of this case, the arrest was not a substantial change in circumstances.

Nevertheless, the arrest is of serious concern. Like the district court, our decision not to change the physical care arrangement is ultimately based on Lisa's recognition of the consequences should she not comply with the conditions of probation. We agree with the following assessment by the district court:

Under the terms of her probation, the Respondent is far less likely to smoke cigarettes, use alcohol, or otherwise utilize illicit drugs. She is currently under three to five years of supervised probation. By her direct testimony, she understands that should she violate

the terms of probation, she will spend a minimum of three and one-half years in prison should her probation be revoked. This appears to provide substantial incentive to the Respondent and offers a degree of comfort to this Court as it relates to the children. Any additional court action involving the Respondent, however, should elicit a prompt response from the Court.

We accordingly decline to transfer physical care based on Lisa's arrest.

B. Founded Child Abuse Report. In 1999, the Department of Human Services issued a founded child abuse report against Lisa for denial of critical care. The report was based on Casey's overnight stay at a neighbor's house without Lisa's knowledge. Marty contends this report warrants a change in the physical care arrangement.

The district court pointed out that Lisa disputed these allegations and had appealed the Department's initial decision. The court further stated it was "not convinced that a single incident of Denial of Critical Care, even if proven, would justify a change in the primary physical placement under the totality of circumstances." Under the particular facts of this case, we agree. There is no question Jordan and her older half-sisters knew where Casey was. The only issue is whether the older children checked on him in the evening. Whether they did or did not, it is clear Casey was not at a stranger's house but at the home of a known playmate of Jordan. He remained there because he fell asleep, and he was brought home the following morning. For these reasons, we conclude the founded report based on this incident does not warrant a change in the physical care arrangement.

C. Lisa's Boyfriend. Marty also maintains Lisa's boyfriend Scott is a bad influence on the children, given his history of drug abuse and convictions. We also are troubled by this association. However, Marty has not established Scott's

relationship with Lisa is a material and substantial change in circumstances. It was Lisa's interest in Scott in 1995 that precipitated the divorce proceedings. Additionally, Marty was aware of Scott's drug use prior to his separation from Lisa and used drugs with both of them. Finally, Marty acknowledged Scott lived at his own residence rather than with Lisa, thereby minimizing contact with the children. For these reasons, we conclude Lisa's relationship with Marty does not warrant a change in the physical care arrangement.

D. Obstruction of Visitation. Marty contends the district court incorrectly concluded he chose to have minimal contact with Jordan and Casey. He maintains that if he did not see the children as much as he could have, it was because Lisa obstructed visitation. We recognize obstruction of visitation by a custodial parent may be grounds for modification of physical care. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). However, we are not convinced Marty has established Lisa systematically impeded visitation. Although the record suggests the parties did not communicate adequately concerning visitation in 1997 and for a portion of 1998, these problems resolved themselves once the parties established a regular visitation schedule toward the end of 1998. On this record, we conclude the visitation issue does not favor a transfer of physical care to Marty.

E. Children's Preference. Marty contends the district court gave undue weight to Jordan's stated preference to live with her mother and her older half-sisters' stated desire to have their younger half-siblings live with them. We may consider the wishes of children who are of sufficient age, intelligence and discretion to exercise enlightened judgment, although these wishes are not

controlling and will be examined with other relevant factors. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). We accord a child's preference less weight in a modification as opposed to an initial custody proceeding. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). Our courts have noted a strong preference to keep half-siblings together. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986).

Jordan was eight years old at the time of trial. The district court questioned her in chambers about her experience with both parents. She testified, "I don't want to live with my dad because my stepmom, she was mean to me and my little brother." She further testified, "Well, I want to live with mom because I want to see my sisters a lot. I want to see my grandma a lot. And I want to see my aunts and uncles and my cousins a lot." Given her fairly tender age, we accord little weight to Jordan's preference. However, we are persuaded it would be inequitable to separate Jordan and Casey from their older half-sisters.

Fifteen year old Katie testified, "[m]e and my little brother are like the closest. And me and my little sister are close." Jordan and Casey appeared not to have a similar relationship with Marty's two sons from a former marriage who lived in Wisconsin with their mother and exercised visitation with Marty on different weekends than did Jordan and Casey. For these reasons, we agree with Marty that Jordan's preference is entitled to little weight but nevertheless conclude the older half-sisters' attachment to the younger children militates in favor of keeping Jordan and Casey with Lisa.

We affirm the district court's denial of Marty's modification application. After considering the respective incomes of the parties and the relative merits of

each party's appeal, we decline to order Marty to pay Lisa any appellate attorney fees. *See In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App. 1999).

AFFIRMED.