

IN THE COURT OF APPEALS OF IOWA

No. 1999-95 (9-282) / 98-1608

Filed August 27, 1999

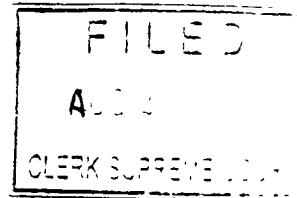
**IN RE THE MARRIAGE OF JAMES J. GERARDY
AND LORI S. GERARDY**

Upon the Petition of
JAMES J. GERARDY,

Appellee,

And Concerning
LORI S. GERARDY,

Appellant.



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

Lori Gerardy appeals from a district court order modifying the decree dissolving her marriage to James Gerardy. **AFFIRMED.**

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellant.

Stephen P. Wing and Eugene F. Dwyer of Dwyer & Wing, P.C., Davenport
for appellee.

Heard by Sackett, C.J., and Vogel, and Zimmer, JJ.

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ZIMMER, J.

Lori Gerardy appeals from an order which modified the custody provisions of the parties' dissolution decree to grant physical custody of their two children, Alissa and Mathew, to the father, James Gerardy. We affirm.

I. Background Facts and Proceedings. The marriage of James and Lori Gerardy was dissolved by decree entered on June 30, 1995. The marriage produced two children, Alissa, born October 14, 1990, and Mathew, born May 20, 1992. Under the decree's stipulated terms, the parties were awarded joint legal custody of the children, with Lori responsible for the children's primary physical care. The parties agreed James would have liberal visitation, including but not limited to every other weekend, one night per week, holiday visitation, and up to two weeks in the summer.

In February 1998, James filed an application for modification of the dissolution decree. He requested physical care of the parties' two children be transferred to him. Lori resisted and filed a counter-claim for increased child support. Following trial held in September 1998, the district court found circumstances had changed since entry of the dissolution decree and that the best interests of the children required the custody provisions of decree be modified. The court transferred primary physical care of both children to James. It accordingly denied Lori's counter-claim for increased child support.

Lori appeals. She argues the evidence does not warrant transfer of physical care of Alissa and Mathew to James. She also contends if the district court's custody

order is reversed, James' child support obligation should be modified because it deviates from the child support guidelines by more than ten percent. James argues that if the custody order is reversed, this court should adopt a new minimum visitation schedule. Lori also requests appellate attorney fees.

II. Scope of Review. Custodial modification proceedings are held in equity, and are therefore reviewed de novo. *See* Iowa R. App. P. 4; *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). We examine the entire record and adjudicate anew rights on the issues properly presented. *See In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). At the same time, we recognize the virtues inherent in listening to and observing the parties and witnesses. *Id.* Consequently, though we are not bound by them, we give weight to the findings of the trial court, especially when considering witness credibility. *Id.*; *see also* 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. *See In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Modification of Custody. Custodial terms of a dissolution decree may be modified when there has been a substantial change in circumstances since the time of the decree which was not contemplated by the dissolution court when the decree was entered. *See 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. *See In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). District courts have 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. See *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)).

The question is not which home is better, but whether James has demonstrated he can offer the children superior care. See *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). James must show an ability to minister to the children's needs superior to Lori. See *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981), *In re Marriage of 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. See *In re Marriage of Smiley*, 518 N.W.2d at 378–79 (Iowa 1994) (citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)). The criteria for determining child custody in original dissolution actions are applied in modification proceedings as well. See *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996). These include factors enumerated in Iowa Code section 598.41(3) (1997), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355–56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). *Id.* The denial by one parent of a child's opportunity to have meaningful and maximum continuing contact with the other parent is a significant

factor which we also consider in determining a custody or physical care arrangement. See Iowa Code § 598.41(1)(c) (Supp. 1997); *In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa App. 1998); see also *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). In determining which parent serves the children's best interests, the objective is to place the children in an environment most likely to bring them to healthy physical, mental, and social maturity. See *In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa App. 1993).

James asserts there has been a substantial change in circumstances in that (1) Lori has been incapable or unwilling to provide him an opportunity for liberal visitation with the children; (2) she has inflicted strict corporal punishment on the children; (3) she has exhibited a lack of stability in providing for the needs of the children; (4) and she has thwarted his attempts to participate in the joint custodial decisions affecting the children. We agree with the district court's finding that there is insufficient evidence to support his allegations Lori has inflicted unusually severe corporal punishment on the children. We now turn to James' remaining claims.

Initially we note the parties presented conflicting testimony regarding their relationships between each other and their children. The district court found James' testimony and evidence to be more credible than Lori's. We accord great weight to this finding. We also note both children are physically healthy, but that Alissa has experienced emotional problems and Mathew has had behavioral and educational difficulties.

Each party complains of the other's behavior and each blames the other for their current difficulties. We agree with the district court's assessment that Lori and James have had problems communicating since their marriage was dissolved. We also agree with the district court's conclusion both parents have the basic skills necessary to care for the children. Nevertheless, we also agree with its ultimate conclusion the long term best interests of Alissa and Mathew demand James be granted primary physical care.

James is more outgoing and ambitious and has proven he is better able and more willing to involve the children in activities that foster social and physical development. His home life appears more structured than Lori's and the evidence shows he is more able and willing to discipline Alissa and Mathew.

The record also indicates James' ability to meet the emotional needs of the children is superior to Lori's. Lori's own emotional problems have occasionally caused her to engage in conduct detrimental to the children's own well-being as well as their relationship with James. Lori has not always recognized the children's emotional and educational problems. A home study conducted pursuant to court order supports the conclusion Lori's parenting skills are limited and that James has the motivation and ability to assume responsibility as the children's primary provider of care.

We are particularly concerned with the ability and willingness of Lori to allow the children continuing meaningful contact with their father. She refuses to attend school activities, such as parent-teacher conferences, if James will also be attending.

The record shows Lori has chosen not to get along with James' family and has prohibited the children's contact with members of James' family when they are seen in public. There is also evidence the children believe Lori will destroy any gifts they receive from James and his family. The record reflects her actions have been emotionally detrimental to the children.

Although Lori has generally permitted James to exercise the scheduled visitation required by the parties' decree, she has consistently interfered with reasonable requests for limited additional visitation. For example, there is credible evidence in the record that Lori arbitrarily denied James additional visitation for Mathew and Alissa to attend James' family reunion and meet his relatives from Pennsylvania. The record also demonstrates Lori purposefully organized the children's weekday schedules so as to prevent James from exercising an evening per week of visitation with Mathew for participation in little league baseball.

It is apparent Lori has engaged in a pattern of conduct designed to limit the kinds of activities Mathew and Alissa could undertake with their father. She clearly has not demonstrated a commitment to providing the children with the maximum opportunity for meaningful contact with their father. Conversely, James appears very willing to foster the children's relationship with Lori and her family.

We recognize Lori has made some improvements in raising the children since the application for modification was initially filed with the district court. However, Lori had over two and a half years to make these improvements before the application was filed. We question the sincerity and longevity of such improvements made only

after being faced with the imminent threat of losing primary physical care of Alissa and Mathew.

Conditions are not now what the district court contemplated at the time the marital dissolution decree was entered. We agree with the district court there has been a substantial change in circumstances. The record supports the order of the district court transferring primary physical custody of Alissa and Mathew from their mother Lori to their father James. Because we affirm the order of the district court, the only remaining issue we consider is the award of appellate attorney fees.

IV. Appellate Attorney Fees. An award of appellate attorney fees on appeal of a child custody modification action is not a matter of right, but rests within the discretion of the court. *See In re Marriage of Titterington*, 488 N.W.2d 176, 181 (Iowa App. 1992). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *See id.* We decline to award appellate attorney fees in this case. Costs of this appeal are to be split equally between the parties.

AFFIRMED.