

IN THE COURT OF APPEALS OF IOWA

No. 6-492 / 96-0262

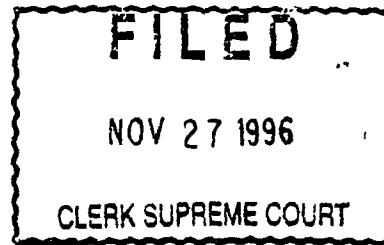
**IN RE THE MARRIAGE OF PAMELLA
A. STER AND DAVID A. STER**

**Upon the Petition of
PAMELLA A. STER,**

Petitioner-Appellant,

**And Concerning
DAVID A. STER,**

Respondent-Appellee.



Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

David Ster appeals from the district court's denial of his application to modify
the custody provisions of the decree dissolving his marriage to Pamela Ster.

AFFIRMED.

Patricia C. Kamath, Iowa City, for appellant.

Judith Jennings Hoover, Cedar Rapids, for appellee.

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

SACKETT, C.J.

Respondent-appellant David A. Ster appeals following the trial court's denial of his application to modify the custodial provisions of his dissolution decree and place physical care of his daughter Beth, born in 1987, with him. He contends he is the superior custodian. Petitioner-appellee Pamella A. Ster contends the trial court should be affirmed and she should be awarded some \$7550 in attorney fees for defending this appeal. We affirm.

This marriage was dissolved in 1990. At that time, by agreement Pamella assumed the physical care of Beth and her brother Adam, born in 1979. This matter came before the court when Pamella, who works as a secretary for the child support recovery division, filed an application to increase her child support.

David and Beth have not functioned well as divorced parents. They have not cooperated and the children have suffered. They both are concerned about their children, but not concerned enough to resolve petty difficulties between each other. Neither has understood that as joint custodians they share the responsibilities of working in concert to raise the children to adulthood.

Adam, who has been in Pamella's care since the dissolution, is of average intelligence but is receiving failing grades in high school. His relationship with his father is considerably strained.

Beth is developmentally disadvantaged. Beth's mental abilities and development are two years below her chronological age. This problem was not

discovered until after the dissolution. Then it was discovered, not by Pamela, but by David's current wife.

David contends he and his current wife are in a better position to care for Beth and presented testimony from Ruppert of HealthSources in Cedar Rapids. Ruppert was hired by David for family counseling and testified at trial. Ruppert had started counseling with both families when Pamela opted out. Ruppert found Beth to be alone and sad. He testified Beth wished to live with her father.

David further points to the serious problems Adam is experiencing as evidence of Pamela's inability to meet her children's needs. Pamela criticizes David for giving up on Adam.

We review de novo. Iowa R. App. P. 4; *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991). We give weight to the credibility assessments made by the trial court. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa App. 1994).

This is not an original custody determination. The parties share joint physical care. Pamela is the current physical custodian. The question, therefore, is not which home is better, but whether David has demonstrated he can offer Beth superior physical care. See *In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). David must show an ability to minister to the child's needs superior to Pamela. See *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 365 N.W.2d 48, __ (Iowa

App. 1985). If both parents are found to be equally competent to minister to the children, physical care should not be changed. *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App. 1992).

The burden for a party petitioning for a change in a dissolution is heavy, *see In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App. 1988), because children deserve the security of knowing where they will grow up and we recognize the trauma and uncertainty these proceedings cause all children. Custody, once fixed, should be disturbed only for the most cogent reasons. *See id.* at 693. David has the burden to show by the preponderance of evidence conditions since the dissolution decree was entered have so materially and substantially changed that Beth's interests make it expedient to award him physical care. *See In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App. 1985).

It is clear both parents can provide for the basic needs of Beth. Both parents should be able to support each other in their respective relationships with the children, but in this case neither has been supportive of the other.

There have been material changes in circumstances since the decree. David has remarried and his current wife is available to assist him with the care of Beth. Pamella is experiencing problems raising Adam. Beth has been found a child with special needs. Adam has not performed well under his mother's care. David currently has not shared the responsibilities he should for Adam.

David contends the trial court did not give sufficient weight to his expert and Pamela's failure to cooperate in assuring him visitation. We give opinion testimony the weight we find it deserves after considering, among other things, the expert's education, experience, familiarity with the case, reasons given for the opinion, and interest, if any, in the case. See *In re Marriage of Scheffert*, 492 N.W.2d 203, 205 (Iowa App. 1992).

A parent's failure to cooperate with visitation is held against him or her in a modification proceeding. See *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Leyda*, 355 N.W.2d 862, 865-67 (Iowa 1984); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659-60 (Iowa App. 1991); *In re Marriage of Gratias*, 406 N.W.2d 815, 817-18 (Iowa App. 1987).

David shows a genuine concern for his daughter. He and his current wife have taken affirmative measures to help her with problems. Pamela has some struggles as a single parent, but she is concerned about her children. Beth needs the love and attention of both parents. While we accept the trial court's conclusion, David has not met the burden necessary at the current time to support a modification. We find he has shown more insight than Pamela into Beth's problems. Pamela as physical custodian has a responsibility to cooperate with David, and he with her. We do not approve of her reluctance to allow David to provide for his daughter's special needs and her failure to cooperate with counseling. A continued failure to cooperate could

be grounds for a later modification of physical care. We affirm the trial court's refusal to modify physical care.

We have considered and rejected Pamella's claim the issue of physical care is not before us on appeal. We consider Pamella's request for appellate attorney fees and order David to pay \$500.

AFFIRMED.