

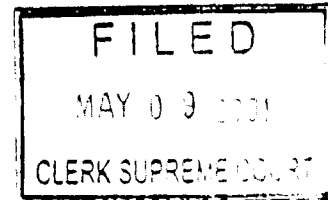
IN THE COURT OF APPEALS OF IOWA

No. 1-073 / 00-76
Filed May 9, 2001

**IN RE MARRIAGE OF TAMERA LOUISE ARNDT
AND GERALD EUGENE ARNDT**

Upon the Petition of
TAMERA LOUISE ARNDT,
Petitioner-Appellee,

And Concerning
GERALD EUGENE ARNDT,
Respondent-Appellant.



Appeal from the Iowa District Court for Mitchell County, John S. Mackey,
Judge.

A father appeals from the modification of the parties' shared physical care
arrangement. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, Stochl, Braun & Churbuck,
Charles City, for appellant.

DeDra Schroeder of Schroeder Law Office, Charles City for appellee.

Heard by Vogel, P.J., and Zimmer and Hecht, JJ.

000006

ZIMMER, J.

Gerald Arndt appeals a district court ruling granting Tamera Arndt's application for modification of the parties' shared physical care arrangement. He argues the court erred in finding the shared care arrangement should be modified. Alternatively, he argues that if modification was required, he should have been awarded primary physical care of the children. Finally, he argues that if the mother is to be awarded primary physical care, he should be awarded the physical care of the children during the summer. We affirm.

I. Background Facts and Proceedings. Tamera (Tammy) and Gerald (Jerry) were married in 1989. Their son Jordan was born in February 1991. Their daughter Jaelyn was born in April 1994.

Tammy and Jerry separated in April of 1998. The parties continued to live near each other in Osage, Iowa, after separating.

The Arndts' marriage was dissolved by dissolution decree in July 1998. By agreement of the parties, the decree provided for joint legal custody of the children, with the parents alternating physical care on a weekly basis. The decree also provided that the parties intended for their children to continue to reside in the Osage school district and if a party moved out of the district, the move would be considered a substantial change in circumstances resulting in placement of the children with the parent who remained in the school district. At the time their decree was entered, a district court judge discussed the challenges of a shared care arrangement with the parties.

In September of 1998, Tammy filed an application to modify custody. She alleged problems had arisen with the placement arrangement and that it would

be in the best interests of the children if she were granted their primary physical care. She also requested that the decree be modified to eliminate the requirement that the children reside within the Osage school district.

In November, Tammy requested the court order the parties and children to submit to mental examinations. Her application was granted and the parties and their children began interviews and testing with Dr. Mark Peltan. In January of 1999, the parties agreed to the dismissal of Tammy's application to modify custody in order to attend counseling to address the problems in their shared physical custody arrangement.

Sometime in May or June of 1999, Tammy moved to Klemme, Iowa where her boyfriend and her family lived. On July 21, she filed a second application to modify custody. Following trial, the district court found the shared custody arrangement had a deleterious effect upon the children and the problem was exacerbated by the parties' inability to co-parent effectively. The court modified custody to place the children in Tammy's primary care. In an order pursuant to Iowa Rule of Civil Procedure 179(b), the court further modified the decree to remove the language requiring that the children reside in the Osage school district.

Jerry has appealed. He first argues the court erred in finding the shared physical care arrangement should be modified. He contends the record did not support the court's findings and that it failed to consider the children's best interests. Jerry alternatively argues that if modification was required, it is he who should have been awarded primary physical care of the children. Finally, Jerry

argues that if Tammy is to be awarded primary physical care of the children, he should be awarded physical care of the children during the summer.

Tammy did not file a cross-appeal. However, she asks that restrictions be imposed on Jerry's visitation to bar him from cross-dressing in front of the children and to prohibit him from making disparaging remarks about her. She also requests that Jerry be ordered to resume counseling in the event that he is awarded physical care of the children during the summer.

II. Scope of Review. We review the record de novo in proceedings to modify the custodial provisions of a dissolution decree. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). We give weight to the findings of the trial court, although they are not binding. *Id.*

III. Modification of Custody. The court can modify custody only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *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 child. *Id.* Additionally, the parent seeking custody must prove an ability to minister more effectively to the child's well-being. *Dale*, 555 N.W.2d at 245. This strict standard is premised on the principle that once custody of a child has been determined it should be disturbed for only the most cogent reasons. *Id.*

Jerry contends the record does not support the court's findings of fact. Specifically, he claims there is no evidence the children were suffering under the shared care agreement. The district court found the parties' shared care arrangement has had a deleterious effect on the children. After reviewing the

evidence, we reach the same conclusion. Although everything had been going well with the shared care arrangement at the time the dissolution decree was entered, things soon began to deteriorate. The counselors who interviewed the children at length testified that both children were confused by the shared living arrangement. There was additional testimony that the children had been acting out as a result of this confusion. The children's difficulties were further complicated by the parties' inability to cooperate and communicate in the parenting of their children. We find these problems constitute a substantial change in circumstances warranting modification of custody. See *Walton*, 577 N.W.2d at 870 (finding the discord between the parents and the disruption it was having on the children's lives warranted a modification of an award of joint physical care.)

Finally, Jerry contends that a modification of physical care was not in the children's best interests. We have already found that the shared care arrangement was having an adverse affect on the children. It was not in their best interests for this arrangement to continue. We find that the modification was in the best interests of the children.

IV. Award of Primary Physical Care. Jerry contends that if the shared care arrangement was properly modified, the court erred in allocating the majority of the physical care to Tammy. He claims the best interests of the children require that he be granted primary physical care.

The criteria for determining child custody in original dissolution actions are applied in modification proceedings as well. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa Ct. App. 1996). The best interests of the child are the

governing factor in custody cases. *Id.* “In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity.” *Id.*

After careful consideration of all of the evidence, the district court concluded the children's primary care should be transferred to Tammy. Upon de novo review of the record, we reach the same conclusion.

Through the counseling sessions, Dr. Peltan found both Tammy and Jerry to be loving and devoted parents. However, he also had concerns about each party. Dr. Peltan recommended that Jerry consult with a clinical psychologist. However, Jerry only attended one counseling session and did not openly discuss his cross-dressing. Jerry also has issues with managing his anger and had been overheard by a neighbor yelling at the children, “I don't care about your fucking mother.” Meanwhile, Tammy entered counseling with Jean McAleer who found Tammy had experienced considerable growth and had become a better parent. By all accounts, Tammy's move to Klemme has been beneficial to the children, who appear more content, relaxed and outgoing.

Based on the evidence, we find it is in the best interests of the children to be placed in Tammy's primary physical care.

V. Visitation. Finally, Jerry argues that he should have been allocated physical care of the children during the summer.

Our governing consideration in establishing visitation rights is the best interests of the child. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). A child should be afforded the opportunity for maximum physical and emotional contact with both parents. *In re Marriage of Ruden*, 509 N.W.2d

494, 496 (Iowa Ct. App. 1993). Therefore, the noncustodial parent should be awarded liberal visitation to effectuate this contact. *In re Marriage of Farrell*, 481 N.W.2d 528, 531 (Iowa Ct. App. 1991).

In its order, the district court granted Jerry visitation of the children on alternate weekends, alternate holidays, alternate birthdays, one evening per week, and "extended visitation during the summer exercised in at least two two-week periods." We believe the district court's order will allow for maximum continuing physical and emotional contact with both parents and reject Jerry's request to extend his summer visitation. The three-month visitation schedule that Jerry proposes will likely lead to the same problems that arose with the shared physical care arrangement. See *In re Marriage of Brainard*, 523 N.W.2d 611, 615-16 (Iowa Ct. App. 1994). We therefore affirm the district court's order in regard to visitation.

In her reply brief, Tammy requests that this court restrict Jerry from cross-dressing or making disparaging comments about her during visitations. Tammy did not file a cross-appeal in this case. While a successful party is not required to cross-appeal to preserve error on a ground urged but rejected by the district court, *Venard v. Winter*, 524 N.W.2d 163, 165 (Iowa 1994), this issue was never brought before the district court. An issue that was not presented to the trial court will not be considered for the first time on appeal. *In re Marriage of Okonkwo*, 525 N.W.2d 870, 872 (Iowa Ct. App. 1994). Therefore, we will not consider Tammy's request.

After de novo review, we affirm the district court's award of primary physical care to Tammy and all other provisions of the modified decree.

AFFIRMED.