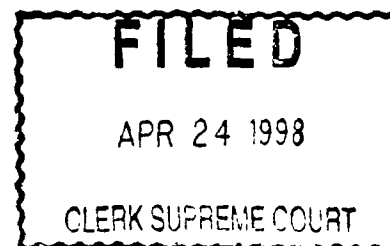


IN THE COURT OF APPEALS OF IOWA

No. 8-050 / 97-1160



**IN RE THE MARRIAGE OF GRANT J. WIESE
AND LISA WIESE**

**Upon the Petition of
GRANT J. WIESE,**

Petitioner-Appellant,

**And Concerning
LISA WIESE,**

Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos,
Judge.

Petitioner appeals a district court ruling denying his application for
modification of the parties' dissolution decree. **AFFIRMED.**

R. Scott Rhinehart of Richard Rhinehart & Associates, Sioux City, for
appellant.

Alice S. Horneber of Horneber Law Offices, South Sioux City, Nebraska, for
appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

SACKETT, P.J.

Petitioner-appellant Grant Wiese appeals the trial court's denial of his petition for modification of the decree dissolving his marriage to respondent-appellee Lisa Wiese. Grant contends he met the necessary burden to transfer primary physical custody of their son, David, from Lisa to him. Grant also contends the trial court should have entered a default judgment in his behalf and should not have ordered him to pay \$1000 of Lisa's attorney fees. We affirm.

Grant and Lisa were divorced in February 1995. They both lived in Sioux City. Lisa and Grant stipulated that Lisa would be awarded primary physical care of David, born in 1986, and their daughter Jennifer, born in 1983.

Following the dissolution, Grant continued to have substantial involvement with the children. He exercised his visitation. He was involved in their recreational activities and was an assistant coach for Jennifer's basketball team and baseball team, and head football coach for David's teams. He attended parent-teacher conferences and was, at all times, current with child support payments. He purchased a home near Lisa's and provided bedrooms for each of the children.

Lisa established a relationship with a man who lived in Milford, Iowa, about one hundred miles from Sioux City. She intended to marry the man and move to Milford to live with him and his two children.

David was not happy about moving to Milford. Grant took him to a licensed psychologist in Sioux City, who interviewed David and determined he wished to

remain with his father in Sioux City. Grant then filed a petition contending there had been a substantial change of circumstances and primary physical custody of David should be transferred to him. Before the application to modify custody was heard, Grant had remarried.

Lisa failed to file a timely answer. Grant asked for a default judgment granting the relief he requested in his petition. Grant also contended in the motion Lisa, despite a promise from her attorney, had failed to attend mediation. The matter was set for hearing. The attorney for Lisa indicated she would file a responsive pleading in seven days and the motion for default was overruled.

Grant contends the trial court should have granted the default. The entry of a default judgment under Iowa Rules of Civil Procedure 230 to 232 is not mandatory. *Wright v. Waterloo Water Works*, 493 N.W.2d 889, 892 (Iowa App. 1992). The question of allowing a default is largely within the discretion of the trial court. *Id.* We find no abuse of discretion here. The policy of the law is to allow trial of actions on the merits. *Id.*

Grant next contends the trial court should have forced mediation. The dissolution decree provided:

If the parties are unable to agree concerning the children, they agree to meet and attempt to resolve the dispute prior to filing any application for court intervention.

Grant contends this imposed a duty on Lisa to first attempt to mediate the present dispute. We do not find this language mandated mediation. We do, however,

consider Lisa's failure to attempt to resolve the issue, as she agreed, adversely to her position.

The trial court denied Grant's petition, finding there were no changed circumstances. We may modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa App. 1995). Under Iowa Code section 598.21(8), a change in the residence of a party and the remarriage of a party are factors to consider in determining whether there has been a substantial change in circumstances. Grant had remarried when the hearing was held, and Lisa intended to do so in the immediate future. Under the facts presented in this case, we find there has been a substantial change in circumstances.

The question then becomes whether Grant can prove an ability to minister more effectively to David's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). This strict standard is premised on the principle that once custody of a child has been determined, it should be disturbed only for the most cogent reasons. *Id.* Our primary consideration in proceedings to modify custody is the best interest of the child. *Id.*

When Grant and Lisa divorced and stipulated Lisa would be awarded primary physical care of the children, they also included a format to allow Grant to have substantial involvement with the children. They agreed Grant would be the first called to provide child care for Lisa. Grant took advantage of that opportunity. Lisa's

decision to leave Sioux City changed that situation. With the parties living one hundred miles apart, the situation which existed after the dissolution can no longer exist.

David is not happy about the move. It appears, in part, to be the result of his feelings of insecurity in leaving a familiar school and community and moving into a new home with two step-siblings. However, the evidence also supports a finding that David and his father have a strong bond. David has indicated a preference to stay with his father. We look to David's age and maturity in assessing the weight that should be given to this opinion. In considering what custody arrangement is in a child's best interests, the court should consider the child's wishes, taking into account the child's age and maturity. *In re Marriage of Bugg*, 492 N.W.2d 452, 454 (Iowa App. 1992).

Grant has concern about Lisa's intended husband, who has been twice convicted of OWI, was determined to be a habitual offender, and is barred from driving for four years. Grant also complains about the fact Lisa smokes in the children's presence. We, too, have concern about these problems. The trial court found, and we agree, that David has a good relationship with Lisa's prospective husband and his children.

We recognize, should David's primary physical care be transferred to Grant, David would be separated from his sister. There is a presumption siblings should remain together. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996).

Lisa argues Grant is too indulgent of David and favors David over Jennifer. She points out she has been substantially involved in the children's life. We recognize these factors, as did the trial court.

Both children appear to have an attention deficit disorder and the parents have elected to keep both children medicated to allegedly control the problem. Lisa contends she is more responsible about administering the medication than Grant. The trial court found this to be true and considered it a factor in refusing to allow modification. The issue of medicating some behavioral disorders in young children is subject to controversy. We do not consider this a factor in assessing the modification.

We find, as did the trial court, Grant has failed to meet the substantial burden necessary to transfer primary physical care of David. We affirm the trial court's refusal to do so.

Grant challenges the award of attorney fees. He contends they were excessive. We recognize the modification action came about as a result of Lisa's moving and Grant is assuming additional costs of providing transportation for visitation.

We review an award of attorney fees for an abuse of discretion. *In re Marriage of Colby*, 569 N.W.2d 157, 159 (Iowa App. 1997). We do not find the trial court abused its discretion. We affirm on this issue. We award no appellate attorney fees.

AFFIRMED.