IN THE COURT OF APPEALS OF IOWA

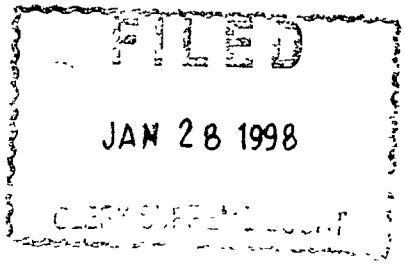
No. 7-580 / 96-1893

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IN RE THE MARRIAGE OF THERESA PATRICIA SWAFFORD AND WILLIAM KENNETH SWAFFORD

Upon the Petition of
THERESA PATRICIA SWAFFORD,
Appellant,

And Concerning
WILLIAM KENNETH SWAFFORD,
Appellee.



Appeal from the Iowa District Court for Des Moines County, John G. Linn, Judge.

The petitioner, Theresa Swafford, appeals the child custody provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Sally Heckman Peck, Iowa City, for appellant.

Mary Ann Brown of Bauer, Schulte, Hahn, Swanson & Brown, Burlington, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

The petitioner, Theresa Swafford, appeals the child custody provisions of the parties' dissolution decree. She argues the district court erred in: (1) granting respondent visitation three weekends each month; and (2) restricting her place of residence to the geographical proximity where respondent and his parents reside as a condition of primary physical care.

Background facts. William and Theresa Swafford were married on July 18, 1992. They have two boys, Andrew, born in May 1993, and Conner, born in April 1995. William was twenty-five years of age at the time of trial and Theresa was twenty-three and both were in good health. Theresa was employed at Walmart, earning approximately $7800 per year. William was employed as a manager of Master Muffler in Burlington, earning $28,600 per year.

The parties both applied for temporary care of the boys and, following a hearing, the court granted Theresa temporary primary physical care. William was afforded liberal visitation.

On August 19, 1996, the district court entered its dissolution decree and granted primary physical care of the children to Theresa. William was granted liberal visitation of three weekends each month, the second and fourth Wednesdays of each month, alternating holidays, one-half of the children's Christmas holiday, and two two-week summer visitation periods. The court further ruled that Theresa was

granted primary physical care on the condition she remain in close geographic proximity to William and his parents.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

I. Visitation. Theresa argues the district court abused its discretion in granting William visitation three weekends each month. She maintains the terms of decree grants William visitation thirty-six weekends each year while she receives only sixteen. We do not believe the best interests of the children are served by granting visitation to William three weekends each month. We find there is wisdom in the traditional and often utilized every-other-weekend visitation arrangement. *See, e.g., In re Marriage of Weidner*, 338 N.W.2d 351 (Iowa 1983). We therefore modify the district court decree and conclude William shall be accorded visitation every other weekend.

II. Geographical proximity as condition. Theresa next asserts the district court abused its discretion in restricting her place of residence to the geographical proximity where William lives and where his parents live. She argues the court's

decree violates her constitutional rights to freedom of travel and association and takes away her right to decide what is best for the children.

We first note the constitutional issue was not preserved for our review. We have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974). *See Martin v. Raytheon Co.*, 497 N.W.2d 818, 820 (Iowa 1993). Without addressing the constitutional arguments, we examine the propriety of conditioning primary physical care on geographical proximity to William and his parents.

The district court made these Conclusions of Law:

> [T]he Court would note that this is a close decision. In concluding that Theresa shall be granted the primary physical care of the children, the Court will do this on the condition that the children will remain in close proximity to William and his parents . . . If Theresa would contemplate moving the children to a different geographic location, the Court would consider this a substantial change of circumstances which ***might*** justify changing primary physical care to William.

(Emphasis added.)

The district court Order contained this language:

> The award to Petitioner of primary physical care is conditioned on the children being in close geographical proximity to Respondent and his parents. Petitioner's attempt to move the children to a different geographic location ***would*** constitute a substantial change of circumstances.

(Emphasis added.)

Iowa Code section 598.21(8A), enacted July 1, 1997, provides the court *may* consider the relocation of a parent and a minor child more than 150 miles away from the residence at the time of the decree to be a substantial change in circumstances sufficient to warrant a modification of custody. While this code section was not in effect at the time the district court made its ruling, we find it instructive. The custodial parent's relocation with a child may be *one factor* in determining which parent could better provide for the best interests of the children, but custody should not be absolutely contingent upon the parent and child not relocating. *See id.; see generally In re Marriage of Frederici*, 338 N.W.2d 156 (Iowa 1983). Furthermore, should either William or his parents move, Theresa would not be able to follow the strict mandates of the decree to remain in close proximity to *both* William and his parents. We find the district court improperly created a mandatory and potentially impossible custody provision. We therefore strike the contingency created by the district court.

III. Appellate attorney fees. Both Theresa and William request appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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 trial court's decision on appeal. *In re Marriage of Roberts,* 545 N.W.2d 340, 345 (Iowa App. 1996). We determine William is not entitled to appellate attorney fees.

We also decline to award Theresa appellate attorney fees as it is not sufficient that Theresa requests fees for the first time in her reply brief. In *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996), the court held:

> Sky view raised appellate attorney fees . . . in its reply brief. Parties cannot assert an issue for the first time in a reply brief. *See Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992). When they do, this court will not consider the issue. *Ames v. Board of Supervisors*, 234 Iowa 617, 623, 12 N.W.2d 567, 570-71 (1944). We refuse to consider the appellate attorney fee [issue] . . . because [it] come[s] too late.

Having considered all arguments before us on appeal, we affirm the district court's primary physical placement of the children with Theresa, we modify and strike the portion pertaining to the geographical proximity contingency, and modify visitation, granting each party visitation every other weekend. Costs on appeal assessed to William.

AFFIRMED AS MODIFIED.