

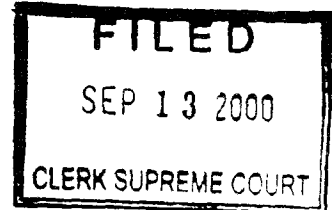
IN THE COURT OF APPEALS OF IOWA

No. 0-226 / 99-0674
Filed September 13, 2000

**IN RE THE MARRIAGE OF CATHY L.
SCHABEN AND DEAN A. SCHABEN**

**Upon the Petition of
CATHY L. SCHABEN,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
DEAN A. SCHABEN,**
Respondent-Appellee/Cross-Appellant.



Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell,
Judge.

The petitioner appeals and respondent cross-appeals from various
provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Bradford F. Kollars, Sioux City, for appellant.

Thomas A. Vakulskas of Vakulskas & Hoffmeyer, P.C., Sioux City, for
appellee.

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

MAHAN, J.

The petitioner appeals and respondent cross-appeals from various provisions of the parties' dissolution decree. Cathy maintains the district court erred in: (1) placing restrictions upon her award of physical care, (2) the amount and duration of the rehabilitative alimony awarded to her, (3) limiting the award of trial attorney fees to \$1000, and (4) not providing visitations between her and the children during Dean's five-week summer visitation period. Dean contends the district court erred in (1) awarding Cathy alimony, and (2) allowing Cathy the option of moving away from Sioux City. Cathy and Dean both seek an award of appellate attorney fees and costs. We affirm as modified.

Cathy and Dean were married in November 1988. They resided together for approximately four years prior to getting married. They have two children together, Brittany, born April 11, 1989, and Tyler, born June 24, 1992. Cathy also has another daughter who resided with the parties until 1991, when she completed paralegal school. When Dean took a promotion in his job at IBP in 1988, the parties moved to Vancouver, Washington from Emporia, Kansas. They resided there for approximately ten years, until Dean received a second promotion that required him to work in Dakota City, Nebraska. The promotion resulted in a substantial increase in Dean's salary and, although Cathy did not want to move, she agreed and supported the move. The parties moved to Sioux City, Iowa in 1997.

In July 1998, Cathy filed a petition for dissolution of marriage. The district court gave the parties joint custody of the children and Cathy physical care with

the restriction she not move the children more than 100 miles from the Sioux City area. Dean was ordered to pay child support and a monthly alimony payment of \$200 for a period of twelve months. Dean was also ordered to contribute \$1000 toward Cathy's attorney fees.

I. Primary Physical Care.

A. Restriction on Physical Care. Our review is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings, but we do give them deference considering its opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

Cathy sought primary physical care of the children. It was her desire to return to the Vancouver area. In the alternative, she was considering a move to Topeka, Kansas, or Lincoln, Nebraska.¹ Dean agreed Cathy be awarded primary physical care but only on the condition she remain in the Sioux City area. In the absence of such a restriction, Dean sought an award of primary physical care. At trial, Cathy testified she would not leave Sioux City if the trial court told her she could only have the children in her care if she stays in Sioux City.

The district court concluded Cathy should be awarded primary physical care as long as she resides within the vicinity of Sioux City. If Cathy moves with the children beyond the vicinity of Sioux City, the court provided the physical care

¹ The Lane Bryant store where she worked was closing. Her employer offered to assist her in finding employment at a similar store in either Topeka or Lincoln.

of the minor children would automatically change to Dean.² The district court found the benefits and advantages to the children by their remaining in the Sioux City area in close proximity to Dean far outweighed Cathy's personal reasons for the move. The district court concluded Dean's continued contact with the children was very important to their overall welfare. The district court stated Cathy's proposed move to Washington "will eliminate any practical and systematic contact with the father, hinder his relationship with these children, and is thereby detrimental to and against these children's best interest."

The relocation of the parent who has primary physical care of the children is a sensitive and emotional issue for both parties involved. The news of a custodial parent's intention to relocate can be devastating to a noncustodial parent who has been very involved in parenting the couple's child. Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to The Custodial Relocation Conundrum*, 29 N.M. L. Rev. 245, 245 (1999). On the other hand, the custodial parent believes he or she should not be held hostage by the noncustodial parent. *Id.* At the heart of this dispute is the child, whose best interests are our primary consideration. See *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995).

² The district court, in its decree, provided for the automatic change in custody only if Cathy resides "in the vicinity of Vancouver, Washington." Similarly, the district court's decree placed the physical care of the children with Cathy as long as both parties reside in "the vicinity of Sioux City, Iowa." Based on statements found in the district court's conclusions of law, we interpret "vicinity of Sioux City, Iowa" to mean within 100 miles of Sioux City. We interpret "in the vicinity of Vancouver, Washington" to mean anywhere outside the 100 mile radius of Sioux City.

In the case before us, technically speaking, the district court is not prohibiting Cathy from moving. Rather, the district court restricted the children from being moved more than 100 miles from Sioux City and ordered custody transferred to Dean if they were. We find such a restriction has the same practical effect as an order prohibiting Cathy from relocating.

No current Iowa case law directly addresses whether a district court has discretion to restrict the party with physical care of the children from relocating in its initial decree. Therefore, we turn to modification cases and cases from other jurisdictions to guide us on deciding this issue. The current trend in Iowa modification cases points toward allowing the custodial parent to relocate absent a showing such relocation would be detrimental to the child's best interests.

The parent with primary physical care determines where the children's home will be, which may include moving the children away from the proximity of the nonprimary physical care parent. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996). Such a move, standing alone, is not a sufficient reason to support a change of custody. *Id.* Our supreme court has stated:

Geographical proximity is a desirable feature of joint custody because it enhances the opportunity for access between the children and the parent who does not maintain their primary residence. Nevertheless, geographical proximity is not an indispensable component of joint custody, and, at least when the decree is silent on the issue, the parent having physical care of the children must, as between the parties, have the final say concerning where their home will be.

In re Marriage of Frederici, 338 N.W.2d 156, 159 (Iowa 1983).

Iowa Code section 598.21(8A) tempers the ability of the primary care parent to relocate. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa App.

1998). It provides the court may consider a relocation of 150 miles or more a substantial change in circumstances for the purposes of modifying a custody order. Iowa Code § 598.21(8A). The primary consideration, even under this distance limitation, is to assure maximum contact between the child and the noncustodial parent. *Williams*, 589 N.W.2d at 762. This is accomplished by assessing the impact of the move on the relationship of the noncustodial parent and the child. *Id.* The emotional stability associated with maintaining the parent-child relationship is primary to the best interests of the child. *Id.*

Restricting a custodial parent's ability to relocate may have constitutional implications. The Iowa courts have not addressed the constitutional issue, and neither party raised it on appeal. We discuss the issue here, however, because we find cases from other jurisdictions instructive to our decision in this case.

The right of interstate travel has been recognized as a basic constitutional freedom. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254, 94 S. Ct. 1076, 1080, 39 L. Ed. 2d 306, 312 (1974). It includes, among other things, the right to migrate, resettle, find a new job, and start a new life. *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S. Ct. 1322, 1328, 22 L. Ed. 2d 600, 612 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). Any infringement upon the fundamental right to travel must be justified by a compelling state interest. *Memorial Hosp.*, 415 U.S. at 258, 94 S. Ct. at 1082, 39 L. Ed. 2d at 315.

Other courts generally balance a custodial parent's fundamental right to travel with the state's compelling interest in the best interests of the children.

The Montana Supreme Court articulated its standard as follows:

We believe that furtherance of the best interests of a child, by assuring the maximum opportunities for the love, guidance and support of both natural parents, may constitute a compelling state interest worthy of reasonable interference with the right to travel interstate. [Citation omitted.] We caution, however, that any interference with this fundamental right must be made cautiously, and may only be made in furtherance of the best interests of the child. To that end, we require the parent requesting the travel restriction to provide sufficient proof that a restriction is, in fact, in the best interests of the child.

In re D.M.G., 951 P.2d 1377, 1383 (Mont. 1998) (quoting *In re Marriage of Cole*, 729 P.2d 1276, 1280-81 (Mont. 1986)). Other states apply similar standards. See, e.g., *LaChapelle v. Mitten*, 607 N.W.2d 151, 163 (Minn. Ct. App. 2000) (protection of the best interests of the child a compelling state interest justifying deprivation of fundamental right to travel, raise one's child); *Watt v. Watt*, 971 P.2d 608, 615-16 (Wyo. 1999) ("The right of travel enjoyed by a citizen carries with it the right of a custodial parent to have the children move with that parent. This right is not to be denied, impaired, or disparaged unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes a detrimental effect of the move upon the children."); *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) ("The law has few objectives more compelling than protecting the interests of children. Where families have suffered the trauma of divorce those interests include not only the care and custody of the child but its right and obligation to know and visit with a noncustodial parent."); *Ziegler v. Ziegler*, 691 P.2d 773, 780 (Idaho Ct. App.

1985) (“Providing and assuring the maximum opportunities for parental love, guidance, support, and companionship is a compelling state interest that . . . warrants reasonable interference with the constitutional right of travel when necessary.”); *Carlson v. Carlson*, 661 P.2d 833, 836 (Kan. Ct. App. 1983) (“[A]s to a divorced parent to whom custody of minor children has been entrusted, such person may be required to forego or forfeit some rights to custody or visitation, as the case may be, consistent with the best interests and welfare of the children and the rights of the other parent.”); *In re Marriage of Manuele*, 438 N.E.2d 691, 695 (Ill. App. Ct. 1982) (“[T]he protection of petitioner’s rights of visitation would justify a reasonable residential restriction as a condition of respondent’s custody of the children.”).

Although the courts articulate similar standards, the outcomes differ depending on the facts and circumstances of a particular case. *See, e.g., Watt*, 971 P.2d at 616 (father failed to meet his burden of demonstrating a material and substantial change of circumstances had occurred, sufficient to justify ordering a change in custody, where mother and children moved beyond the 50 mile limit provided for in the decree); *D.M.G.*, 951 P.2d at 1383 (father failed to meet his burden to provide legally sufficient proof the best interests of the parties’ children would be most appropriately served by requiring mother and children to relocate to Helena, Montana, where father resided, from Salem, Oregon); *Manuele*, 438 N.E.2d at 695 (restriction conditioning mother’s physical custody of the children upon her continuing to live in the county was unreasonable). *Compare, e.g., Everett v. Everett*, 660 So.2d 599, 601-02 (Ala. Civ. App. 1995) (residential

restriction served the best interests of the children, thereby overriding mother's constitutional right to travel); *Zeigler*, 691 P.2d at 780–81 (100 mile radius restriction was reasonable, not overly broad under the circumstances).

In contrast, some cases conclude conditioning custody upon relocation has no effect on the custodial parent's right to travel. See, e.g., *LaChapelle*, 607 N.W.2d at 164 (“[T]he trial court did not restrict [custodial parent’s] right to remain in Michigan; the court only required [the child] to be returned to Minnesota. Any burden on [custodial parent’s] right to travel arises from her desire to remain [the child’s] sole physical custodian.”); *Clark*, 489 N.E.2d at 100 (“[T]he court’s order does not impose any necessary burden whatever upon her right to travel. She remains free to go wherever she may choose. It is the children who must be returned to Indiana.”); *Carlson*, 661 P.2d at 836 (“Her right to travel or even to establish residence elsewhere is limited only by her desire to retain her status as the custodial parent.”).

In our de novo review of the record for the case before us, we find the 100 mile restriction placed by the district court as a condition on Cathy’s retaining physical care of the children proper. The district court determined it would be in the children’s best interests to remain near Dean in Sioux City. Further, Cathy agreed if she were ordered by the court to remain in Sioux City, she would do so. Cathy’s ability to relocate with the children must be tempered with the best interests of the children. We find the district court did so in this case.

B. Automatic Modification. The district court further concluded as follows:

The petitioner's removal of these children to a point more than 100 miles from Sioux City at a time when the respondent continues to reside here will result in their automatic change of physical care to the respondent and necessitate that in any such subsequent action herein the petitioner has the burden of showing that any such proposed change is in the best interest of these children and that she is able to show a superior claim based upon an ability to minister to the children's need more effectively than the respondent.

Our supreme court has stated we should not "foreclose in advance the right of a custodial parent to move elsewhere. All we can do is to protect the right of the noncustodial parent in such an event." *In re Marriage Welbes*, 327 N.W.2d 756, 758 (Iowa 1982). Iowa case law would certainly support a requirement Cathy notify Dean in advance of any proposed move outside of the 100 mile restricted area. *In re Marriage of Deck*, 342 N.W.2d 892, 894 (Iowa App. 1983); *In re Marriage of Malone*, 340 N.W.2d 798, 799-800 (Iowa App. 1983). Such a requirement would give Dean advance notice and the opportunity to request a hearing on the issue. *Deck*, 340 N.W.2d at 894. Dean could then seek an award of primary physical care. The court may consider a relocation of 150 miles or more a substantial change in circumstances. Iowa Code § 598.21(8A). However, the burden of proof would be on Dean to show the move would not be in the children's best interest and he should receive primary physical care. *Deck*, 340 N.W.2d at 894-95; see also *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)).

We conclude the district court improperly placed the burden of proof on Cathy to show a proposed relocation is in the best interests of the children. We

also conclude the district court improperly attempted to specify in advance the circumstances which would be grounds for a future modification action. We have already approved the award of primary physical care to Cathy as long as she resides within the vicinity of Sioux City. However, we disapprove of the language in the decree which provides in advance that Dean would automatically assume primary physical care if Cathy moves beyond the vicinity of Sioux City. We therefore strike from the decree the language placing the burden of proof on Cathy in a modification action and the language which provides for the automatic transfer of the children to Dean in the event Cathy moves. In the event Cathy moves from the Sioux City vicinity, Dean would be responsible for filing any modification action and would assume the burden therein.

II. Alimony. The district court ordered Dean to pay Cathy \$200 a month in alimony for a period of twelve months. Cathy claims she has supported Dean in his advancements in employment and has foregone her own employment opportunities and education in order to provide childcare and other domestic duties during the marriage. Cathy completed only her sophomore year in high school and has not acquired a GED. She desires to return to school and pursue computer training.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Eastman*, 538 N.W.2d 874, 876 (Iowa App. 1995). When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) the present standards of living and ability to pay balanced against the relative needs

of the other. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa App. 1996). The court may consider the amount of child support ordered under the decree when determining if spousal support is to be awarded and, if so, the appropriate amount of the award. *In re Marriage of Will*, 489, N.W.2d 394, 400 (Iowa 1992).

Alimony has traditionally taken the place of support that would have been provided had the marriage continued. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). It is awarded to accomplish one or more of three purposes. In this case, Cathy is asking for alimony in the form of rehabilitative alimony. This serves to support an economically dependent spouse through a limited period of education and retraining. *O'Rourke*, 547 N.W.2d at 866. Its objective is self-sufficiency. *Id.*

Cathy believes she needs to improve her employment-related skills in order to increase her opportunities for advancement and pay. She contends therefore, the trial court's award for rehabilitative alimony should be increased to \$750 per month for a period of five years.

We conclude Cathy should be allowed to further her education. Therefore, we find rehabilitative alimony should be increased to \$300 per month for a period of three years.

III. Trial Attorney Fees. Cathy claims she should have been awarded \$5000 for her trial attorney fees instead of the \$1000 the trial court granted her.

Ordinarily, an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). An award of attorney fees depends upon the ability of the respective parties to pay, given the financial circumstances and earnings of each. *Id.* We conclude the district court properly considered this issue, and we find no abuse of discretion.

IV. Visitation. Cathy contends she should be allowed visitations with the children during Dean's five-week summer visitation period. We look to *In re Marriage of Russell*, 473 N.W.2d 244 (Iowa App. 1991), for guidance on this issue. In *Russell*, the mother wanted visitation with the parties' daughter during the father's extended summer visitation. *Id.* at 247. We stated "an extended visitation will assist James and his daughter in maintaining their relationship. We encourage James to allow his daughter to visit her mother during the extended visitation if she so desires but we decline to order a visitation schedule." *Id.*

We take the same stance in this case and would encourage Dean to allow Cathy visitations with the children during his summer visitation period, but we decline to order him to do so.

V. Dean's Cross-Appeal. Dean contends on his cross-appeal the district court erred in allowing Cathy the option to move from the Sioux City area and in awarding her alimony. Because we have previously discussed these issues we will not address them here.

VI. Appellate Attorney Fees. Cathy and Dean request appellate attorney fees. A successful party does not have a vested right to appellate

attorney fees. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa App. 1999). Rather, the court exercises its discretion in determining whether an award is appropriate. *Id.* In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). We deny the parties' request for appellate attorney fees.

We tax the cost of this appeal equally between the parties.

AFFIRMED AS MODIFIED.