

IN THE COURT OF APPEALS OF IOWA

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No. 7-713 / 97-864

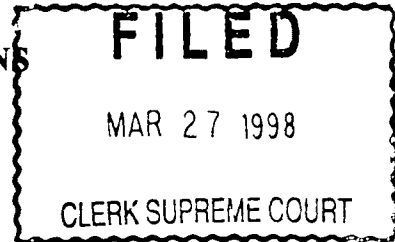
**IN RE THE MARRIAGE OF LORETTA ANN WILKINS
AND MARION JAMES WILKINS**

Upon the Petition of
LORETTA ANN WILKINS,

Appellee,

And Concerning
MARION JAMES WILKINS,

Appellant.



Appeal from the Iowa District Court for Polk County, Larry J. Eisenhauer,
Judge.

Marion Wilkins appeals from a district court ruling refusing to modify the
child custody provisions of the parties' dissolution decree. **AFFIRMED.**

Rod Powell of Powell Law Firm, P.C., Norwalk, for appellant.

Diane L. Dornburg, Des Moines, for appellee.

Considered by Cady, C.J., and Sackett, and Mahan, JJ. Streit, J., takes no part.

CADY, C.J.

Marion Wilkins appeals from the district court ruling denying his request for modification of the primary physical care provision of the dissolution decree. He claims the district court erred by failing to find a substantial change in circumstances occurred warranting a transfer of primary physical care. We affirm the district court.

Marion and Loretta Ann Wilkins married October 26, 1974. They had five children, including fifteen-year-old Skyler, born December 15, 1981. Marion and Loretta divorced in February 1993. The trial court awarded the parties joint legal custody with Loretta receiving primary physical care of Skyler.

Marion subsequently remarried and currently lives in a house in Des Moines. He works as a truck driver. He has maintained regular visitation with Skyler. Loretta is currently unemployed and lives in a two-bedroom house in Des Moines. Including Loretta and Skyler, eight people reside in Loretta's home. Skyler shares a bedroom with his adult sister and her young daughter.

On appeal Marion claims the trial court erred by failing to find a substantial change in circumstances occurred warranting a modification of the dissolution decree. He maintains, subsequent to the decree, changes occurred in Skyler's living arrangements, Loretta expressed a lack of interest and supervision of Skyler, and Loretta attempted to alienate Skyler from him. He also contends the trial court erred by not giving enough weight to Skyler's preferences.

I. Standard of Review

We ~~review~~ the record de novo in a proceeding to modify child custody. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). This requires us to examine the complete trial record and determine the issues presented anew unimpeded by the findings of the trial court. *In re Marriage of Salmon*, 519 N.W.2d 94, 95 (Iowa App. 1994). At the same time, we recognize the inherent virtues in listening to and observing the parties and witnesses. *Dale*, 555 N.W.2d at 245. Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

II. Primary Physical Care

Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the children. *See In re Marriage of Frederici*, 388 N.W.2d 156, 158 (Iowa 1983). Nonetheless, the parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Dale*, 555 N.W.2d at 245; *Frederici*, 388 N.W.2d at 158. This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons. *In re Petition of Anderson*, 530 N.W.2d 741, 741-42 (Iowa App. 1995). Moreover, as in all cases involving custody, our first consideration in custody modifications is the best interests of the children. *Dale*, 555 N.W.2d at 245.

Marion claims Skyler's living arrangements constitute a substantial change in circumstances not contemplated by the trial court. Specifically, he asserts because Skyler must live in a small house with eight people, and share a bedroom with an adult sister and her young child, primary care should be modified. While Skyler's current bedroom arrangements may not be ideal or appropriate, it is not a substantial change in circumstances not contemplated by the trial court at the time of dissolution. Moreover, Loretta is working to obtain a larger home where Skyler would have his own room. Given the transitory nature of the housing arrangements and our standard that child custody should only be disturbed for the most cogent reasons, we decline to modify the primary physical care arrangement based on Skyler's living conditions.

Marion also maintains Loretta lacks interest in Skyler, fails to adequately supervise him, and works to alienate Skyler's affections from him. The record does not support Marion's contentions. Loretta has been involved with Skyler's education and his daily care. Although Loretta does not provide a detailed daily structure for Skyler, this does not rise to the level of a substantial change in circumstances. Further, we do not find Loretta has alienated Skyler's affections from Marion. While Loretta and Marion do not communicate about Skyler's life and Loretta's boyfriend made some comments about Marion, Skyler maintains regular visitation with his father. Skyler also has a good relationship with his father.

Marion additionally asserts the district court erred by failing to give enough weight to Skyler's preferences in the primary physical care arrangement. Although

a factor, a preference expressed by a child is given less weight in a modification action than in the original custody proceeding. *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa App. 1987). Considering all the factors, as well as our policy to disturb custody only for the most cogent reasons, we decline to modify the physical care arrangement.

We have considered all of Marion's claims and affirm the district court decision.

AFFIRMED.

Mahan, J., concurs; Sackett, J., concurs specially.

000414

SACKETT, J. (concurring specially)

I ~~concur~~ specially. I have concerns about the condition of the home where fifteen-year-old Skyler lives with his mother. I affirm only because I give deference to the trial court's ability to assess the motives and credibility of each parent.