

**IN THE COURT OF APPEALS OF IOWA**

No. 8-668 / 98-0669

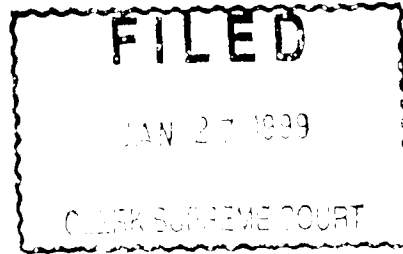
**IN RE THE MARRIAGE OF CHRISTINE KAY DUNT  
AND DEAN ALAN DUNT**

**Upon the Petition of  
CHRISTINE KAY DUNT,**

Petitioner-Appellee,

**And Concerning  
DEAN ALAN DUNT,**

Respondent-Appellant.



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Appeal from the Iowa District Court for Warren County, Jerrold Jordan, Judge.

Respondent appeals from the district court order denying his request for modification of child custody. **AFFIRMED AS MODIFIED AND REMANDED.**

Catherine K. Levine, Des Moines, for appellant.

Robert M. Benton of Stuyvesant & Benton, Carlisle, for appellee.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

**SACKETT, C.J.**

~~Respondent~~-appellant Dean Alan Dunt appeals from the district court's denial of his application for modification of the custodial provisions of the decree dissolving his marriage to petitioner-appellee Christine Kay Dunt, now known as Christine Kay Copper. Dean contends the district court: (1) should have awarded him primary physical care of the children; (2) should not have modified the child support obligation; and (3) should not have granted Christine attorney fees. Both parties request appellate attorney fees. We modify custody and remand to the district court.

Christine and Dean have two children, Jamie, born October 3, 1989, and Joshua, born August 22, 1991. Their marriage was dissolved on May 28, 1996. During the separation preceding the dissolution, Christine and Dean shared the physical care of the boys equally. In the dissolution proceedings, Christine was represented by an attorney; Dean was not. The decree provided for joint custody and named Christine the parent having primary physical care. Dean was ordered to pay \$700 per month in child support. The child support ordered was less than what would have been ordered had the child support guidelines been applied. The district court found a deviation from the child support guidelines was justified because both parties lived in Carlisle, Iowa, and the custodial arrangement resulted in Dean assuming substantial custodial responsibilities for the children. The district court specifically found Dean cared for both children an average of two weeks a month and had approximately \$190 in monthly child care expenses. Dean also was ordered to pay

\$100 a month into a college fund for the children. The district court also considered this contribution in deviating from the child support guidelines.

Four months after the dissolution decree was entered, Christine took a job in California. The parties agreed to mediate the custodial provision of the decree. A mediation agreement was signed in September of 1996. The agreement provided Dean have physical custody of the children effective in September of 1996. He was to continue to have physical custody until a date in June of 1997. The exact day in June was to be determined in May of 1997. Dean was to continue to pay the ordered child support and Christine was to be responsible for paying child care expenses of \$450 a month. The children were to move to California to be with Christine sometime in June of 1997. The mediator was not an attorney and recommended the parties consult an attorney if either had questions about the legal ramifications of the agreement. There is no evidence either party did. The agreement was not approved by the district court.

Christine moved to California early in October of 1996 without the children. Christine contends sometime in the Spring of 1997 Dean advised her he would not allow the children to leave Iowa. Dean disagrees with Christine's rendition of the events, although he admits to a telephone call where he asked for specifics concerning Christine's plans for the children's care in California.

Christine moved back to Iowa in June 1997. Dean filed a petition for modification of the decree in August 1997. Christine married in October 1997.

On November 3, 1997, the district court on the joint application of Christine and Dean appointed Sheila Pottebaum to do a custody evaluation. The parties were to split the costs of the evaluation. The order directed Pottebaum to determine the fitness of the parties as to physical care of the children; a copy of her evaluation was to be filed with the Clerk of Court for Warren County.

Pottebaum reported both parents were capable of being the primary care parent. Pottebaum rendered the opinion Dean was more stable and should be the primary care parent. The district court, while finding Pottebaum's report excellent, declined to modify the decree. In doing so, the district court particularly found, "Were this a case of initial determination of custody, [Pottebaum's] conclusions would be more valid." The court went on to find the parties' financial conditions had changed since the original decree and amended to require child support of \$657.65, but provided Dean was no longer responsible for paying into the college fund. The court also ordered Dean to pay \$3000 toward Christine's attorney fees.

Christine then filed an application for a nunc pro tunc order asking the district court award her child support of \$886.31 pursuant to the child support guidelines. On April 15, 1998, Dean filed a notice of appeal. On April 16, 1998, the court amended its order to reflect Dean's child support obligation was \$886.31. On April 27, 1998, Dean filed an amended notice of appeal to include the nunc pro tunc ruling.

Dean first contends he should have been awarded primary physical care. This is a modification action. Consequently, Dean bears the burden of proving both a change of circumstance and he is the superior parent. Dean was made a joint

custodian in the dissolution decree. He consequently is benefitted in seeking physical care by the inference he has met the joint custody tests set forth in *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979). See *In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984). However, in seeking a change in physical care, he carries a burden similar to that imposed on a parent seeking a change of custody. *Id.*

The question is not which home is better, but whether Dean has demonstrated he can offer the children superior care. See *In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). Dean must show an ability to minister to the children's needs superior to Christine's. See *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa App. 1985) (Hayden, J., dissenting). If both parents are found to be equally competent to minister to the children, custody should not be changed. See *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App. 1992).

We review de novo. Iowa R. App. P. 4; *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991). The burden for a party petitioning for a change in a dissolution is heavy. See *In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App. 1988). Dean has the burden to show by the preponderance of evidence conditions since the dissolution decree was entered have so materially and substantially changed the children's best interests make it expedient to award custody to Dean. See *In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App. 1985). The burden to modify a dissolution decree is a heavy burden. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The parent seeking to change the

physical care has a heavy burden and must show the ability to offer superior care. See *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

The Iowa courts have historically not changed custody on the basis of a parent's move or planned move from the area where both parties reside absent other circumstances. See *In re Marriage of Urban*, 359 N.W.2d 420, 425 (Iowa 1984); *Frederici*, 338 N.W.2d at 160. These cases pre-date legislative changes providing if a parent is to relocate the residence of a minor child to a location one hundred fifty miles or more from the residence of the minor child at the time custody was granted, the court may consider the relocation a substantial change in circumstances. See Iowa Code § 598.21(8A) (Supp. 1997). This legislative change is compatible with other legislative changes in the past decade focusing on the opportunity for substantial parental involvement in a child's life by both parents even when there has been a marriage dissolution. *In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa App. 1998).

Christine did move to California. She has, however, returned to Iowa. The evidence is she does not intend to stay in central Iowa nor in the state. Her stated intentions would indicate she plans to locate over one hundred and fifty miles from Carlisle.

Dean has an engineering degree and a stable work record. He has exhibited financial responsibility. His marriage to Christine was his first marriage. In May of 1996, he began dating a woman who has never married and holds a Bachelors of Art degree from the University of Iowa and is employed by the College Aid Commission.

Dean has had no arrests except for minor traffic violations. He is in good health. He has been involved in a number of community activities with his children. At the time of the hearing, he was an assistant den leader for Jamie's Cub Scout den and a group leader for Joshua's Tiger Cub group.

Christine has an R.N. degree. She has not shown financial responsibility. Her marriage to Dean was her second marriage. She commenced a relationship with her current husband while yet married to Dean. She has changed jobs more frequently than Dean. She claims her childhood included substance abuse, sexual abuse, and neglect.

The mediation agreement was not approved by the district court; consequently, while we consider it in assessing the facts, it does not change the legal principles we apply in this case. While we recognize Christine left the children with Dean with the promise they would be sent to California, we also recognize in addressing the children's interests her decision to leave them with their father resulted in their bonding further with him.

Pottebaum did an extremely thorough evaluation. She visited with both Dean and Christine and a person each suggested. She visited with each of the children. She observed the parties with the children. She made a visit to each home. She explored the children's relationship with Christine's husband and Dean's girlfriend. She gave both Dean and Christine a series of tests. Pottebaum's report notes a number of positive things about both parents. She found the children enjoyed being with each

of them. Additionally, she determined the children had a good relationship both with Christine's husband and Dean's girlfriend.

Pottebaum gave the opinion the consistency of the relationship the children have enjoyed with their father is important. She noted the relationship with their mother was disrupted by her move to California. While Pottebaum noted Christine claimed the move to California was for job opportunities, Pottebaum found no dearth of adequate job opportunities for her in the Des Moines area and was of the opinion the reasons for Christine's move to California were difficult to decipher and found her move was more likely motivated by a decision to be close to her current husband. She contrasted this with Dean's demonstrated willingness to put the children's needs first, even if it cost him employment advantages.

Pottebaum found Dean more involved with the children's outside activities but rationalized it probably was related to the primary responsibility he assumed for the children during the prior year.

Pottebaum summarized her investigation recommending Dean be the primary care parent. In so doing, she relied on the following findings, among others:

Dean Dunt has maintained a stable work environment, stable finances, and a consistent living environment. Christine Copper has had much more difficulty establishing a stable living environment, has undergone several work changes and has a more precarious financial situation. She is hopeful she will be able to resolve these concerns sometime in the near future but, during the somewhat lengthy course of this evaluation, Christine did not move closer to solving these dilemmas and seemed to actually move farther away from them. . . . [N]either Chris nor Christine can give any specifics as to where they will be living, what type of specific environment they will be able to generate for the children, a clear financial structure for raising these

two boys along with their expected child and how they will insure education, health care and etc. for the boys. While there is an at least average degree of likelihood that Chris and Christine will be able to eventually provide stability to their lives, it is true they have not been able to do so to date.

The remarriage of Christine and the question about her geographic location are substantial changes in circumstances. Our de novo review convinces us Dean has shown he is the superior parent. In arriving at this conclusion, we give considerable weight to Pottebaum's opinion. We also cannot ignore the fact the children, in reality, have for the most part been in Dean's primary care since the dissolution. The evidence shows the children will enjoy stability under Dean's primary care. They experienced some emotional trauma after the dissolution, and an additional uprooting will not be in their best interest. Children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa App. 1994). Custody, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997).

We recognize this holding is not in accord with the mediation agreement entered into by Christine and Dean. While we applaud parties who seek to resolve custody disputes through mediation, custodial agreements are not binding on the court unless approved by the district court. Children also are not to be bargained for by mediation; rather, mediation agreements as to their custodial care require their interests be the primary focus of the agreement. The mediation agreement between Christine and Dean allowed the children to settle in a custodial arrangement with their

father who has always been a primary person in their lives. It then provided nine months later they be transported to California to begin a custodial relationship with their mother and her new husband. In addition, it provided Dean, while assuming primary care, continue to pay child support with Christine paying for child care in an amount less than the child support she was to receive. We do not find the children's interests were the primary focus of the agreement.

We modify to award Dean primary physical care. Having done so, we need not address his challenges to the child support.

We remand to the district court to fix Christine's visitation and child support obligation. We award no appellate attorney fees. Costs on appeal are taxed to Christine.

**AFFIRMED AS MODIFIED AND REMANDED.**