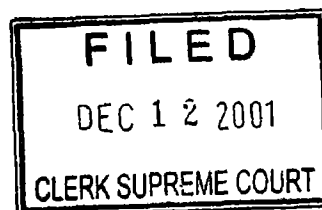


IN THE COURT OF APPEALS OF IOWA

No. 1-475 / 00-1741
Filed December 12, 2001

**IN RE THE MARRIAGE OF KAREN LYNN BIGGERSTAFF
and JOSEPH MICHAEL BIGGERSTAFF**

**Upon the Petition of
KAREN LYNN BIGGERSTAFF, n/k/a KAREN
LYNN GRIES,
Petitioner-Appellant,**



**And Concerning
JOSEPH MICHAEL BIGGERSTAFF,
Respondent-Appellee.**

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul,
Judge.

The petitioner appeals a district court ruling on her petition to modify the
visitation and child support provisions of the parties' dissolution decree.

AFFIRMED.

Theodore E. Karpuk of Bikakis, Arneson, Karpuk & Hindman, Sioux City,
for appellant.

Thomas A. Fitch of Fitch Law Office, South Sioux City, Nebraska, for
appellee.

Heard by Sackett, C.J., and Huitink, J., but decided by Sackett, C.J., and
Huitink and Miller, JJ.

006051

SACKETT, C.J.

Petitioner-appellant Karen Lynn Biggerstaff sought to modify the custodial provision of the January 2000 decree dissolving her marriage to respondent-appellant Joseph Michael Biggerstaff to allow her to take their children to Rhode Island to live. The district court denied Karen's request and awarded Joseph primary physical care of the parties' children born in 1989 and 1993, and ordered Karen to pay child support. Karen contends (1) Joseph should not have been awarded primary care of the children; (2) the district court should have ordered Joseph to encourage the children's relationship with her; (3) the court should not have modified custody without making it contingent on her moving to Rhode Island; and (4) the court should have adjusted Joseph's child support and visitation. We affirm.

The burden to modify a dissolution decree is a heavy burden. See *In re Marriage of Melton*, 256 N.W.2d 200, 204 (Iowa 1977). The parent seeking to change the physical care must show the ability to offer superior care. See *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). The burden to change visitation is a lesser burden. See *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 1998); *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985).

The Iowa courts have historically not changed custody when the parent with custody moves from the area in which both parties reside, absent other circumstances. See *In re Marriage of Vrbanc*, 359 N.W.2d 420, 425 (Iowa 1984); *In re Marriage of Frederici*, 338 N.W.2d 160 (Iowa 1983). These cases pre-date

legislative changes providing that if a parent is to relocate the residence of a minor child to a location 150 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. Iowa Code § 598.21(8A) (1999). If the court determines that the relocation is a substantial change in circumstances, the court shall modify the custody order to, at a minimum, preserve, as nearly as possible, the existing relationship between the minor child and the non-relocating parent. See *Id.* 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 Ct. App. 1998).

We find the fact that Karen sought to leave to be a substantial change in circumstances. *Thielges*, 623 N.W.2d at 237. At the time of the dissolution the custodial arrangement was agreed to by Karen and Joseph and approved by the court. The parties assumed joint custody of the children and the physical care of the children was granted to Karen. The parties agreed to liberal exchange of the children and joint input into the decisions concerning their care. Joseph had liberal visitation. The district court determined that the custodial arrangement agreed to by the parties and in place at the time of the modification hearing resulted in Karen having the children in her care 196 days of the year and

Joseph having the children in his care 169 days.¹ Additionally, the parties agreed that neither parent would move more than fifty miles from Sioux City, Iowa, without prior consent of the court or the written agreement of the other parent. The parties further agreed that Joseph should pay \$450 a month in child support to Karen. The stipulation was approved on January 6, 2000. The decree of dissolution was also entered on January 6 that year.

Six months later Karen filed this petition to modify, asking for a modification allowing, among other things, for her to have primary physical care of the children in a different geographical location than Sioux City. She immediately filed a motion for an expedited trial date.

The case was heard on July 24, 2000, and the district court filed a decree of modification on August 16, 2000. The court found Karen was moving to Rhode Island in a few days in order to be near a man she met on the Internet in March of 1999 and to distance her children from Joseph. The district court found the man on the Internet was a factor in Karen's wish to end the marriage, and that she was less than honest in denying that it was. The district court made it clear it was not assessing fault to Karen as a result of the relationship, but he did consider her testimony concerning her contacts with this man in assessing her credibility.

The court recognized that Karen could receive more money where she was moving but noted the only area where she sought employment was where her boyfriend was residing.

¹ Although Karen argues with the court's calculation of days, our review of the record convinces us that Joseph had the children well over one third of the time.

Though the children did not testify, the court found they were opposed to leaving Sioux City and associating with Karen's boyfriend. The court found that Karen's reasons for the move did not override the adverse impact the move would have on the children. Consequently, the court denied Karen's application and awarded physical care of the children to Joseph. Karen was given seven weeks of summer visitation, time at Christmas depending on her location, visitation during spring break, and visitation anytime she was in the Sioux City area. Each of the parties was ordered to pay half of the transportation costs for Christmas and summer vacations. Karen was ordered to pay transportation costs for spring break.

Karen sought a new trial, contending the decree was unfair, was based on hearsay and was essentially punishment for her responsibly making plans and having a dating relationship. She further contends it was made despite Joseph's refusal in court to give a waiver for counseling records and that it did not account for the possibility that she may not move to Rhode Island. Further, she claims, it did not address the children's interests. Karen also made a motion for an expansion of the district court's findings. The district court ruled on the motion, finding there was no suggestion in the evidence that Karen's moving plans would not be carried out if she was not granted permission to move with the children in her primary physical care. The court denied the other motions, but provided that Karen should have the right to contact the children by telephone during reasonable hours and that the children should be allowed to call their mother no less than weekly.

Joseph filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) asking the trial court to order Karen to pay child support and to terminate his current child support obligation. The district court sustained the motion, relieving Joseph of his child support obligation and ordering Karen to pay \$917 a month as child support.

At the time of the hearing Karen was nearly thirty-five and Joseph was thirty-six. Karen was raised in Sioux City. Her parents live in Sioux City and her only sibling lives in Sioux Falls, South Dakota. She graduated from Morningside College in Sioux City in 1988. She has hours towards a master's degree. Karen taught school and signed a contract with the Sioux City community school district to teach the 2000-2001 school year for \$38,000.

Joseph graduated from a Nebraska high school. His parents and his younger sister live in Martinsburg, Nebraska.

Karen explored opportunities in schools in Rhode Island and assented to an offer of \$52,600 from the Pawtucket, Rhode Island Public Schools. Karen contends the substantial increase in her salary justified her move. She says the increased salary is necessary for her to pay the debts she was ordered to pay in the decree of dissolution. She said funds in her IPERS account are available to her only if she is not employed in a school system in Iowa.

Karen acknowledges part of her interest in Rhode Island was because she was dating an unmarried man thirty-four years old at the time of trial. The man has no children. He works in the construction industry and plays music on weekends for weddings and local events. He lives with his family in Acushnet,

Massachusetts, about an hour from Pawtucket. Karen went to Rhode Island for an initial interview in June of 2000 with the children. She went again in July without the children. She believes the area is a good place to live, she has housing, and she finds the citizens of the town friendly. She said housing costs were higher but other living expenses were comparable to those in Sioux City. She obtained a townhouse for \$1,000 a month. It had two bedrooms or perhaps three. Michael's school was two blocks away and Laticia's a mile away. She said the only daycare she would need was an hour for Michael in the morning.

Karen contends that Joseph's twelve-hour days four days a week does not fit with the children's school schedules and he would have to hire a nanny. Karen complains that the woman Joseph would hire for the job appeared at trial as more of a mother to the children than a nanny.

Karen contends she is the better caretaker. She also contends that Joseph harassed her with calls, letters and cards in an attempt to reconcile with her. Karen contends the letters from Joseph telling her he loves her and promises to be a better husband and that he was displeased with her relationship with the man she met on the Internet indicates he will not be a good parent.

Karen was named physical custodian, although due to the time the children spent with Joseph, the custodial arrangement came close to being shared custody. Should Karen be given permission to move the children to Rhode Island it would not be possible to structure a custodial arrangement that would allow Joseph to maintain the arrangement he now has with his children.

The district court found Karen's decision to move was based in part on a desire to exclude Joseph from the children's life, a finding with which we agree. The children wish to stay in Sioux City. Giving the required deference to the factual findings made by the district court we affirm.

AFFIRMED.