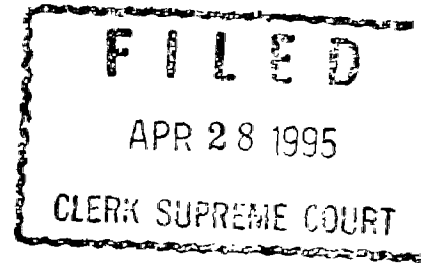


IN THE COURT OF APPEALS OF IOWA

No. 4-577 / 94-107



MICHELLE McCANN n/k/a MICHELLE SMITH,
Petitioner-Appellee,

vs.

JEFFREY McCANN,
Respondent-Appellant

**JEFFREY ARTHUR McCANN II and CHRISTOPHER ALLEN McCANN, By
their father and Legal Guardian JEFFREY A. McCANN,**
Plaintiff-Appellant,

vs.

**MICHELLE D. SMITH f/k/a MICHELLE D.
McCANN f/k/a MICHELLE D. ESTES,**
Defendant-Appellee.

Appeal from the Iowa District Court for Greene County, Louie F. Beisser, Judge.

Father appeals a judgment of the district court granting the mother's application
for modification of custody of the parties' two minor children. **AFFIRMED.**

Jeffrey A. McCann, pro se, Watertown, New York, for appellant.

Kelley A. Rice of Legal Services Corporation of Iowa, Des Moines, for appellee.

Considered by Hayden, P.J., and Sackett and Huitink, JJ.

HUITINK, J.

Jeffrey and Michelle McCann were married in 1977 and are the parents of two minor children, Jeffrey II, born May 7, 1981, and Christopher, born December 3, 1983. The parties were divorced in Alabama in August 1985. Pursuant to the decree, Michelle and Jeffrey were granted joint physical custody with each having custody for six months each year.

In 1987 the parties entered into a stipulation for modification of the dissolution decree. The stipulation was approved by the Alabama courts and provided that Jeffrey would have custody of the children during the school year and one month of the summer and Michelle would have visitation for two months during the summer.

Jeffrey is in the military. From 1987 to 1990 he was stationed in Georgia, and the children lived with him there. In 1989 the juvenile court of Clayton County, Georgia, removed the children from Jeffrey's custody based on a founded report that he had physically abused Christopher. Jeffrey's wife at that time, Nanette, reported the abuse to state authorities. The children were placed in foster care. The court determined, and Jeffrey agreed, that the children had been denied proper parental care. The court ordered that Jeffrey enroll in parent effectiveness training classes, stress counseling, and Parents Anonymous. The court further ordered that the paternal grandmother, Daphne McCann, live in the home and be the primary caretaker of the

children. In November 1989 the juvenile court terminated supervision of the family by the department of family services

In August 1990 Jeffrey and the children moved to Panama. Daphne continued to reside in the household until November 1992. Also, from December 1991 until December 1992, Jeffrey's last wife, Dana, lived in the household. In December 1992 Dana reported to military authorities that Jeffrey had physically abused her and the children. An investigation determined the abuse of Dana was substantiated, but authorities were unable to substantiate the reports of abuse to Jeffrey II and Christopher.

The children resided in Panama until June 1993, when they came to Iowa for visitation with Michelle. The children at that time told their mother they had been physically abused by Jeffrey and expressed their desire to live with their mother. Michelle refused to send the children back to Jeffrey following her summer visitation.

On September 3, 1993, Jeffrey filed a contempt action against Michelle, citing her failure to return the children. Michelle subsequently filed an application for modification of custody and injunction against Jeffrey. Jeffrey filed an action for temporary and permanent writ of habeas corpus seeking the return of the children. The district court consolidated the three separate cases.

On September 17, 1993, the State filed a CINA petition based upon a founded report of abuse by Jeffrey. The Iowa juvenile court deferred further adjudication on

this matter until the district court had held a hearing and ruled on the various pending actions.

Hearings were held in October 1993. At the hearings, both children testified Jeffrey frequently disciplined them by beating them with a belt. The children also testified Jeffrey sometimes beat them with his fists. Once he gave Jeffrey II a bloody nose. Once when Christopher interrupted Jeffrey while he was playing cards, he struck Christopher and knocked him to the floor.

There was testimony that all four of Jeffrey's former wives had complained about physical abuse to themselves and their children. Jeffrey's first wife, Roberta, testified she had obtained custody of their daughter, Candace, because Jeffrey had beaten Candace during a period when he had temporary physical care. Candace testified Jeffrey had physically and emotionally abused her and she had observed him engage in the same conduct towards Jeffrey II and Christopher.

Michelle, a party to the present action, testified Jeffrey II and Christopher told her they had been physically abused by Jeffrey. She stated she found the boys to be credible because her own relationship with Jeffrey had been marked by violence.

Jeffrey admitted it was his third wife, Nanette, who had reported his physical abuse of Jeffrey II and Christopher to Georgia authorities.

Dana, Jeffrey's last wife, testified she had observed Jeffrey physically abuse Jeffrey II and Christopher when she lived with them in Panama. Her testimony was

corroborated by Spring Busicchia, a neighbor in Panama, who testified she had seen Jeffrey strike Christopher and pick him up by his hair.

Jeffrey presented the testimony of Rebeca Mata, the person in charge of the child abuse investigation in Panama. She testified she found no physical evidence of child abuse. He also presented the testimony of the children's school nurse, the school principal, and Christopher's third grade teacher from Panama. Each of these witnesses testified she had seen no evidence of child abuse. Jeffrey testified he has been assigned to a post in New York but was temporarily stationed in Omaha, Nebraska, while the custody dispute was pending.

The district court found the children could not be returned to their father due to physical abuse. The court ruled Michelle had shown a substantial change in circumstances and that it would be in the children's best interest that custody be transferred to Michelle. The district court also ruled that Jeffrey could have reasonable supervised visitation. The court denied Jeffrey's petition for writ of habeas corpus. Jeffrey appealed.

The district court found Michelle was in contempt of court for failing to return the children after her visitation period ended. The court found she should spend three days in the county jail but allowed her to purge herself of contempt by not violating any further order or decree. Michelle has not appealed.

I. Jeffrey contends the Iowa district court did not have jurisdiction to entertain Michelle's petition for modification. He believes that under Iowa Code chapter 598A, the Uniform Child Custody Jurisdiction Act (UCCJA), the case should have been heard in Georgia, where the last custodial order involving the children was filed. Jeffrey claims his residence is in Georgia and this would be the state with the closest connection to the case.

We exercise de novo review of jurisdictional issues raised under chapter 598A. *In re Marriage of Hubbard*, 315 N.W.2d 75, 77 (Iowa 1982). The fundamental question of which state is best suited to resolve custody quickly, permanently, and on the merits, is decided by us anew. *In re Marriage of Cervetti*, 497 N.W.2d 897, 899 (Iowa 1993).

Modification of a custody decree of another state must meet the requirements of section 598A.14, which provides:

If a court of another state has made a custody decree, a court of this state shall not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter, or has declined to assume jurisdiction to modify the decree, and a court of this state has jurisdiction.

Thus, the first question is whether Georgia still has jurisdiction under section 598A.3. We determine Georgia does not have jurisdiction under subsection (a) because the children have not lived in Georgia for the past six months. We find Georgia does not have jurisdiction under subsection (b) because there would not be

substantial evidence in Georgia concerning the children's care, protection, training, and personal relationships. Jeffrey and the children moved from Georgia in August 1990 and have had little contact with the state since. Furthermore, we find Georgia does not have jurisdiction under subsection (c) because the children are not present in that state and requiring Georgia to take emergency action. In addition, we find Georgia does not have jurisdiction based on subsection (d), where no other state has jurisdiction, because as we will discuss further, we believe Iowa has jurisdiction to hear this case

We conclude Georgia does not have jurisdiction of the children under the UCCJA. We note the supreme court has stated that when the children and all parties have moved away the deference to another state's continuing jurisdiction is no longer required. *In re Marriage of Leyda*, 398 N.W.2d 815, 819 (Iowa 1987). Here, the parents and the children had not lived in Georgia for more than three years at the time of the modification hearing.

The next question is whether Iowa has jurisdiction under the UCCJA. We determine Iowa has jurisdiction under subsections 598A.3(1)(c) and (d). Under subsection (c), the children are physically present in Iowa, and we find it is necessary in an emergency to protect the children because they have been subjected to abuse. We find it was an emergency because under the dissolution decree, the children were due to be returned to Jeffrey's care and Michelle was violating the decree by keeping the children. However, we find there was clear evidence the children would have been

subjected to continued physical abuse if returned to Jeffrey. We believe this is the type of situation subsection (c) was designed to address.

We also find Iowa has jurisdiction under subsection (d) because no other state has jurisdiction. We have already found Georgia does not have jurisdiction. While Jeffrey does not argue that either Alabama or Panama should have jurisdiction of the case, we consider them, and determine they do not have jurisdiction. None of the parties have lived in Alabama since 1987. Also, while Jeffrey and the children lived in Panama more recently, Jeffrey is no longer stationed in Panama, and it would be very inconvenient and expensive to make all of the parties go to Panama for a hearing.

II. Jeffrey asks us to decline to take jurisdiction pursuant to section 598A.8(2), which provides:

Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

Section 598A.8 provides a discretionary ground for denying jurisdiction. *O'Neal v. O'Neal*, 329 N.W.2d 666, 669 (Iowa 1983). It is a codification of the "clean hands" doctrine and should not be used if doing so would jeopardize the welfare of the child. *In re Marriage of Rosalez*, 417 N.W.2d 226, 227 (Iowa App. 1987).

We find section 598A.8 could be applied here because Michelle improperly retained the children after a visit. However, we conclude it would be an abuse of discretion in this case to deny jurisdiction based on section 598A.8 because to do so would jeopardize the welfare of the children.

III. Having found Iowa has jurisdiction to consider Michelle's petition for modification, we next consider whether the parties' dissolution decree should be modified. Jeffrey contends Michelle has failed to meet her burden to show she could minister more effectively to the children's best interests. Jeffrey claims Michelle did not meet her heavy burden because she is an alcoholic, was unemployed, and was receiving ADC payments at the time of the modification hearing.

Appellate review of an action to modify a decree of dissolution is de novo. *In re Marriage of Howe*, 471 N.W.2d 902, 903 (Iowa App. 1991). A party seeking modification of custody has the burden to show a substantial change in circumstances and that these changes make it essential and in the children's best interests that custody be changed. *In re Marriage of Weidner*, 338 N.W.2d 351, 361 (Iowa 1983). The parent seeking custody must prove an ability to minister more effectively to the children's well-being. *In re Marriage of Scott*, 457 N.W.2d 29, 31 (Iowa App. 1990). This burden stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App. 1988).

We find there has been a substantial change in circumstances due to the fact there is clear evidence in the record to show Jeffrey physically abused Jeffrey II and Christopher. Candace, Dana, and Spring all testified they had seen Jeffrey physically abuse the children. Roberta and Michelle testified to Jeffrey's violent temper.

Michelle has also shown she can minister more effectively to the children's well-being. While Michelle is not without problems, she has shown a willingness to meet the children's needs. Michelle enrolled the children in counseling through Lutheran Social Services after they revealed they had been abused by Jeffrey. She testified she had gotten the children involved in Boy Scouts and planned to encourage them to participate in this and other extracurricular activities at school.

Michelle admitted she was a recovering alcoholic. She testified she had only had one relapse over the past five years and continued treatment by attending Alcoholic's Anonymous meetings. Michelle had been employed as a certified nursing assistant until September 1992, when she injured her knees. She was then employed as a waitress until April 1993. She has not been employed since due to continuing problems with her knees. At the hearing she testified that through the Vocational Rehabilitation Center she was planning to begin a two-year program in social services in January 1994. Michelle stated she had applied for social security disability benefits.

We conclude Michelle should be granted physical care of Jeffrey II and Christopher. We affirm the decision of the district court to modify the dissolution

decree. No request for attorney fees was made in this case, and thus, none were awarded. Costs of this appeal are assessed to Jeffrey McCann.

AFFIRMED.

Hayden, P.J., concurs; Sackett, J., concurs specially.

SACKETT, J. (specially concurring)

The focal question in this case is whether the Iowa court properly assumed jurisdiction to modify a Georgia decree establishing custodial and visitation rights with two minor children. The mother, an Iowa resident, sought modification after she refused to deliver the children to the father in violation of the provisions of the Georgia decree. The basis for the Iowa court's modification is alleged events concerning physical abuse of the children while they were living with their father, a member of the United States Armed Services, in his assignment in Panama. When the charges were made, the children and the father were living in Panama and there was an extensive investigation by The Family Advocacy Case Management Team in Panama that basically cleared the father of the charges.

The trial court made no finding Georgia subscribes to the UCCJA. I find Georgia does. *See* Iowa Code § 598A.3; Georgia Code, §§ 74-501 to 74-525.

The trial court and the majority found Georgia no longer had jurisdiction or had lost jurisdiction. I disagree with this conclusion. The father showed at the time he was assigned by the United States Armed Forces to serve in Panama, he was a resident of Georgia; and he continued to maintain his residence in Georgia despite assignment outside the United States. The Iowa court has held a soldier's residence does not change when he or she enters the service. *Kirby v. Holman*, 238 Iowa 355, 370, 25 N.W.2d 664, 672 (1947).

There is authority from other states to support a holding state is not deprived of continuing jurisdiction under 28 U.S.C.A. § 1738A(d) by virtue of the fact the children and both parents were not living in the state when the modification proceedings were begun where one parent's absence was due to military service which did not change the parent's residence for purposes of the statute and a parent continues his or her residence in a state when absent on a military assignment. *See generally Whitfield v. Whitfield*, 519 So. 2d 546, 553 So. 2d 1152 (Ala. App. 1987); *Mark L. Jennifer S.*, 506 N.Y.S.2d 1020, 133 Misc. 2d 454 (1986); *Hart v. Hart*, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

I believe Iowa should adopt a similar rule in fairness to servicemen and women, who in the service of their country are transferred outside their declared state of residence.

The father now lives in the State of Nebraska. Consequently, the issue has been rendered moot.