

IN THE COURT OF APPEALS OF IOWA

No. 1998-9 (8-673) / 98-1048

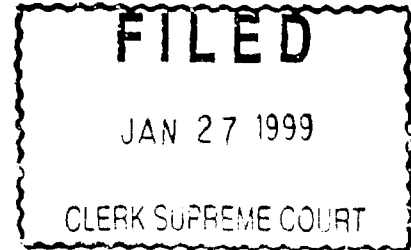
**IN RE THE MARRIAGE OF MARIVIC FRANCOIS
AND NICKOLAS FRANCOIS**

Upon the Petition of
MARIVIC FRANCOIS,

Appellant,

And Concerning
NICKOLAS FRANCOIS,

Appellee.



Appeal from the Iowa District Court for Jackson County, David J. Sohr, Judge.

Marivic Francois appeals custody provisions of the parties' dissolution decree.

AFFIRMED AS MODIFIED.

Nancy S. Tabor of Baty and Tabor Attorneys, Maquoketa, for appellant.

Steven J. Kahler of Schoenthaler, Roberg, Bartelt & Kahler, Maquoketa, for
appellee.

Considered by Huitink, P.J., Mahan, J., and Habhab, S.J.* Zimmer, J., takes
no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Petitioner-appellant Marivic Francois appeals the custody provisions of the parties' dissolution decree. We affirm as modified.

Marivic and Nickolas Francois were divorced pursuant to dissolution decree on May 21, 1998. The parties agreed to joint legal custody, but a hearing was held to determine physical care and visitation. The district court subsequently awarded to Nickolas primary physical care of the parties' children, Nikko and Jasmine, ages seven and four respectively.

Marivic appeals. She alleges the district court erred in awarding primary physical care of the minor children to Nickolas by not correctly applying statutory standards in determining the best interests of the children. She also argues the district court failed to restore her maiden name pursuant to her request.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *See In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Marivic's main argument is the district court should have determined primary physical custody and the best interests of the child with reference to Iowa Code section 598.41(3). We agree factors the court considers in determining legal custody are enumerated in Iowa Code section 598.41(3). However, Iowa Code section

598.41(4) clearly states section 598.41(3) applies where the parents have not agreed to joint legal custody.¹

Here, the parents agreed to joint custody. As long as the trial court approved that arrangement, the issue of whether to grant joint custody was not before the court.²

II. In child custody cases, the best interest of the children is the first and governing consideration. The objective should always be to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974).

In determining what is in the best interest of these two children, we are guided by the applicable statutes of our state and the precedent set by the published opinions of this court and our supreme court. With these principles in mind, and from our de novo review of the record, we agree with the trial court evidence in the record supports a finding that it is in the best interests of these two children that their primary physical care be placed with Nickolas.

Geographic proximity of the parents is a factor that should be considered in determining the question of what is in the best interest of children. Certainly, it is not nor should it be the sole factor, but it is one which the trial court and we must weigh in with the other evidence. A change in residence involving a substantial distance can

¹ Iowa Code section 598.41(4) reads, "Subsection 3 shall not apply when parents agree to joint custody."

² We agree with the appellant that a number of the paragraphs under subsection 3 are factors set forth in our case law that courts should take into consideration when determining which parent should be granted primary physical custody of children.

present significant obstacles to regular and active visitation by the noncustodial parent. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). There cannot be much question that geographic 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. See *In re Marriage of Frederici*, 338 N.W.2d 156, 159 (Iowa 1983). Although *Dale* and *Frederici* involve modification, much of the discussion in those two cases applies to original custody disputes.

Marivic's plan is to relocate to Washington, a move of nearly 2000 miles from the parties' present location. She has failed to demonstrate any particular advantage in moving the children to Washington. She readily admits she has no housing arrangements in Washington, stating only that she will live with her sister's family until alternative arrangements can be made.

Conversely, by granting primary care to Nickolas the children would remain in the family home and in a familiar community. They would retain important friendships, maintain important ties with nearby relatives, and continue social and cultural activities uninterrupted. In addition, Nickolas is employed and capable of supporting the children. The children's best interests will be served if Nickolas is given responsibility for their physical care.

III. Marivic finally requests she be restored to her maiden name, Marivic D. Diche. Though the parties agreed to this change in the stipulation, the district

court did not address this issue.³ We discern no reason for not allowing this change, and accordingly modify the district court's ruling to reflect Marivic's change of name to Marivic D. Diche.

AFFIRMED AS MODIFIED.

³ Marivic complains the trial court failed to respond to her request to change her name in her motion to enlarge findings. However, we note from the record that before the court could rule on that motion, Marivic had filed her notice of appeal. Thus, the trial court lost its jurisdiction to rule on that motion.