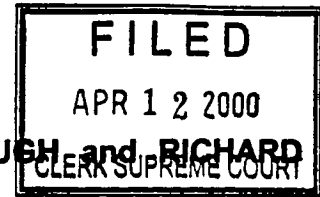


IN THE COURT OF APPEALS OF IOWA

No. 0-115 / 99-1009
Filed April 12, 2000



**IN RE THE MARRIAGE OF DARLA JEAN KAVANAUGH and RICHARD
TIMOTHY KAVANAUGH**

**Upon the Petition of
DARLA JEAN KAVANAUGH,
Petitioner-Appellee,**

**And Concerning
RICHARD TIMOTHY KAVANAUGH,
Respondent-Appellant.**

Appeal from the Iowa District Court for Linn County, Douglas S. Russell,
Judge.

Richard appeals from the district court ruling denying his application to
modify the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Matthew J. Brandes and Paul P. Morf of Simmons, Perrine, Albright &
Ellwood, Cedar Rapids, for appellant.

Karen A. Volz of Ackley, Kopecky and Kingery, Cedar Rapids, for
appellee.

Heard by Mahan, P.J., and Zimmer and Vaitheswaran, JJ.

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MAHAN, P.J.

Richard appeals from the district court ruling denying his application to modify the custody provisions of the parties' dissolution decree. He contends the court erred in (1) failing to award him primary physical care of the parties' son, (2) failing to afford appropriate weight to the court-ordered custody evaluation, and (3) holding it did not have authority to enter a temporary order modifying physical care. Darla requests appellate attorney fees. We affirm.

Darla and Richard Kavanaugh were divorced in August 1993. Darla and Richard were awarded joint legal custody of their child, Jordan, born on February 12, 1990. Primary physical care was given to Darla subject to Richard's rights to visitation. Both parties have remarried since the divorce. Richard and his new wife, Carol, have no children and reside in Olin. Darla and her new husband, Joseph, have two children and moved to Des Moines, approximately 170 miles from Olin. The reason for this move was because Darla's new husband was doing his medical residency program there.

After learning Darla was moving to Des Moines, Richard filed an application to modify the decree requesting he be granted temporary physical care of Jordan. The district court appointed Kathleen Ruyle to do a child custody evaluation and recommendation. For the evaluation, Kathleen spent one hour with each party and their spouse, three hours with Jordan, one hour with each of the parties and Jordan alone, and a home visit to each party's home. The parties also filled out a twenty-five-page questionnaire.

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~~Kathleen stated in~~ her evaluation her "impressions of the parents in this family ~~were~~ very positive. Both appeared to be warmly connected to their child and sincere and open. The child-sharing plan they had seemed to be working well for Jordan. He told me that he liked it and had few problems with it." Kathleen noted this was a difficult case because both parents were assessed to be "very good parents. They obviously care deeply about their son and want what is best for him. They provide him with a good home and emotional and intellectual stimulation." However, because of Jordan's slight preference to be with his dad and the possibility if he lived with his mom he would have to move again in three years, Kathleen recommended Richard have primary physical care.

Richard asserts the new distance between the parties, Jordan's slight preference to live with him, and Kathleen's recommendation as grounds for custody modification. He also asserts Darla's enrolling Jordan in a Seventh-Day Adventist Church against his wishes and the parties' communication problems as additional grounds for the modification.

I. Standard of Review. Our review of child custody modifications is de novo. Iowa R. App. P. 4; *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N.W.2d at 28.

II. Modification. We disagree with Richard's contention the district court erred when it denied his application to modify the custody provisions to grant him primary physical care of Jordan.

To change the custodial provision of a dissolution decree, the party seeking the modification must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the child's welfare supports the requested change. See *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)). The change must be more or less permanent and relate to the welfare of the children but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons justifies placing the heavy burden upon a party seeking to modify custody. *Clifton*, 526 N.W.2d at 577.

In addition to the burden of showing a material and substantial change in circumstances, Richard must also show he has the ability superior to that of Darla to minister to Jordan's needs. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Therefore, the question is not which is the better home but whether Richard has demonstrated he can offer Jordan superior care. *Id.* Custody should not be changed if both parents are found to be equally competent to minister to the needs of the child. *Id.*

The original decree of dissolution was filed on August 10, 1993. In the original decree, Darla was given primary physical care of Jordan subject to Richard's visitation rights in which Richard would provide the transportation. Richard exercised his visitation privileges faithfully. These visitations were going reasonably well and were expanded so weekday visits became overnight visits and weekend visits extended to include overnight on Sunday. Until Darla's move to Des Moines, the parties' residences were approximately an hour apart. A new visitation schedule and transportation arrangements were worked out between the parties because of the move. Since Darla would not participate in the weekday transportation, Richard would drive to Des Moines and spend the late afternoon and evening with Jordan and then drive home again. Although the lack of overnight stays on the weekday visits and the increased travel time may have slightly reduced Richard's time with Jordan, Darla has not interfered with Richard's actual visits and any disagreements the parties have concerning visitation has not harmed Jordan or amounted to a substantial change in circumstance.

Darla married Joseph in January 1995, and in June 1998, they moved to Des Moines in order for Joseph to complete his medical residency program. Richard argues this move to Des Moines constitutes a material and substantial change in circumstances. Historically the Iowa courts have not changed custody on the basis of one parent moving from the area where both parties reside absent other circumstances. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873-74 (Iowa App. 1998) (citing *In re Marriage of Urban*, 359 N.W.2d 420, 425 (Iowa

1984)). ~~The Urban~~ case pre-dates the legislative changes that provide if one parent ~~relocates~~ the minor child's residence to a new location that is one hundred fifty miles or more from the child's residence at the time the custody was granted, the court may consider such relocation to be a substantial change in circumstances. *Id.* at 874; Iowa Code § 598.21(8)(A) (1999). This is consistent with other legislative changes that focus on the opportunity for substantial parental involvement in a child's life, even in a situation where a marriage dissolution has occurred. *In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa App. 1998).

We agree with the district court's finding Darla's move to Des Moines was for a proper reason and not for the purpose of depriving Richard of visitations. Darla will share in the burden of the transportation for the visitations, whereas before, transportation had been Richard's sole responsibility. Also, compared to the distance between the parties' residences prior to Darla's move to Des Moines, the increased travel distance involved for Darla and Richard for Jordan's visitations are not extraordinary. Any diminished time Richard has with Jordan was adequately remedied by the district court when it modified the visitation arrangements.

~~One of the~~ reasons behind Kathleen's recommendation primary care of Jordan ~~be with~~ Richard was based on Jordan's voicing his slight preference to live with his father. Although this may be true, evidence indicates Jordan loves both his parents and both are very good parents and care deeply about Jordan. A child's preference to live with one parent over the other is given some weight

but in a modification this preference gets less weight than it would in an original custodial determination. *Mayfield*, 577 N.W.2d at 873.

Another ground Richard argues for modification is Darla's enrolling Jordan in a Seventh-Day Adventist School in Des Moines where he is doing well academically and socially. We agree with the district court this is not a substantial change in circumstances. Jordan attended a Christian school before he moved to Des Moines and, in fact, Jordan has never attended public school.

After careful review, we agree with the district court Richard has not met his heavy burden of showing a material and substantial change in circumstance that would warrant a modification in the custody provision. However, even if he had shown a material and substantial change in circumstance, he did not meet the additional burden of showing he is the superior parent over Darla. The record indicates both parties have remarried and can provide a stable and happy home for Jordan. Jordan also has a good relationship with his younger brother and sister, from Darla's marriage to Joseph, and being separated from them would not be in his best interest.

III. Court-Ordered Evaluation. The district court in this case did not directly address the custody evaluation conducted by Kathleen, but it appears it did rely on findings from the evaluation to assist it in reaching the conclusion there was no substantial or material change in circumstances to merit a change of physical care. The district court did not err in the amount of weight in which it accorded the custody evaluation. The recommendation of an independent custodial investigator may be used to assist in the determination of primary

physical custody, but it is not controlling. *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa App. 1993).

IV. Attorney Fees. Darla requests appellate attorney fees. A successful party does not have a vested right to appellate attorney fees, rather the court exercises its discretion in determining whether an award is appropriate. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa App. 1999). The court considers the parties' financial conditions, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Spiegel*, 553 N.W.2d 309, 320 (Iowa 1996).

After considering these factors, we believe an allowance of appellate attorney fees is appropriate. Richard shall pay \$500 of Darla's appellate attorney's fees.

AFFIRMED.

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