

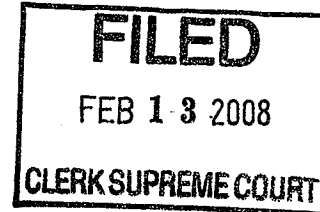
IN THE COURT OF APPEALS OF IOWA

No. 8-037 / 07-1330
Filed February 13, 2008

IN RE THE MARRIAGE OF DORINDA MILLER
AND JOSEPH MILLER

Upon the Petition of
DORINDA MILLER,
Petitioner-Appellant,

And Concerning
JOSEPH MILLER,
Respondent-Appellee.



Appeal from the Iowa District Court for Crawford County, James D. Scott,
Judge.

The petitioner appeals the district court's ruling granting modification of the
custody provisions of the dissolution decree. **AFFIRMED.**

Bryan Swain of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for
appellant.

Elizabeth Kellner-Nelson of Pendleton Law Firm, P.C., West Des Moines,
for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

ENTERED

FEB 15 2008

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MAHAN, P.J.

Dorinda Miller appeals the district court's order granting modification of the child custody provisions of the dissolution decree of Dorinda and Joseph Miller. As we conclude the district court's ruling modifying physical care was proper, we affirm.

I. Background Facts and Proceedings.

Dorinda and Joseph's marriage was dissolved by a stipulated decree in July 2003. They have one daughter, Madison, born in November 2001, of whom Dorinda had physical care under terms of the decree. Joseph filed a modification petition in July 2004 requesting physical care be changed to him. The parties reached an agreement approved by the court in June 2005 that expanded Joseph's visitation and accommodated it to better meet his new work schedule. This stipulated modification also contained a provision placing a moratorium on all non-emergency modifications for five years. At the time, Dorinda and Joseph both lived in or near Vail in Crawford County, Iowa.

Within three weeks of the new modification order, Dorinda informed Joseph that she intended to move with Madison to Kearney, Nebraska. Joseph filed another modification petition in July 2005, in anticipation of Dorinda's move. This petition was set for hearing on May 10, 2006, but because Dorinda had not accomplished any move to Kearney as of that date, Joseph dismissed the petition without prejudice.¹ Again within a few weeks of the dismissal of the latest modification petition, Dorinda did actually move to Kearney, Nebraska, with

¹ Additional litigation surrounding dismissal of this petition occurred, but will not be discussed here as it is not relevant to the issues on appeal.

Madison. Some intervening litigation ensued concerning visitation and transportation issues between June 2006 and April 2007.

Joseph filed the modification petition at issue on appeal in April 2007, requesting physical care be changed from Dorinda to him. Dorinda also filed a modification petition, requesting that Joseph's visitation be changed to a more standard schedule to keep interference with her work schedule at a minimum when it came to transporting Madison for visitation. Following trial on custody issues, the district court concluded that a significant change in circumstances had occurred with Dorinda's move to Kearney, that Joseph had proven a superior ability to parent Madison, and physical care should be granted to him. An order modifying the decree as such and laying terms of visitation was entered on July 18, 2007. Dorinda appeals, contending the district court erred when it granted Joseph physical care of Madison.

II. Scope and Standards of Review.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). Our overriding consideration is the children's best interests. *Ford*, 563 N.W.2d at 631.

III. Issue on Appeal—Custody Modification.

Dorinda asserts on appeal that the district court erred when it removed Madison from her physical care and placed her in the physical care of Joseph. A party seeking modification of a dissolution decree must establish there has been a substantial change in circumstances since the entry of the decree. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). To change a custodial provision of a dissolution decree, the applying party is required to establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the child's best interests make it expedient to grant the requested change. *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 child's welfare. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the child, *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002), and to minister more effectively to the child's well-being. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). This heavy 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 Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

It is clear from the record before the trial court that Dorinda's move from Crawford County, Iowa, to Kearney, Nebraska, exceeds 150 miles. Under Iowa Code section 598.21D (2007), if a custodial parent moves 150 miles or more from the former custodial home, this may be considered a substantial change in circumstances. Thus, the district court's ruling that the move constitutes a

significant change in circumstances under section 598.21D is consistent with the statute, and we affirm this issue.

We now turn to the issue of whether Joseph proved himself able to provide superior care to Madison. In reaching its decision, the district court made ample note that both Dorinda and Joseph are able to cook, perform household duties, and are proper caregivers and parents to Madison. Madison was about to begin kindergarten in the fall of 2007 and exhibited good mental and emotional health. Joseph has been an involved parent and strived to keep visitation and in contact with Madison since the dissolution and particularly since the relocation to Kearney, though Dorinda has been her primary caregiver. The evidence at trial focused greatly on the relationship between Dorinda and Joseph and their behavior since the previous modification. The district court found Dorinda's actions more troublesome and unsupportive of Joseph's relationship with Madison:

Dorinda has both supported and undermined Joseph's relationship with Madison. When she relocated, Dorinda initially refused to share visitation transportation because the modification decree state Joseph should provide transportation. Dorinda's attorney assured Joseph that Dorinda would share in transportation. . . . Prior to the breakdown of the parties' cooperation in April, Dorinda had shown some flexibility in the visitation schedule, meeting Joseph a few hours later than the schedule called for in order to accommodate transportation. Dorinda has also provided Joseph with copies of Madison's report cards from preschool and the school schedule. She made an effort to allow Joseph visitation when he was working in western Nebraska.

Unfortunately, Dorinda has also undermined the principles of joint custody. Her demeanor and testimony reveal ill will and lack of respect for Joseph. When she moved to Kearney days after Joseph dismissed his petition to modify, she neglected to tell Joseph. He did not learn of the move until he realized Madison would not be available for visitation. At the time of the cancelled

modification hearing, Dorinda had investigated housing and schooling in Kearney and had an option on a house. Nevertheless, she kept Joseph in the dark.

Dorinda's mother lives close to Joseph. Soon after moving to Kearney, Joseph was unable to exercise a weekend visitation because of the distance and Dorinda then returned to visit Dorinda's mother in Iowa. Even though they were within miles of Joseph's home, Dorinda did not allow Joseph to see Madison.

Other examples of Dorinda's lack of support for Joseph include her last-minute notification that Madison must be returned early from visitation for her immunization and failure to tell Joseph of her extracurricular activities. Also, the Court finds Madison's preschool was willing to provide Joseph with information concerning Madison until Dorinda advised them not to.

The court also noted that much of Madison's extended family through Joseph still live in Iowa, including her paternal grandparents and maternal grandmother. Before she made the decision to move to Kearney for work, Dorinda admitted that she had not inquired into employment prospects in Iowa or Nebraska nearer to Crawford County, though she believed suitable employment was available, because a commute would be too lengthy.² For all of these reasons, the district court found that Joseph could provide superior care to Madison back in Iowa. Like the district court, we note that this is a tough case between two parents who obviously love and are both able to care for their daughter. However, Iowa Code section 598.41 makes it clear that one parent's ability or inability to support the other parent's relationship with the child is an important factor to consider in these cases. The denial by one parent of support for the child's maximum continuing physical and emotional contact with the other parent is a significant factor in arriving at a proper custody arrangement. See Iowa Code § 598.41. This factor likewise would apply to a physical care

² Dorinda has experience in the architectural field and as a computer-aided drafter. She moved to Kearney to work for a former employer.

determination. Deferring to the district court's credibility findings as better suited to judge witnesses and evidence before it, we agree with its ruling granting physical care to Joseph as in Madison's best interests. See *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the best interests of the child should guide a determination of a physical care arrangement). We decline to award attorney fees on appeal, *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997) (stating an award of attorney fees is not a matter of right, but rests within the court's discretion), and affirm. Costs on appeal are assessed to Dorinda.

AFFIRMED.

