**IN THE COURT OF APPEALS OF IOWA**

No. 6-508 / 06-0324
Filed October 25, 2006

**IN RE THE MARRIAGE OF JENNIFER A. METCALF AND KRIS D. METCALF**

**Upon the Petition of**
**JENNIFER A. METCALF,**
Petitioner-Appellee,

**And Concerning**
**KRIS D. METCALF,**
Respondent-Appellant.

---

Appeal from the Iowa District Court for Jefferson County, Annette J. Scieszinski, Judge.

Appellant appeals the district court's modification of the decree, awarding appellee physical care. **AFFIRMED.**

John D. Jacobsen of Hallberg, Jacobsen, Johnson & Viner, P.L.C., Cedar Rapids, for appellant.

Sara Cochran, Fairfield, and Douglas L. Tindal of Tindal & Kitchen, P.L.C., Washington, for appellee.

Heard by Miller, P.J., and Eisenhauer, J., and Robinson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

**EISENHAUER, J.**

Kris Metcalf appeals from the modified child custody provisions of the decree dissolving his marriage to Jennifer Metcalf n/k/a Jennifer Mullinnix. He contends the court should have continued joint physical care of their daughter Rachel. In the alternate, he argues he should be granted physical care of the child.

The parties' marriage was dissolved in May 2003. They have one child, Rachel, born April 16, 2001. The parties stipulated, and the court decreed, that the parties would have joint legal custody and joint physical care of Rachel and she would spend half of her time in each parent's home.

Both parties have remarried. At the time of the modification hearing, Kris was forty-three years old and employed with the City of Fairfield as a police officer; Jennifer was thirty-four years old and employed with the Iowa City Community School District as a special education teacher.

On April 25, 2005 Jennifer filed an application for modification, alleging a substantial change in circumstances based on her anticipated relocation to Iowa City[1] and the parties' inability to reevaluate the issue of joint physical care, given the distance between the parties' homes. On July 23 Jennifer moved from Fairfield to Iowa City[2] due to her relationship with her current husband, her new job, and "more opportunities . . . to make a better living." On July 25, the parties agreed through mediation that Rachel would spend alternating weeks with each

[1] Jennifer obtained employment in Iowa City on April 6, 2005, although her starting date was not until August 16, 2005.
[2] Jennifer testified that Iowa City is about an hour's drive from Fairfield.

parent until August 1, 2006, and the issue for the court would be the physical care of Rachel "at that time i.e. where Rachel will primarily live and go to school."

Following the modification hearing, where the only testimony came from the parties, the district court entered an order finding "the developments in this family warrant a change in physical custody." The court granted Jennifer physical care, awarded Kris liberal visitation, and ordered Kris to pay $342 per month in child support. Kris appeals.

We review the record de novo in proceedings to modify the custodial provisions of a dissolution decree. *In re Marriage of Pendergast,* 565 N.W.2d 354, 356 (Iowa Ct. App. 1997). We give weight to the findings of the trial court, although they are not binding. *Id.*

***I. Substantial Change in Circumstances***

Kris asserts the court erred in finding a substantial change in circumstances existed to warrant modification of the decree. *See In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998) (finding a court may modify a decree when substantial change of circumstances, which are more or less permanent and relating to welfare of child, occur since time of decree, and were not contemplated when decree was entered). While Kris argues no change of circumstances has occurred, both parties agree that joint physical care is not feasible with Jennifer living in Iowa City and Rachel starting school in the fall of 2006. The current agreement of the parties—alternating weeks—is unworkable when the parties reside in two different school districts with approximately an hour drive in-between. Although the decree provided that if either party moved from the area the parental time schedule would be reevaluated, the fact of

Jennifer's new marriage and new job were not contemplated with such a move. Moreover, there was evidence the parties' communication had deteriorated since August 2004, making the current arrangement difficult. *See In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996) (finding when actions of the parties indicate they are no longer able to cooperate, modification of joint physical care status is appropriate); *Walton*, 577 N.W.2d at 870 (noting discord between parents which disrupts lives of children and joint physical care arrangement warrants modification to sole physical care). Iowa Code section 598.21(8A) (2005) has no application as the move was not one hundred fifty miles or more. We look to the overall circumstances to determine if a substantial change has occurred. There is a substantial change in circumstances.

***II. Primary Caregiver***

Kris contends the district court erred in placing physical care with Jennifer. The best interests of the child are the first and governing consideration in determining the child's primary caregiver. *Walton*, 577 N.W.2d at 871. Under the dissolution decree, both parents have been found suitable to render primary care. *See Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002). Thus, the question is which parent can render better care. *Id*.

Most of the evidence was each party being critical of the other. It appears the relationship of the parties deteriorated soon after Kris remarried and Jennifer began dating her current husband. According to Jennifer, Kris told her he would serve her with papers and seek to prevent Rachel from leaving Fairfield. Little evidence was offered concerning the effect on Rachel of the move to Iowa City. Rachel starts kindergarten in August 2006.

Both parents offer stable, nurturing environments where Rachel can thrive. The district court found that Jennifer supports and encourages Kris's relationship with Rachel. But, Kris "shut[s]" Jennifer out of routine information about Rachel's healthcare and other matters, and does nothing to affirmatively support Jennifer and Rachel's relationship. The district court found Rachel's best interests were to place physical care with Jennifer, and upon our de novo we find the record supports such a conclusion. Kris's allegations of Jennifer "physically harm[ing]" Rachel, having an eating disorder, and having unresolved issues concerning sexual abuse have all been considered by the trial court and by this court and do not alter our decision. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989) ("a trial court, as first-hand observer of witnesses, holds a distinct advantage over an appellate court, which necessarily must rely on a cold transcript").

***III. Admission of Evidence***

Kris asserts the court erred in admitting evidence of matters which occurred prior to the dissolution action. After Jennifer testified she was Rachel's primary caregiver prior to the divorce, she was asked, "What duties or tasks, childcare-type, did Kris perform while you were married?" Kris's counsel then objected, stating:

> Your Honor, I'm going to object to this line of questioning. I don't believe it's appropriate given that we're here on a modification action, and this information seems to get at what was going on prior to the entry of the decree in 2003.

The district court overruled the objection, finding the information relevant to assess "what the baseline of contemplation was for the parties and for the Court at the time that the decree was entered."

Because this is an equitable claim, the district court need not rule on objections, but may hear all evidence subject to objections. *Wilker v. Wilker*, 630 N.W.2d 590, 597 (Iowa 2001). On our de novo review, we may decline to address the issue of admissibility when we can arrive at the same result with or without the evidence. *See In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005) (citing *Wilker*, 630 N.W.2d at 598). Even without the evidence Kris complains of, the record supports the determination that it is in Rachel's best interests to award Jennifer primary physical care.

Kris also argues in his brief that "the facts and circumstances of his prior marriage, the nature of his contacts with his other children and any and all issues relating to events prior to the dissolution are categorically irrelevant." Kris did not object to the admission of information regarding his prior marriage or his other children, and in fact, he provided much of this information on direct examination. Thus, he has not preserved the issue for review.

***IV. Mediation Agreement***

Kris argues the district court erred in failing to address the mediation agreement. He suggests Jennifer's testimony regarding the agreement reflected her unwillingness to provide maximum contact between Rachel and Kris. However, in the context of this modification action it is unnecessary to consider the mediation agreement because it was temporary (only scheduled to continue until August 2006), and it was superseded by the entry of the modification order. Nonetheless, we have considered each party's willingness to provide maximum contact with the child in our overall assessment of the child's best interests.

**AFFIRMED.**