

**IN THE COURT OF APPEALS OF IOWA**

No. 8-183 / 07-1253  
Filed July 16, 2008

**IN RE THE MARRIAGE OF JODI DIANE SMITH AND SCOTT OWEN SMITH**

**Upon the Petition of  
JODI DIANE SMITH,**  
Petitioner-Appellant,

**And Concerning  
SCOTT OWEN SMITH,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Marshall County, Timothy J. Finn,  
Judge.

Jodi Smith appeals the trial court's order granting Scott Smith's petition to modify the custody provisions of the parties' dissolution decree and denying her counterclaim to modify the physical care provisions of the decree. **AFFIRMED.**

Lora L. McCollom-Sinclair of Skinner, Nielsen, & McCollom, PLC, West  
Des Moines, for appellant.

Cathleen J. Siebrecht of Siebrecht Law Firm, Des Moines, for appellee.

Heard by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

**MILLER, P.J.**

Jodi Smith appeals the trial court's order granting Scott Smith's petition to modify the custody provisions of the parties' dissolution decree and denying her counterclaim to modify the physical care provisions of the decree. Both parties request appellate attorney fees. We affirm.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Jodi and Scott were married December 8, 1995. A decree dissolving their marriage was entered on August 7, 1998. They had one child during their marriage, Lilly, born in April 1996. The original decree awarded the parties joint legal custody of Lilly and placed her physical care with Jodi. Since their marriage dissolved, both parties have remarried. Scott married Karen McDowell and Jodi married Brice Rau. Scott and Karen have no children. Scott has one son from a prior relationship who lives with the boy's mother. Jodi has four other children: Brandon, age seventeen, and Mara, age fifteen, both of whom reside with Jodi's parents; Lindi, age nine, who resides with Lindi's father, James; and Lexia, age five, who is Jodi and Brice's daughter.

On April 5, 2004, Scott filed a petition to modify the decree, seeking physical care of Lilly. The district court granted Scott's petition, changed physical care of Lilly from Jodi to Scott, and maintained joint legal custody. In a very lengthy and well reasoned opinion, the court set forth a number of concerns and reasons why a change of Lilly's physical care to Scott was necessary. The most significant of these concerns was the fact that Damon, whose mother Kathy was a close friend of Jodi's, and for whom Jodi provided child care, had sexually

abused Lilly on two separate occasions while Lilly was in Jodi's care. Damon was dealt with in juvenile court for this offense. In granting Scott's first petition for modification, the district court found, in part, the following:

It strains credulity to conclude that Jodi did not know that Damon was a threat to abuse younger children. First, she attended staffings at DHS with Kathy concerning Damon. Second, Jodi provided child care for Damon because no one else would do so. Third, Kathy and Jodi were close friends and likely discussed Damon's problems. Fourth, Damon and Lilly had sexual contact in February, 2004, prior to the incident described in the child protective assessment dated March 10, 2004. This clearly placed Kathy and Jodi on notice that Damon represented a threat to Lilly. The two sexual abuse incidents represent a negligent lack of attention by Jodi to Lilly's welfare. This is a significant, material, and substantial change in circumstances since the issue of custody was last addressed by the court.

In the spring of 2006 Jodi asked Kathy to watch Lilly as well as Lindi. She stated she had been told by the Iowa Department of Human Services (DHS) that Kathy could watch the girls so long as Damon was not present in the home. Jodi testified that Kathy was the only person home when she dropped off the girls, and she knew Damon had been sent away by that time. Apparently Kathy's adult son, A.J., returned home at some point and began playing with the girls on the bed in the bedroom, repeatedly closing the bedroom door, and then sexually abused them. Neither of the girls discussed the incident with anyone right after it happened because A.J. said he would hurt their mother if they told.

Scott learned of the sexual abuse from James approximately three to five weeks after it happened, after Lindi told her father what had happened. Scott then confronted Lilly, who admitted "something happened." In June 2006 Lilly finally admitted to her therapist that A.J. had touched her crotch area and forced

her to put her mouth on his genitals. Jodi initially did not believe the abuse had occurred, purportedly because of Lilly's history of lying and exaggerating, but eventually came to realize the abuse had in fact occurred. A.J. was charged with and convicted of sexually abusing the girls and is currently serving a prison term for the crimes.

On June 2, 2006, Scott filed the present petition for modification. On the same date he also filed a "Motion for Emergency Hearing" seeking to immediately limit or terminate Lilly's visits with Jodi. The motion was denied on procedural grounds. Trial on Scott's modification petition was originally scheduled for November 2006, but was continued a number of times at Jodi's request. On April 12, 2007, Jodi filed an answer and counterclaim asking that the petition to modify be dismissed and seeking to have physical care of Lilly placed with her. Trial on the matter was eventually held on May 9 and 10, 2007.

At trial Scott testified that immediately upon learning of the abuse he took Lilly back to therapy with Tamera Bibbins. Because Jodi did not initially believe Lilly was telling the truth about the abuse, Bibbins recommended no contact between Jodi and Lilly, and later recommended only supervised visits. She further recommended Scott prevent telephone contact between Lilly and Jodi so that Lilly would not be "re-victimized" by Jodi's questioning.

Jodi eventually contacted Bibbins in late October or early November 2006. At that point Bibbins told Jodi that if Jodi did not believe Lilly it would be difficult for her to help in the healing process. The next meeting Jodi had with Bibbins was in January 2007. At that point Bibbins agreed to a therapeutic visit between

Lilly and Jodi. This visit occurred on February 14, 2007, and went fairly well, although Bibbins believed Jodi was still somewhat blaming Lilly. The next visit was March 28, 2007. This was not a successful session, and afterward Jodi made a scene in the parking lot and Bibbins had to call security. As a result, Bibbins discontinued the sessions.

Scott was also advised by the detective investigating the sex abuse claim not to allow any contact between Lilly and Jodi while the investigation was pending. Scott stated he was aware there was a court order which allowed Jodi visitation and was aware he was violating the order by not allowing the visits but believed he needed to do whatever was necessary to keep his daughter safe. At the time of trial Bibbins continued to recommend only supervised visitation between Lilly and Jodi until Lilly reached age sixteen, and that telephone contact be monitored.

The DHS did investigate the incident and a founded child abuse report was filed against Jodi for "sexual abuse by omission." The report was founded because Jodi knew or reasonably should have known of the risk to Lilly because the perpetrator's mother was her friend and there had been prior abuse by her friend's other son, yet Jodi allowed her children to continue to be exposed to them. A child in need of assistance petition was not initiated, because Lilly was living with Scott at the time and the State felt she was protected in his care.

As part of the process involving both Lilly's and Lindi's DHS cases, Jodi underwent therapy and parenting development. In-home workers, including Lennie Mellows and Sherri Rossiter, worked with Jodi to improve her parenting

skills. Rossiter worked with Jodi from August 31, 2006 through the time of trial on parenting and therapy. During this time she attempted to arrange supervised visitations between Lilly and Jodi, but was told by both Scott and the DHS that could not happen until Bibbins agreed to it. This was the first time Rossiter had ever experienced such a limitation on visitation. When Rossiter spoke with Bibbins, Bibbins told her she believed it was not in Lilly's best interests to see Jodi until Jodi could admit the sexual abuse had occurred. Rossiter also met with Lilly at Scott and Karen's home, but was not allowed to talk to Lilly about Jodi. She testified this was the first time in her experience that one parent had ever forbidden her to discuss the other parent with the child.

When Rossiter became aware no visitation was being allowed, in violation of the court order, she questioned both Bibbins and Scott about the situation. Scott hung up on her and Bibbins simply acknowledged she was aware she was going against the court order but believed that was in Lilly's best interest. After Rossiter made this inquiry about the court order she was taken off the case because Scott no longer wanted to work with her. Rossiter testified Jodi did well developing her parenting skills during her time working with her. Her recommendation at the time of trial was still for reunification of Jodi and Lilly, based upon their prior relationship and Lilly's desire to see Jodi. However, on cross-examination Rossiter acknowledged she is not an individual therapist, she had not spoken to Jodi's therapist, she did not conduct a psychological evaluation of Jodi, and she was not familiar with Jodi's mental health history other than a prior anxiety disorder for which Jodi no longer took medication. She

also recommended that visits between Jodi and Lilly be supervised until they could re-establish their relationship.

In a ruling filed May 24, 2007, the district court placed sole legal custody of Lilly with Scott subject to limited, supervised visitation rights in Jodi, and denied Jodi's request to change physical care of Lilly from Scott to her as "unreasonable and not appropriate." On June 5, 2007, Jodi, acting without the assistance of counsel, filed a packet of documents entitled "Ruling on Applications to Modify." Within the packet Jodi made reference to a "1.904 Motion." The district court treated the packet as an Iowa Rule of Civil Procedure 1.904(2) motion to enlarge or amend and entered a ruling denying the motion as untimely and irrelevant or not supported by the evidence.

On appeal Jodi contends the district court erred in awarding Scott sole legal custody of Lilly, in limiting her to supervised visitation, and in failing to transfer physical care of Lilly to her. Jodi and Scott each seek an award of appellate attorney fees.

## **II. SCOPE AND STANDARDS OF REVIEW.**

This action for modification of a dissolution of marriage decree is an equity case. See Iowa Code § 598.3 (2007) ("An action for dissolution of marriage shall be by equitable proceedings . . ."); *Id.* § 598.21 (providing for modification of orders for disposition and support when there is a substantial change in circumstances). Our review is thus *de novo*. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinehart*, 704

N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value on custodial issues, and courts must make their decisions on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

### **III. TIMELINESS OF APPEAL.**

Initially, we note Scott's argument that we do not have jurisdiction of this appeal because Jodi did not timely file her rule 1.904(2) motion and thus her notice of appeal was also untimely. An appeal which is not taken within thirty days of the final order, judgment, or decree is untimely, and the appellate court is without jurisdiction to hear it. *Fenchel v. Fenchel*, 268 N.W.2d 207, 208 (1978). A motion to enlarge or amend under rule 1.904(2) stays the time for filing an appeal to thirty days after the entry of the ruling on such motion. Iowa Rule of App. P. 6.5(1). However, a motion under rule 1.904(2) must be filed within ten days after the filing of the court's decision with the clerk unless the court, for good cause, grants additional time. Iowa Rs. Civ. P. 1.904(2), 1.1007. An



untimely post-trial motion is defective and does not toll the running of the thirty day period within which an appeal must be taken. *Lutz v. Iowa Swine Exports Corp.*, 300 N.W.2d 109, 110 (Iowa 1981).

Scott contends that because Jodi's June 5, 2007 post-trial motion was not timely, the deadline for her to appeal the district court's May 24, 2007 order was thirty days after the entry of that order, or June 24, 2007 and thus, her July 16, 2007 notice of appeal was untimely. Although some question exists as to whether Jodi's 1.904(2) motion and thus her appeal were in fact timely, because we find her claims to be largely without merit we choose not to rely on jurisdictional grounds to dispose of this appeal.

#### **IV. MERITS.**

The legal principles governing modification actions are well established.

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

*In re Petition of Anderson*, 530 N.W.2d 741, 741-42 (Iowa Ct. App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Here, unlike in an original custody determination, the question is not which home is better, but whether the parent seeking the change has demonstrated he

or she can offer the child superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). If the parents are found to be equally competent to minister to the children, custody should not be changed. *Id.* The burden upon the parent seeking to change custody is heavy “because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children.” *Id.* at 213-14. Children’s preference of where to live is given some weight, but less weight in a modification than in an original custodial determination. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998).

As noted by the district court, Scott initially overcame these burdens several years ago when the court, although continuing joint legal custody, modified Lilly’s physical care from Jodi to Scott. Thus, the issue before the district court, and now this court on appeal, is whether the facts in this case warrant a further modification from joint legal custody to sole legal custody with Scott as Lilly’s legal custodian and Jodi having visitation.

“The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances.” *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). If either parent requests joint custody the court must order joint custody unless it cites clear and convincing evidence, pursuant to the factors in Iowa Code section 598.41(3), that joint custody is unreasonable and not in the best interest of the children to the extent that the legal custodial

relationship between the children and a parent should be severed. Iowa Code § 598.41(2)(b).

Jody first contends the district court erred in awarding Scott sole legal custody. More specifically, she contends the court failed to properly apply the provisions of Iowa Code section 598.41 and failed to consider Scott's denial of her visitation rights as joint legal custodian. In granting Scott's petition for modification, the district court set forth the following reasons for granting him sole joint legal custody of Lilly.

1. Lilly has been exposed to improper supervision while in the care of her mother;
2. Lilly has been sexually abused two previous times while in the supervision of her mother;
3. Lily has now been sexually abused a third time while in the care of her mother;
4. Lilly is entitled to be reared in a safe and emotionally stable atmosphere where she is not subjected to repeated acts of sexual abuse;
5. Lilly needs to be reared in a positive, emotionally stable environment now and cannot wait for years of psychological treatment and therapy for a period of years while her mother becomes a responsible adult.

We agree with these conclusions of the district court and adopt them as our own.

We conclude these clear and convincing reasons set forth by the court, pursuant to section 598.41(3), as to why joint custody here is unreasonable and not in Lilly's best interests evidences the court's specific compliance with the statutory requirements of section 598.41(2)(b). Thus, we conclude the court did in fact properly apply section 598.41.

In addition, we do not believe the district court failed to consider the fact that Scott denied Jodi visitation in contradiction of her rights as a joint custodian

and the terms of the decree. On the contrary, the court specifically considered this fact and decided it was not egregious enough to warrant a continuation of joint legal custody. The court noted that Bibbins's advice to ignore the court order and not allow Jodi visitation with Lilly was not good legal advice. However, the court went on to find that based on the specific circumstances of this case the fact that Scott limited Lilly's visits with Jodi, "who on at least three different occasions had placed the child in a situation where she was sexually abused, is certainly understandable."

Jodi next contends the court erred by limiting her to supervised visitation. We disagree. Lilly's therapist, Ms. Bibbins, testified that it would be in Lilly's best interest for her visits with Jodi to be supervised until Lilly is sixteen, when she would be old enough to not be emotionally affected by her mother and would have enough professional resources to handle her mother. Furthermore, Ms. Rossiter and Jodi both agreed that supervised visitation would be appropriate at least for a period of time until Lilly and Jodi can rebuild their relationship. Accordingly, the court was correct to order supervised visitation between Jodi and Lilly at the present. If circumstances change in the future such that Jodi believes unsupervised visitations can occur she may seek modification, by agreement if possible and by petition to the court if not, at that time.

Although Jodi does not state it as an issue in her brief, we note that in her "Statement of the Case" she asserts that the district court "Erred by allowing Scott to dictate the terms of her visitation." Her complaint appears to be directed at the portion of the court's ruling that states:

The cost of such supervision shall be paid for and arranged by Petitioner Jodi. The Respondent shall be allowed to designate the supervisor of said visitation and the time and location of said visit.

Jodi's concern regarding this language has some basis, as the record demonstrates that after Lilly's physical care was changed to Scott he in many respects failed or refused to comply with his responsibilities as a joint legal custodian. Among other things, he failed to notify Jodi of injuries Lilly sustained, failed to consult with or notify Jodi of medical appointments he made for Lilly, failed to consult with Jodi about having Lilly repeat the third grade, and failed to consult with Jodi about Lilly's religious training. However, the questioned portion of the court's ruling, just as comparable portions of any such ruling, must be read as incorporating a requirement of reasonableness. Otherwise stated, and as applied to the language in question, Scott may not designate unreasonable times or locations for Jodi's visitations with Lilly, may not unreasonably refuse to designate an appropriate supervisor or supervisors requested by Jodi, and may not cause Jodi to incur expense for supervision of visitations if such expenses can reasonably be avoided. When the language in question is so construed, we find no need to modify it.

Finally, Jodi argues the court erred in failing to transfer physical care of Lilly from Scott to her, based on the fact Scott blatantly ignored and denied Jodi her rights as a joint custodian. As set forth above, Scott's limitation of Jodi's visitation rights, based in part on Bibbins's recommendation, was in violation of the court's decree. However, based on the specific facts and circumstances of the case at hand, including the fact Lilly had been sexually abused on three

separate occasions while in Jodi's care, his actions in denying Jodi some of her rights as Lilly's joint custodian were understandable and not entirely unreasonable. We certainly do not encourage one parent to act in violation of the other parent's rights and the court ordered visitation schedule. However, the protection and best interest of the child has to always be paramount in our considerations. Here, Scott was attempting to act in Lilly's best interests and in accordance with advice from professionals and law enforcement. As set forth above, Scott's action was not sufficiently egregious to prevent a finding that he should have sole legal custody of Lilly, let alone to support a change in physical care from him to Jodi. The district court found, in part:

The first time a mother places a child in a situation where the child is sexually abused could be described as tragic, negligent irresponsible, uncaring, or possibly poor judgment or even accidental. The second time the **same mother** places the **same minor child** and another minor child in the **same household** and her children are again sexually abused, cannot be described as anything other than **gross, and perhaps criminal, negligence**. It certainly evidences a standard of poor parental supervision which cannot be tolerated. The welfare of Lilly dictates that Scott's request to award him sole legal custody of Lilly should be granted. Likewise, Jodi's request to change custody to allow her primary physical care of Lilly is unreasonable and not appropriate.

(Emphasis in original). We agree with this reasoning.

#### **V. APPELLATE ATTORNEY FEES.**

Both Scott and Jodi request an award of appellate attorney fees. Such an award rests in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal. *Id.*

The record shows that at the time of the previous modification hearing in October 2004 Scott was working for Ryko Manufacturing and earning \$18.40 per hour. Jodi was unemployed at the time of the October 2004 hearing, and had been unemployed since 2001. At the time of the present modification hearing in May 2007 Jodi and her husband had just recently started their own part-time business selling natural energy drinks. Prior to that, she was employed at a pizza place from May to August of 2006. Scott had been employed with Par Electric as a lineman for approximately two years at the time of the May 2007 hearing.

Although Jodi's appeal lacks merit, the record before us provides essentially no information concerning the parties' present needs or abilities to pay and is insufficient to award either party appellate attorney fees. Accordingly, each party shall be responsible for their own attorney fees on appeal.

## **VI. CONCLUSION.**

Based on our de novo review, and for the reasons set forth above, we conclude the district court did not err in placing sole legal custody of Lilly with Scott and limiting Jodi to supervised visitation at this point in time. We further conclude the court was correct in denying Jodi's request to change physical care of Lilly from Scott to her. Each party shall be responsible for payment of their own appellate attorney fees.

**AFFIRMED.**