

**IN THE COURT OF APPEALS OF IOWA**

No. 7-238 / 06-1208  
Filed April 25, 2007

**IN RE THE MARRIAGE OF CASI CUMMINS  
AND DAMIAN CUMMINS**

**Upon the Petition of  
CASI CUMMINS, n/k/a CASI SHULTZ,**  
Petitioner-Appellant,

**And Concerning  
DAMIAN CUMMINS,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Linn County, Larry J. Conmey,  
Judge.

Casi Cummins appeals from the order modifying the child custody  
provision of the decree dissolving the parties' marriage. **AFFIRMED.**

R.L. Sole of Glasson, Sole, McManus & Pearson, P.C., Cedar Rapids, for  
appellant.

Delmer D. Werner, Cedar Rapids, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

**VAITHESWARAN, J.**

Damian and Casi Cummins divorced in 2002. Under a stipulated decree, the parties agreed to joint physical care of their son and two daughters.

Approximately two years after the dissolution decree was entered, Damian petitioned to modify physical care. He alleged (1) he had the children over fifty percent of the time, (2) the children were late or absent from school when in Casi's care, (3) he lost jobs due to Casi's failure to pick up the children, (4) Casi moved multiple times after the decree was entered, (5) Casi did not contribute to childcare costs, and (6) Casi quit her job. Casi counterclaimed for physical care. She alleged Damian (1) did not share equal responsibility in caring for the children, (2) did not provide health insurance for the children, and (3) caused one of the children to break her finger.

Following trial, the district court modified the decree to grant Damian physical care of the children. Casi appealed.

On appeal, the parties concede that there has been a substantial change of circumstances since the decree was entered. *See In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). They disagree on which parent is able to provide superior care. *See Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002).

Where the parties shared joint physical care, neither parent is automatically deemed the superior parent. *Id.* Instead, the petitioning party, in this case, Damian, has the burden of showing he will provide superior care. *Id.*

On this question, Casi contends that the district court failed to consider Damian's "predilection for corporal punishment." She maintains "[a]t a

minimum . . . the fact of physical discipline merits consideration by the trial court in making a custody determination."<sup>1</sup>

We agree with Casi that physical abuse is a factor that should be considered. *In re Marriage of Clifton*, 526 N.W.2d 574, 576 (Iowa Ct. App. 1994). On our de novo review, we further agree there is troubling evidence concerning the method of discipline used by Damian. For instance, Damian admitted that he struck his son with a belt when he was four years old. He also admitted he struck his daughters with a belt at least once.<sup>2</sup>

This, however, is not the only evidence of questionable use of force. Damian testified that Casi slapped Chase "right off the couch." He also testified that she dragged Jaden across the floor, causing rug burns. Finally, he noted that Casi refused to take Courtney to the doctor after she ran into a wall at her day-care center. He ultimately took her to a hospital, where her forehead was sutured. Given these methods of discipline by Casi, we believe Damian's acts do not defeat his application for physical care.

We turn to the remaining factors cited by the parties in their respective pleadings. At the time of the modification hearing, Damian had flexible employment that allowed him to attend to the children's needs. His fiancée provided day care for Chase, even on days when Casi exercised physical care under the joint physical care arrangement. Casi conceded the children liked Damian's fiancée "a lot." Damian was also in the process of purchasing a six-

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<sup>1</sup> Although this factor was not raised in Casi's counterclaim, it was raised during the modification hearing.

<sup>2</sup> With respect to Casi's allegation that he broke one of his daughter's fingers, Damian testified this happened as he was rolling up a car window and all witnesses who testified on the subject acknowledged it was an accident.

bedroom home from his parents. His employment allowed him to cover most of the children's expenses, including day care costs. Additionally, Casi conceded that Damian paid her cell-phone bill on two or three occasions so that the parents could maintain communication. While Casi noted that Damian had not maintained health insurance as ordered by the court, the record reflects she was receiving public assistance that covered the children's medical bills.

Meanwhile, there was evidence that Casi's life was turbulent before the modification action was filed. She moved several times, lived in a home that was too small for three children, and overslept, making one of her daughters late for school. She also failed to pick up the children from Damian as scheduled, causing him to lose several construction jobs.

We recognize that, by the time of the modification hearing, Casi had moved to a mobile home that accommodated all three children and had access to a car, making it easier to transport the children. We also recognize that, on at least one occasion, Damian was responsible for his daughter's school tardiness. Finally, there is evidence suggesting Casi was the parent largely responsible for scheduling speech therapy sessions for one of her daughters. Notwithstanding this evidence, the overall record supports the district court's finding that Damian "can provide a stable home for the children" and "has been attentive and dedicated to the children's everyday needs and wellbeing."

We conclude Damian established he could furnish superior care. Accordingly, we affirm the district court's modification of the stipulated joint physical care arrangement set forth in the decree.

**AFFIRMED.**