

**IN THE COURT OF APPEALS OF IOWA**

No. 9-126 / 08-1572  
Filed May 29, 2009

**IN RE THE MARRIAGE OF DEBRA K. GERHOLDT AND KEVIN L. GERHOLDT**

**Upon the Petition of  
DEBRA K. GERHOLDT,**  
Petitioner-Appellant,

**And Concerning  
KEVIN L. GERHOLDT,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Floyd County, Colleen D. Weiland,  
Judge.

Petitioner appeals from the district court ruling modifying the custody provisions of the dissolution decree and granting respondent primary physical care of the parties' son. **AFFIRMED.**

Todd Prichard of Learned, Prichard & Associates, P.C., Charles City, for appellant.

Nathaniel W. Schwickerath of Schwickerath, P.C., New Hampton, for appellee.

Heard by Sackett, C.J., and Vogel, J., and Nelson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**SACKETT, C.J.**

Debra Gerholdt appeals, challenging a district court decision severing a joint physical custody arrangement and awarding primary physical care of her seven-year-old son to his father, Kevin L. Gerholdt. We affirm.

**SCOPE OF REVIEW.** We review de novo. Iowa R. App. P. 6.4. Prior cases have little value as precedent, and we base our decision primarily on the particular circumstances of the parties presently before us. See *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 6.14(6)(g).

**PROCEEDINGS.** The marriage of Debra and Kevin was dissolved in October of 2007. In dissolving the marriage the district court approved and incorporated in the decree a stipulation of the parties which resolved a number of issues including custody of their son. In the stipulation the parties agreed that they would have joint legal custody of their son and that the placement of the child should be moved every week. The parties also shared certain specified holidays. At the time the dissolution decree was filed both parents lived in the Charles City, Iowa, area. The child attended Washington Elementary school there. By February of 2008 Debra had moved to Ames, Iowa. The child remained with Kevin on school days during the school year and continued at Washington Elementary. Debra had weekend time with the child. On May 9, 2008, Kevin filed a petition to modify custody. The parties shared care of the child during the summer vacation. In late summer of 2008 Kevin enrolled the

child in Washington Elementary and Debra enrolled him in an elementary school in the Ames district. For a short time he attended both schools on different days.

Fortunately the matter came on for hearing on August 27, 2008. The parties presented substantial evidence as to their relationship with the child both before and after the dissolution. And the district court, to its credit, entered a ruling on September 2, 2008, deciding the issue of primary physical care so the child was not being moved from school to school. The court made several findings that were not complimentary to either party and then awarded Kevin primary physical care. The court concluded that (1) Kevin demonstrated more housing stability than Debra, (2) Debra's voluntary move subjected the child to a change in home, school, and access to friends and family, (3) after Debra's move the child lived with Kevin for four months with Debra's blessing and the child suffered no apparent adverse results, and (4) Kevin continued to pay child support even while the child's primary caretaker. The court noted while Kevin's living situation had remained stable, Debra had moved five times since the parties' dissolution and Debra gave Kevin minimal child support reimbursement while the child lived with him.

The court provided that Debra have the child on alternating weekends, four nonconsecutive weeks in the summer, and alternating school breaks. Debra was to pick the child up for her visitation and Kevin was to pick him up and bring him back to his home when the visits were concluded. Debra was ordered to pay Kevin \$324 a month as child support. Each party was ordered to pay his or her own attorney fees.

Debra contends she should have primary physical care because Kevin has a history of domestic abuse and because if such a parent is unfit for joint custody, he is unfit for primary physical care. Kevin contends any domestic abuse on his part preceded the dissolution decree, there is no history of domestic abuse, and even if there was a history of domestic abuse, the court is not bound to make its custody decision based thereon.

**MODIFICATION OF CUSTODY.** To change the custodial provision Kevin must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially changed that his son's welfare supports the requested change. See *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). 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. *Id.* We agree with the parties that a material and substantial change of circumstances has been shown. The joint physical care arrangement provided for in the dissolution decree will no longer be feasible or in the child's interest. To continue it would require the child to change schools every week.

The only question is who should have primary physical care. The parties had joint physical care, consequently both parents have been determined to be suitable caretakers and the question is who is the better parent. See *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The issue in a dispute over primary care is which parent will do the better job of raising the children. *In re Marriage of Riggert*, 537 N.W.2d 789, 791 (Iowa Ct. App. 1995); *In re Marriage of*

*Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App. 1991). We determine each case on its own facts to decide which parent can minister more effectively to the long-range interest of the children. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). Gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in an original custody proceeding. See *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App. 1985). We look to the factors set forth in *Winter*, 223 N.W.2d at 166-67. We give consideration to a parent's role in child-raising prior to a separation in fixing physical care. See *In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa Ct. App. 1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992).

Both parents love their child and want his primary care. We agree with the district court's conclusion that Kevin is the better parent. We consider, as did the district court, that Debra's living arrangement has not been as stable as has Kevin's. Clearly prior to their dissolution neither had a stellar reputation. Kevin, in March of 2005, pled guilty to domestic abuse assault, a simple misdemeanor in violation of Iowa Code sections 708.2A(1) and 708.2A(2)(a) (2005) and he entered an *Alford* plea in Minnesota in 1994 to a charge of criminal sexual conduct in the third degree. He admittedly used marijuana. Debra had a serious drinking problem, has been engaged in physical confrontations with her family and others, threatened suicide, and had treatment for mental disorders.

Kevin has been the more attentive parent. The evidence is that he has a schedule for the child, has attended school conferences, and made arrangements for special tutoring when advised that the child needed it. Kevin

helps the child with his homework, reads to him, and supervises his play. On the other hand, there is evidence that Debra yells at the child and calls him names. The child has returned from Debra's home with unexplained bruises and an unattended dog bite. The evidence is that she is in constant turmoil with her adult children. Debra's half-brother testified Kevin was the better parent for the child as he has a good relationship with the child and he is the one the child would run to if he fell. He further testified Debra's relation with her adult children is that they drink together and fight and argue. A friend of both parties who spent time with them testified when something was wrong with the child Kevin would set aside what he was doing and tend to the child. Debra sends the child to the playground with a walkie-talkie and no other supervision. There were times when she shooed the child away because she was working on the computer. The child made statements that his mother put a lock on his door so she could drink and use the computer. Debra lied on applications for assistance. She and her boyfriend smoke in their bedroom and car despite the fact the child suffers from asthma. Frequently, Debra drank alcohol to excess and witnesses testified she was not able to care for her son herself. Debra told a former boyfriend she had hit the child. She said, "I lost it and I hit him." When Kevin had the child enrolled in a three week summer school as recommended by the child's teacher, Debra did not cooperate.

Additionally, Debra has had four different boyfriends that lived in or spent time in her home since the dissolution. The child does not like her current live-in boyfriend, but the child appears to have a good relationship with Kevin's live-in

girlfriend, who is the second he has had since the dissolution. If a parent seeks to establish a home with another adult, that adult's background and his or her relationship with the child becomes a significant factor in a custody dispute. *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). The companion will have an impact on the child's life, and the type of relationship the parent has sought to establish and the manner in which he or she has established it, is an indication of the parent's priorities. *See id.* We concur with the district court that Kevin is the better person to have primary physical care.

**AFFIRMED.**