

**IN THE COURT OF APPEALS OF IOWA**

No. 9-704/ 09-0029  
Filed November 25, 2009

**IN RE THE MARRIAGE OF TONY JOSEPH REED  
AND KRISTIN KAY REED**

**Upon the Petition of  
TONY JOSEPH REED,**  
Petitioner-Appellee,

**And Concerning  
KRISTIN KAY REED,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Marshall County, Carl D. Baker,  
Judge.

A mother appeals from a district court ruling granting the father's petition  
to modify the physical care, visitation, and child support provisions of the parties'  
dissolution decree. **AFFIRMED.**

Barry S. Kaplan and Melissa A. Nine of Kaplan, Frese & Nine, L.L.P.,  
Marshalltown, for appellant.

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for  
appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

**DOYLE, J.**

Kristin Reed, now known as Kristin Gilman, appeals from a district court ruling granting Tony Reed's petition to modify the physical care, visitation, and child support provisions of the parties' dissolution decree. Upon our de novo review, we affirm.

***I. Background Facts and Proceedings.***

The parties' marriage was dissolved in 2001. They had one child together, Mariah, born in 1996. The dissolution decree placed Mariah in the parties' joint legal custody and in Kristin's physical care. Tony was granted visitation with Mariah and ordered to pay child support.

Tony filed a petition for modification of the parties' dissolution decree in February 2008, seeking an order placing Mariah in his physical care. In response to an interrogatory propounded by Kristin, Tony listed twenty-nine alleged changes in circumstances requiring a modification of the physical care provision of the decree. Many of these claimed changes concerned the increasingly poor relationship between Mariah and her mother. The petition came before the district court for trial in October 2008, shortly before Mariah's twelfth birthday.

At the time of the trial, Tony was employed as the director of a juvenile detention center. He married Sara, a special education teacher, in 2003. They have three children together and live in Marshalltown. Kristin is the director of nutritional services at a hospital in Grinnell, and her husband Dale works as a heavy equipment operator for a construction company. She and Dale have four-year-old twin boys together. Dale also has two older children from a previous

marriage who do not live with him but visit on occasion. Kristin, Dale, Mariah, and the twins live in Grinnell.

Despite living in different towns, Tony sees Mariah on a regular basis due to the generous visitation provisions in the parties' dissolution decree, which provided for visitation every Wednesday night through Thursday afternoon and every other Friday night through the following Monday afternoon. During the summer, the parties share care of Mariah on an alternating week basis. Mariah is thus able to participate in softball and swimming in Marshalltown. She is also involved in girl scouts, art club, and band in Grinnell.

In 2006, when Mariah was in fourth grade, she told someone at her school that her stepfather had scratched her on her arm. The school reported the incident to the Iowa Department of Human Services (DHS). Following an investigation, DHS issued a "[c]onfirmed but not founded" report of physical abuse, according to Kristin. She then decided to obtain family counseling for herself, Dale, and Mariah. Tony, who was not immediately informed of the incident, testified that around the same time he noticed "Mariah started to show some signs of depression." He described her as becoming withdrawn, angry, and resentful. Her school performance also began to suffer. At the end of her fourth grade year, the school sent Tony and Kristin a letter informing them that Mariah had been absent or tardy thirty-three times that year alone.

Although Mariah's attendance improved in fifth grade, her mood did not. Tony testified Mariah's fifth-grade teacher told him that "[a]t times Mariah comes to school . . . in tears; she's just gotten out of a huge conflict with her mom, and she can't focus on school." According to Tony, Mariah's teacher felt the issues at

home were “affecting her as a person, her with her friends, and also her academically.” Mariah began seeing the school counselor, Julie Bisher, on occasion. She told Bisher that she was not happy at her mother’s house and wanted to live with her father. Bisher testified at trial that Mariah struggled with her relationship with her mother and stepfather. Recognizing the problems developing between them, Kristin took Mariah to see a psychologist, but stopped the sessions after the first visit when Mariah indicated she wanted to live with her father. Tony decided to continue Mariah’s counseling with a psychologist in Marshalltown, Dr. Brian Steiner.

Mariah’s first visit with Dr. Steiner occurred shortly after Tony filed his petition to modify. She met with him about every two weeks for many months thereafter. Based on his sessions with Mariah, Dr Steiner testified his “main concern is that at this point she’s feeling unwanted or unloved in some ways, unwelcome in the relationship with her mother. It seems to have gotten, in Mariah’s eyes, very negative.” He believed she was becoming “more and more depressed.” The conflict between Mariah and her mother also appeared to be escalating.

About two weeks before the trial in this matter, Tony noticed a bruise on Mariah’s arm. She told him Kristin had pinched her. Tony reported the incident to DHS and kept Mariah out of school the next day to talk to an investigator.<sup>1</sup>

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<sup>1</sup> Tony attempted to reopen the record after the trial so that he could submit the child protective assessment completed by DHS after its investigation, but the district court denied his request. Tony now appears to argue in his brief that the court erred in so doing. However, because he did not file a separate appeal or cross-appeal, we need not and do not consider that argument as the issue is not properly before us. See *In re Marriage of Novak*, 220 N.W.2d 592, 598 (Iowa 1974).

Although he told Kristin that Mariah was not going to school that day, he did not immediately tell her the reason for Mariah's absence. Mariah saw Dr. Steiner a few days after the incident. She told him about her fight with Kristin and "reported that her mother continues to be angry & hostile quite frequently." Bisher also observed that in the weeks preceding the trial, Mariah was more agitated and stressed at school. Mariah told Dr. Steiner that she did not want to testify at the trial, preferring instead that he "come and talk here rather than doing it herself. She didn't want to be a part of it." Dr. Steiner accordingly recommended that Mariah not testify. Tony nevertheless called Mariah as a witness.

Mariah testified that her relationship with Tony was very good, while her relationship with Kristin was not stable. She explained that Kristin would often get mad and scream at her whereas Tony was trusting, honest, and loving. She was comfortable and relaxed in her father's home and was able to talk to him more easily than to her mother. Kristin acknowledged the conflict between herself and Mariah, but she viewed it as "typical." She testified that she believed Mariah was "trying boundaries, and I'm holding her accountable, and I think that's how you learn, you grow."

Following the trial, the district court entered a written ruling finding that Mariah's physical care should be transferred to Tony due to the court's "concern about the deteriorating relationship between Mariah and her mother," though it was "not convinced that the entire cause of the conflict lies with Kristin."

Kristin appeals.

## **II. Scope and Standards of Review.**

Our review is de novo in this equity case. Iowa R. App. P. 6.907 (2009). 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 fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. 6.904(3)(g); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

## **III. Discussion.**

### **A. Physical Care.**

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. *Id.*

The district court's decision to modify the dissolution decree to place Mariah in Tony's physical care was based on the deteriorating relationship

between Mariah and her mother. Kristin claims, however, that “it is not atypical for a mother and daughter to have some conflict—particularly as the daughter matures” and begins “looking for the path of least resistance.” She accordingly argues the “conflicts between [her] and Mariah are of the typical mother-daughter variety,” which do not “rise to the level needed to modify [a] custodial order[ ] that had been in place for many years.” We disagree.

Dr. Steiner testified that the consistency of Mariah’s issues with her mother

are greater than average. This isn’t just kind of a normal conflict kind of thing. It’s been ever since I met Mariah which has been quite a while now that she’s consistently complained of these issues and felt this way. Normally there would be an ebb and flow to those kind of things. Some days—sometimes when I’d see the child, they’d say, Oh, things are going better, and other times not, and that doesn’t happen with Mariah.

He explained that Mariah was “feeling unwanted or unloved in some ways, unwelcome in the relationship with her mother. It seems to have gotten, in Mariah’s eyes, very negative.” According to Dr. Steiner, Mariah “has a sense that things have changed since her little brothers came around; that she grieves a little bit of her position in the family being changed.” He believed Mariah was becoming “more and more depressed” with feelings of “anxiety and some fearfulness, and she’s also had some hurt and angry feelings that are overwhelming at times,” although she is “for the most part . . . fairly well put together.” Mariah’s guidance counselor and teacher confirmed the heightened level of discord Dr. Steiner observed in Mariah’s relationship with her mother.

Tony testified Mariah “appears very, very depressed.” He described Mariah’s relationship with Kristin as strained and “pretty bad the majority of the

time.” Mariah’s guidance counselor, Julie Bisher, similarly testified that there was animosity between Mariah and her mother, but she was unsure how much of that discord was of Mariah’s own choosing. Bisher began visiting with Mariah around the same time that Mariah’s fifth grade teacher noticed she was having difficulty in school due to conflicts at home. That teacher informed Tony that Mariah would come to school at times in tears after having gotten into a fight with her mother.<sup>2</sup>

Kristin acknowledged the discord between herself and Mariah, testifying she attempted counseling with Mariah on one occasion because “Mariah and I were having some difficulty seeing eye to eye on obligations and responsibilities and ways of communicating with each other.” Indeed, the level of conflict between Kristin and Mariah in the weeks preceding the trial escalated to such a point where a child abuse report was made to DHS after Tony observed a bruise on Mariah’s arm from Kristin pinching her. This was the second child abuse report made involving Mariah, the first occurring in 2006 after a fight between Mariah and Dale.

Based on the foregoing, we conclude the contentious relationship between Mariah and Kristin, which necessitated continuing counseling for Mariah and resulted at times in poor school attendance and performance, is a substantial

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<sup>2</sup> In Kristin’s reply brief, she claims for the first time on appeal that Tony’s testimony regarding statements Mariah’s fifth-grade teacher made to him were inadmissible hearsay. We need not and do not consider this argument for several reasons: First, “an issue cannot be asserted for the first time in a reply brief.” *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992). Second, Kristin cites no authority in support of this issue. See Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed waiver of that issue.”). Finally, we would arrive at the same result on the merits of the case, with or without that evidence, under our de novo review. See *Wilker v. Wilker*, 630 N.W.2d 590, 598 (Iowa 2001).

change in circumstances. See, e.g., *In re Marriage of Junkins*, 240 N.W.2d 667, 668-69 (Iowa 1976) (determining the tension and difficult relationship between child and stepfather necessitated change in physical care); *In re Marriage of Woodward*, 228 N.W.2d 74, 76 (Iowa 1975) (finding deterioration of mother-daughter relationship required change in custody). We must next determine whether Tony demonstrated the ability to provide superior care and minister more effectively to Mariah's well-being.

As we stated earlier, in a modification action, as opposed to an original custody determination, the question is not which home is better, but instead whether the parent seeking the change has demonstrated that he or she can offer the child superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). On this question, Mariah's best interests remain our polestar. See *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998) ("The best interests of the children is the first and governing consideration in determining the primary care giver of the children."). In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and emotional maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

Kristin asserts that "Mariah was doing fine in her . . . care" and that this case simply presents a classic example of the "grass is greener" syndrome."

We are not unmindful of the fact, even in the happiest of marriages, children tend where possible to play the love of either parent against the discipline of the other. Parenthood calls for married persons to be alert for such a natural tendency and adjustments for it are common. When marriage is terminated the propensity of a

child to play one parent against the other can become a force strong enough to bring considerable anguish alike on parents and child.

*Woodward*, 228 N.W.2d at 76. Here, however, Dr. Steiner testified that he did not believe Mariah was looking for greater freedom and less discipline at her father's house. Instead, according to Dr. Steiner,

[i]n Mariah's case, it really is her belief that . . . I'll get along better with Mom if I don't spend so much time there; she'll be happy to see me; I'll feel like she wants me there when I'm there.

. . . .  
 Mariah's desire to live with Dad as opposed to mother isn't based on—it doesn't appear to be based on a sense that things are going to be so much better at Dad's. It's more along the lines of things are bad at Mom's and I know what things are like at Dad's, and if I'm there, then I can work on things being better with Mom.

Both Dr. Steiner and Bisher were concerned what would happen to Mariah in the future if she continued to live with Kristin. Dr. Steiner explained that Mariah is

entering into that time, that adolescence time when the rebelliousness comes out, and I'm really afraid how she's going to react to those feelings and urges as she gets into those teen years if she is not able to improve that relationship with her mom.

Bisher likewise testified that she

wondered if Mariah lived with Tony now if she could develop that better relationship with her mother as time goes on . . . . I do know from experience with children that if they're not allowed sometimes to make those choices at this age that it can get pretty rebellious.

Along those same lines, although not controlling, we also give some weight to Mariah's preference as to which parent she wants to live with. See Iowa Code § 598.41(3)(f) (2007); *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993) (recognizing we give less weight to the child's preference in a modification action than in an original custody decision). In assessing Mariah's

preference, we look at, among other things, her age and educational level, the strength of her preference, her relationship with family members, and the reasons she gives for her decision. See *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985).

Mariah was almost twelve years old at the time of the trial. By all accounts, she was a mature, honest, and intelligent young girl. She described her relationship with her father in positive terms, testifying that she viewed him as trusting, honest, and loving. She explained that she felt comfortable and relaxed in her father's home and was able to talk to him more easily than she was able to talk to her mother. In contrast, Mariah described her relationship with her mother as unstable. She testified that her mother gets mad at her and yells a lot for no reason. She felt her mother's house was somewhat tense, "[l]ike I have to get things done and if I don't get them done, then I'll get in trouble." Mariah also testified that her mother often disparaged both her father and stepmother, which upset her. See Iowa Code § 598.41(3)(e) (directing trial court to consider whether each parent can support the other's relationship with the child); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659 (Iowa Ct. App. 1991).

After giving Mariah's testimony and preference to live with her father "some weight but not great weight," the district court determined that

[t]his case presents a close question on the issue of physical care. However, after considering the testimony and demeanor of Tony and Kristin, this Court gained the impression that Kristin is reluctant to support Tony's relationship with Mariah and that she remains focused on past grievances and on controlling Mariah's relationship with her father. This court concludes that primary physical care of Mariah shall now be transferred to Tony.

We agree with Kristin that the “record is clear that Mariah has two devoted parents who love her very much and want her to live with them and their other children.” In close cases such as this, we give careful consideration to the district court’s findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995); see also *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992) (stating we give considerable deference to a trial court’s credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses). After considering the parties’ arguments on appeal and reviewing the evidence anew, we ultimately agree with the district court that Tony demonstrated the ability to minister more effectively to Mariah’s well-being given the discord between Mariah and her mother and the tension Mariah experienced in her mother’s house. We therefore agree with the district court’s decision to modify the parties’ dissolution decree and place Mariah in Tony’s physical care.

***B. Appellate Attorney Fees.***

Each party requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court’s discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In arriving at our decision, we consider the parties’ needs, abilities to pay, and the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Applying these factors to the circumstances in this case, we decline to award either party appellate attorney fees.

***IV. Conclusion.***

Upon our de novo review, we agree with the district court’s order modifying the parties’ dissolution decree and placing Mariah in her father’s

physical care. The judgment of the district court is therefore affirmed. Each party shall be responsible for his or her own appellate attorney fees.

**AFFIRMED.**