

**IN THE COURT OF APPEALS OF IOWA**

No. 9-762 / 09-0271  
Filed December 30, 2009

**ROBIN DUHN,**  
Plaintiff-Appellant,

**vs.**

**TRAVIS JOHNSON,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Story County, Gary L. McMinimee,  
Judge.

A mother appeals a district court's modification order granting physical  
care of her child to the father. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des  
Moines, for appellant.

Andrew J. Boettger of Hastings & Gartin, L.L.P., Ames, for appellee.

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

**MANSFIELD, J.**

Robin Duhn appeals the district court order modifying a child custody order and granting Travis Johnson physical care of the parties' daughter. Robin contends the district court should have awarded her physical care. We affirm.

**I. Background Facts and Proceedings.**

In 1998, Robin and Travis began an on-again, off-again romantic relationship. Robin was previously married and had a son, Maxwell. In February 2001, Robin and Travis's daughter, Hannah, was born. At that time, Robin and Travis were living together with Hannah and Maxwell. Travis was attending Iowa State University, and Robin either worked part-time or went to school part-time in order to care for Maxwell and Hannah. In 2002, after Travis graduated from Iowa State, they moved to West Des Moines, and Travis began law school at Drake University.

Robin and Travis separated in 2003, and subsequently both moved to Ames to separate residences. After the move, Robin was Hannah's primary caregiver. Robin testified that she and Travis were attempting "to work things out." However, they ultimately ended their romantic relationship in 2005.

The parties came to an agreement regarding child custody and support. At that time, Robin and Travis both lived in Ames and agreed to joint physical custody. On August 5, 2005, the district court entered a decree, which established paternity and approved the parties' stipulation regarding child custody and support. Robin and Travis were granted joint legal custody and joint physical care of Hannah. The physical care schedule provided that Robin would care for Hannah from Sunday at 9:00 a.m. to Wednesday morning and Travis

would care for Hannah from Wednesday afternoon to Saturday at 9:00 a.m., and the parties would alternate Saturday at 9:00 a.m. to Sunday at 9:00 a.m. The following language was also included:

The parties acknowledge and understand that arrangements for Hannah's joint physical custody in each of them require[] that she be able to attend the same school. Therefore, the parties agree that if either parent moves more than 45 miles away from Hannah's present school, the parent who does not move shall assume primary physical care of Hannah for the entire period of the separation and a new visitation agreement will be negotiated.

Travis was ordered to pay child support on a temporary basis in the amount of \$150 per month, but the amount of child support was to be reviewed by the parties on October 1, 2005. On November 8, 2005, the decree was modified to provide that Travis was to pay child support in the amount of \$422 per month.

In 2006, Travis moved to Ankeny and purchased a townhome. Robin and Travis agreed that Hannah should remain in the same school district in Ames. On November 9, 2006, the district court approved the parties' stipulation to modify the prior decree. The court-approved stipulation stated as follows:

This matter is brought before this Court because of a substantial change in circumstances from the original order pursuant to Iowa Code 598.21, because [Travis Johnson] is moving out of the Ames, Iowa area to the Ankeny, Iowa area. . . . The parties have agreed that Hannah's school district will not change and that it will remain as the Ames, Iowa school district, and that the terms of the August 5, 2005 Court order as modified by the November 8, 2005 order should be modified to reflect this agreement.

In June 2008, Robin moved from Ames to Milford to live with her parents. Milford is in Dickinson County and is approximately 166 miles from Hannah's elementary school in Ames. The parties were not able to agree on a long-term plan for Hannah. For the summer, Hannah accompanied Robin (and Robin's son

Maxwell) to Milford, and Travis exercised weekend visitation. In August 2008, when the school year resumed, Hannah went back to the Ames schools, Travis provided for Hannah's physical care, and Robin exercised visitation.

On September 3, 2008, Robin filed an application for modification of the custody decree, requesting physical care of Hannah. Travis responded and requested physical care of Hannah. Trial was held on December 2, 2008. At the time of trial, Robin was thirty-one years old and Travis was thirty-three years old.

The testimony revealed that since 2005, the parties were successful in implementing the joint physical care schedule. However, Robin believed that she remained Hannah's primary care provider. On school days when Travis cared for Hannah, he would drop off Hannah in the morning at Robin's house. Robin would then get Hannah ready for school and generally Hannah and Maxwell would walk to school together. After school, the children would walk home together, and Travis would pick up Hannah after work around 5:30 p.m. Additionally, both parties testified to some communication problems they had with one another—mainly not being informed by the other of events or issues regarding Hannah.

Travis testified that shortly after graduating from law school in 2005, he became employed with the Story County Attorney's Office. Travis's job was flexible and allowed for him to care for Hannah's needs that arose during the day. He lived in the house he owned in Ankeny with two roommates—his cousin and a friend. At the house, Hannah had her own bedroom, while she shared a bathroom with Travis.

Robin testified that she moved to Milford for financial reasons. From 2005 until she moved in 2008, Robin held several different jobs and had lived at four separate locations in Ames, accumulating debt. She explained that she was a single mother and Ames was an expensive place to live, and she was employed at a job where she earned only ten dollars an hour. As she put it, "I was living barely from crisis to crisis and that's no way to live and my mom just said, honey, I think it's time to come home." Accordingly, in 2008, she moved to Milford to live with her parents. She testified that she did not want to move, but "I didn't really see any other option." Robin has many family members in the Milford area, and Travis's parents and sister also live in the area. Since August 2008, Robin has been employed at the Seasons Center for Community Mental Health where she teaches life skills to individuals with mental illness.

Additionally, Robin testified that Hannah and Maxwell had a close relationship. Maxwell's father testified that Robin is a good mother who has encouraged his relationship with Maxwell.

On January 16, 2009, the district court entered its order granting Travis physical care and Robin visitation. The district court first noted the parties' agreement that joint physical care is no longer in Hannah's best interests. Thus, it was necessary to "determine which parent can minister more effectively to the long range best interests of the child." The district court stated that "the choice as to which party should have responsibility for Hannah's physical care is a difficult one." However, the court found that Travis should be granted physical care because

(1) he has demonstrated over the past several months that he is capable of meeting Hannah's physical, mental, and social needs, while fulfilling employment that allows him to meet her financial needs; (2) he has demonstrated stability and thoughtfulness in his life whereas Robin's impulsivity regarding a relationship, roommates, living accommodations, employment, and apparently spending cause her to live "crisis to crisis" and has forced her to do things she does not want to do, like moving to her parents' home in Milford; and (3) Hannah has thrived in Travis's care. These foregoing factors, considering the age difference between the children (Hannah 2nd grade age seven and Maxwell middle school age thirteen), Travis's willingness to support the relationship between Hannah and Maxwell, and the extensive summer visitation the Court envisions, provide compelling reasons for separating the half-siblings.

Robin appeals.

## **II. Scope of Review.**

We review custody orders de novo. Iowa R. App. P. 6.907 (2009). However, the district court had the advantage of listening to and observing the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(o).

## **III. Physical Care.**

Typically, when an original custody order is modified, the party seeking modification must prove a material and substantial change in circumstances. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). When the modification would mean that one parent receives physical care, that parent must

also demonstrate an ability to minister more effectively to the child's well-being.  
*Id.*

Since the entry of the original custody order in 2005, the parents have shared equally the physical care of Hannah. However, Robin and Travis agree that because they now live some three hours' drive apart, joint physical care is no longer workable. Therefore, there has been a substantial change in circumstances necessitating modification of the original decree. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996) (stating the "particular circumstances surrounding a change in residence may ultimately support a change in" physical care).

Consequently, we address this as an initial custody determination where the issue is which parent can render better care. See *Melchiori v. Kooj*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). In making this physical care decision, the district court is guided by the factors enumerated in Iowa Code section 598.41(3) (2007), as well as other nonexclusive factors enumerated in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The ultimate objective of a physical care determination is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). As each family is unique, the decision is primarily based on the particular circumstances of each case. *In re Marriage of Hansen*, 733 N.W.2d 683, 699 (Iowa 2007).

Robin argues that she should have been granted physical care of Hannah. Robin first asserts that she was the better parent, to which Travis responds that he is the superior parent. The evidence at trial demonstrated that both Robin

and Travis are good parents who love their well-adjusted daughter. Robin was Hannah's primary caregiver when she was very young, but she also claims that under the joint physical care schedule, she actually provided more of Hannah's care. However, Travis has been a very involved father since Hannah's birth. Both parents have played a significant role in Hannah's education and activities and have taken Hannah to the doctor. Robin pointed to the fact that she cared for Hannah before and after school on Travis's physical care days, but we will not fault Travis for having Hannah's mother care for her rather than using a non-relative babysitter. When either Robin or Travis has had physical care, Hannah has done well. The district court specifically noted that Hannah had been doing well in the fall of 2008 in Travis's physical care, even without Robin's assistance.

The district court acknowledged that both parents were capable and this was a difficult decision, but found that Travis could provide Hannah a more stable environment. Robin has changed her employment and residence several times. She gave Travis minimal notice of her move to Milford. Travis, on the other hand, has had stable employment and housing over the past several years.<sup>1</sup>

Robin next asserts that Hannah should not be separated from her brother. "There is a presumption that siblings should not be separated from one another without good and compelling reasons." *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992); see also *In re Marriage of Smiley*, 518 N.W.2d 376, 380 (Iowa 1994). This general principle governs awards of physical care in cases of half-

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<sup>1</sup> Robin argues that she should have been "commended" for taking affirmative and positive steps to improve her life and that of her children by moving to Milford. We do not perceive the district court's observations to be criticism. Faced with a difficult choice between two capable and caring parents, the district court chose the parent who had the longer track record of stability, believing that to be in Hannah's best interests.



siblings as well as others. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). However, this rule is not ironclad and “circumstances may arise [that] demonstrate that separation may better promote the long-range” interest of the child. *Will*, 489 N.W.2d at 398. In the present case, Hannah and Maxwell had a close relationship, and Travis was supportive of this relationship. The district court considered the six-year age difference between Maxwell and Hannah, Travis’s willingness to support Hannah’s relationship with Maxwell, and the extensive summer visitation that would foster the siblings’ relationship. See *id.* (stating that the court should consider the age difference between the children separated). In light of the conclusion that Travis can provide a more stable home for Hannah, we do not think it is in Hannah’s best interests to remove her from Travis’s physical care in order to assure her “the benefit of constant association with” Maxwell. *In re Marriage of Wahl*, 246 N.W.2d 268, 271 (Iowa 1976).

We defer to the district court’s credibility assessments and conclude that the district court’s factual findings were fully supported by the record. The district court considered all the appropriate factors in making the physical care award. Therefore, we affirm.

**AFFIRMED.**