

IN THE COURT OF APPEALS OF IOWA

No. 6-720 / 06-0365
Filed November 16, 2006

**IN RE THE MARRIAGE OF JENNIFER RENE STOOS AND BRIAN ROBERT
STOOS**

**Upon the Petition of
JENNIFER RENE STOOS, n/k/a
JENNIFER R. ATHENS,**
Petitioner-Appellant,

vs.

BRIAN ROBERT STOOS,
Respondent-Appellee.

Appeal from the Iowa District Court for Plymouth County, James D. Scott,
Judge.

Petitioner-appellant appeals the modification of the dissolution decree to
award primary physical care of their son to respondent-appellee. **REVERSED
AND REMANDED.**

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

R. Scott Rhinehart, Sioux City, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

The district court modified the custody provision of the dissolution decree of Jennifer Athens and Brian Stoos to award primary physical care of their son Cody, who was born in 1991, to Brian. Jennifer contends Brian has failed to meet the necessary burden to support modification in that he has shown neither a substantial change in circumstances or that he can render superior care. She further contends that her child support should be increased. We reverse and remand.

Jennifer and Brian's marriage was dissolved in 1994. They agreed they would be joint legal custodians of Cody and Jennifer would have primary physical care. Brian was ordered to pay child support. At the time of the dissolution both parties lived in western Iowa. In 1996, when Jennifer moved to the Des Moines area, they agreed to a modification of visitation, which the district court approved.

The parties both remarried. Jennifer and her second husband have three children, and Brian and his second wife have one. Cody has been welcomed in both homes and enjoys a good relationship with both parents and step-parents. Brian has been current with his child support, and Jennifer has cooperated with visitation.

In the summer of 2005, Cody indicated he wanted to live with his father. Based on Cody's wishes, Brian filed a petition for modification indicating there had been a material change of circumstances and that primary physical care of Cody should be with him. Attached to Brian's petition was Cody's affidavit stating he wanted to move to Remsen, Iowa, to be with his father as they enjoyed woodworking, working on cars, and watching Vikings football games together.

The affidavit also stated that Remsen was a smaller school than the one Cody attended in West Des Moines, Iowa, and he would have more opportunities in Remsen to play basketball, baseball, and golf as the competition to play sports was not as stiff as it was at West Des Moines Valley High School.

Jennifer denied there should be a change and requested that Brian's child support be increased.

The district court heard the matter in January of 2006 and in early February filed a ruling. The court found both parties had stable marriages, adequate housing, and a reasonably comfortable lifestyle. The court found Cody was bright, personable, articulate, and well-behaved and generally received A grades on his schoolwork, though recently his grades had declined. The court found Cody was popular with peers and had friends in the Des Moines area as well as in Remsen and that he displayed above average responsibility for his age. The court further found Cody had a strong relationship with both of his parents.

The district court found that Brian had shown a substantial change in circumstances, reasoning that Jennifer's relocation was a substantial change in circumstances even though the visitation provisions were modified after her relocation. The court also found Brian had demonstrated the ability to offer superior care. The court then analyzed under current case law the factors that formed Cody's opinion and determined that Cody's stated preference to live with his father was sufficient to find that Brian can offer superior care. The court modified primary physical care and established a child support obligation for Jennifer.

Jennifer contends Brian failed to prove a substantial change in circumstances and that he could render superior care.

We review de novo. Iowa R. App. P. 6.4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). 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). Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered, which is more or less permanent and relates to the welfare of the child. *Melchiori*, 644 N.W.2d at 368 (citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) and *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996)). The parent seeking to change the physical care from the primary custodial parent to the petitioning parent has a heavy burden and must show the ability to offer superior care. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004); *Melchiori*, 644 N.W.2d at 368; *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). If both parents are found to be equally competent to minister to the children, custody should not be changed. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). Children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). Custody, once fixed, should be disturbed only for the

most cogent reasons. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

Brian was made a joint custodian in the dissolution decree. He consequently is benefited in seeking physical care by the inference he has met the joint custody tests set forth *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979). See *Whalen*, 569 N.W.2d at 628. However, in seeking a change in physical care, he carries a burden similar to that imposed on a parent seeking a change of custody. *Id.*

We disagree with the district court that Jennifer's move to Des Moines supports a finding there is a substantial change in circumstances. While the move could have been so considered at the time that Jennifer made it, after she moved the decree was modified. Consequently Brian must show there has been a substantial change of circumstances since the modification of the decree.

Brian argues that Cody's strong preference supports his position.

In determining the weight to be given to Cody's preference we consider (1) his age and educational level, (2) the strength of his preference, (3) his intellectual and emotional makeup, (4) his relationship with family members, and (5) the reason for his decision. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-60 (Iowa Ct. App. 1985). A child of Cody's age has the right to have his or her opinion considered in the case of the appointment of a guardian¹ and he has

¹ Iowa Code section 633.559 (2005) states:

The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian. Preference shall then be given to any person, if qualified and suitable, nominated as guardian for a minor child by a will executed by the parent having custody of a minor child, *and any qualified and suitable person requested by a minor fourteen years of age or older*, or by standby

to consent to his adoption.² As the district court found in assessing these factors they certainly point to giving Cody's preference substantial weight. However, the ultimate question is far more complicated than merely asking Cody which parent he wants to be his primary custodian. See *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). Brian has not met the necessary burden to show a substantial change in circumstances.

This is a difficult case. It is unfortunate that the parties, as they have done before, could not resolve the issue themselves. Cody has a strong desire to live with his father and the record may not accurately reflect all of his underlying reasons. He may blame his mother for not letting him move. But Cody's preference cannot be controlling. Therefore, we find the burden for modification was not met. We remand to the district court to consider school schedules and fix a time for Cody to return to his mother's care and to consider her request that Brian's child support obligation be increased.

We award Jennifer \$2000 in appellate attorney fees. We deny Brian's request for appellate attorney fees. Appellate costs are taxed to Brian.

REVERSED AND REMANDED.

petition executed by a person having physical and legal custody of a minor. Subject to these preferences, the court shall appoint as guardian a qualified and suitable person who is willing to serve in that capacity. (Emphasis added).

² Iowa Code section 600.7 states:

1. An adoption petition shall not be granted unless the following persons consent to the adoption or unless the juvenile court or court makes a determination under subsection 4:

...
d. The person to be adopted if that person is fourteen years of age or older.