

IN THE COURT OF APPEALS OF IOWA

No. 0-369 / 10-0185

Filed June 30, 2010

**IN RE THE MARRIAGE OF JESSICA LEA TRUAX
AND RUSTY LEE TRUAX**

**Upon the Petition of
JESSICA LEA TRUAX,**
Petitioner-Appellant,

**And Concerning
RUSTY LEE TRUAX,**
Respondent-Appellee.

Appeal from the Iowa District Court for Butler County, James M. Drew,
Judge.

A mother appeals from a district court order modifying the physical care
provisions of the parties' dissolution decree. **AFFIRMED.**

Larry W. Johnson, Iowa Falls, for appellant.

Ronald J. Pepples, Parkersburg, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Jessica Truax appeals from a district court order modifying the physical care provisions of the decree dissolving her marriage to Rusty Truax. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

Rusty and Jessica divorced in August 2004. They have two children together: Jordyn, born in 1996, and Myranda, born in 2001. The dissolution decree placed the children in the parties' joint legal custody and in Jessica's physical care. Rusty was granted visitation with the children and ordered to pay child support.

Following their divorce, Jessica regularly let Rusty have more visitation with the children than was provided for in the parties' decree. The children would sometimes spend four or five nights a week with Rusty and his wife Morgan. In February 2009, Jessica allowed Jordyn to move into Rusty's home. By May of that year, however, Jessica wanted Jordyn to return to her house. Jordyn refused, so Jessica called the police for assistance. An officer came and spoke with Jordyn, who eventually agreed to go back to her mother's house.

In June 2009, Rusty filed a petition for modification of the dissolution decree, seeking physical care of both children. The petition came before the court for trial in December 2009.

Rusty testified at trial that Jessica often left the children at home by themselves, which concerned him "greatly, especially my daughter being a teenager getting curious with boys and other different things." He stated one night about a month before the trial he received a telephone call from Jordyn.

Myranda had woken up during the middle of the night and was sleepwalking, which she did on occasion. Jordyn had tried calling her mother, but was unable to reach her. Rusty also tried to contact Jessica several times. She eventually returned his call and agreed to let him take the children to his house for the night.

Rusty was additionally concerned with the number of times Jessica had changed residences. He testified that he had remained in the same home since the parties' divorce. Jessica, on the other hand, had moved to five different residences during that same time period. She was also involved in several different relationships, occasionally allowing the men she was dating to live with her and the children. Both children's performances at school were suffering.

Following the trial, the district court entered a ruling ordering the children's physical care to be transferred to Rusty. The court gave the following reasons for its decision: (1) "Jordyn is not doing well in school, and Myranda is slipping"; (2) the "stability Rusty offers as compared to Jessica"; and (3) Jessica's inability "to refrain from making negative, disparaging comments about Rusty and Morgan in front of the girls." The court concluded,

Jessica's own wants and needs have often been in conflict with those of the girls. It appears to the court that she simply is not capable of finding an appropriate balance. The court cannot risk the girls' overall well-being on the hope that Jessica will do better in the future. Jordyn and Myranda will only go through adolescence and the teen years once and the stakes are simply too high to gamble.

Jessica 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).

III. Discussion.

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 children'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 children's welfare. *Id.* The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the children and minister more effectively to their well being. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). 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.* at 213-14.

Jessica begins by arguing the district "court's conclusion that Jordyn was not doing well in school is simply not supported by the evidence." We disagree based upon our de novo review of the record.

Jordyn's math teacher testified that Jordyn struggled with math last year, though she had noticed some improvement this year. She attributed that to a special study hall Jordyn was placed in to assist her with her schoolwork. She also stated Rusty and Morgan's frequent contact with her was helpful in improving Jordyn's performance at school. The teacher stated that in May 2009

when Jordyn returned to her mother's house, she noticed a visible change in Jordyn's temperament, testifying she "became a little bit bitter and preoccupied."

Jordyn's science teacher similarly testified that Jordyn's grades improved while she was living with her father. She stated Jordyn became

more responsible about getting work in and doing a better job at correcting work and finding out what she needed to do to improve her grade. It was really a definite—you could see it in her grades that there was something different.

The teacher testified "Jordyn does well . . . in the classroom when it's structured . . . she really thrives in structure And I would just like to . . . have her be in a situation where she's encouraged and she knows exactly what she needs to do when." She testified Rusty and Morgan contacted her weekly regarding Jordyn's performance in school, while she had no contact with Jessica.

We also agree with the district court that Myranda's performance in school is declining. In kindergarten and first grade, Myranda received mostly exemplary marks from her teachers. By second grade, however, those marks had dropped to satisfactory. It appears Myranda's temperament has also changed in the past year. Rusty testified she has been "getting a lit bit more agitated about certain things. . . . Her and her sister sometimes just don't get along very good, which is a big concern if she's watching her." Morgan likewise testified Myranda has become "more argumentative. She hits a lot. She throws a lot of fits. She's always upset. . . . She just seems a lot more unhappy." Even Jessica testified Myranda "has had a little change in her . . . as far as hitting and that type of thing."

Jessica next argues the district court “presumed that [her] changing of residences was a destabilizing factor for the children.” She argues the “testimony was unequivocal the children did not change school districts notwithstanding these change[s] in residences.” While that may be true, we agree with the district court that five different residences in a five-year period of time is concerning. Moreover, even though Jessica’s moves did not require the children to change schools, their declining academic performance suggests they were negatively affected by these disruptions in their home life. Also concerning is Jessica occasionally leaving the children alone at night, especially given Myranda’s tendency to awaken at night disoriented as to where she is and what she is doing. Jordyn is obviously distressed by such occurrences, as demonstrated by her repeated telephone calls to Rusty and Morgan when she is unable to reach her mother.

Rusty, on the other hand, has remained in the same home the children lived in during the parties’ marriage. He has been in only one relationship since the parties’ divorce. Jessica has had a number of relationships since then. She obtained a protective order against one of the men, although she later reconciled with him. Jessica testified only one of these men actually lived with her and the children. Another man stayed in her apartment on occasion, once for an extended period. Another man spent a great deal of time in the home. *See In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003) (“[I]f a parent seeks to establish a home with another adult, that adult’s background and his or her relationship with the children becomes a significant factor in a custody dispute.”).

The importance of stability in a child's life cannot be overemphasized. See *In re Marriage of Coulter*, 502 N.W.2d 168, 171 (Iowa Ct. App. 1993). Jessica, unfortunately, has not been able to provide the same level of stability for the children that Rusty has. She has also spoken negatively about Rusty and Morgan in front of the children and limited their positive contact with the children. See Iowa Code § 598.41(1)(c), (3)(e) (2009); *In re Marriage of Manson*, 503 N.W.2d 427, 429 (Iowa Ct. App. 1993) (stating the ability of each parent to actively support the other's relationship with the children "is instrumental in the successful mental, emotional, and social development of the children"). Rusty does not do the same.

Although not controlling, we do give some weight to Jordyn's stated preference as to which parent she wants to live with. See Iowa Code § 598.41(3)(f); *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 her 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. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985).

Jordyn testified she wanted to live with her father

because when I am there I get better grades and when we go out and stuff my dad takes us with him. Like when my mom goes out she leaves us at home sometimes and like she goes out drinking and stuff and brings home guys, and like my dad, he takes us with him all the time. He doesn't bring home people. He has a wife. We each have our own room.

She stated that she relies on her father and Morgan for help with her homework and recognized that she received better grades when she was living with them. Although Jessica attempted to discount Jordyn's testimony by stating she was manipulative and prone to falsehoods, the district court found Jordyn credible, observing "[n]o other witnesses testified about any similar concerns related to Jordyn." See *In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (stating we give great deference to a trial court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses).

We find the children's deteriorating performance in school, Jessica's multiple moves and relationships, her tendency to leave the children at home alone, and her attitude towards Rusty, when considered together, constitute a substantial change in circumstances. For the same reasons, we agree with the district court that Rusty demonstrated the ability to minister more effectively to the children's well-being. See *Paxton v. Paxton*, 231 N.W.2d 581, 584 (Iowa 1975) (affording district courts considerable discretion in modifications even though our review of such proceedings is de novo). He showed the children were more likely to reach healthy physical, mental, and emotional maturity in his home given the greater structure and stability he was able to provide for them. See *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996) (stating our objective is to place children in an environment most likely to bring them to healthy physical, mental, and emotional maturity). The marked improvement Jordyn's teachers observed while she was in her father's care from February to May 2009 is evidence of Rusty's ability to offer the children superior care.

IV. Conclusion.

We affirm the district court's decision to modify the parties' dissolution decree and place the children in Rusty's physical care.

AFFIRMED.