

**IN THE COURT OF APPEALS OF IOWA**

No. 7-245 / 06-1922  
Filed May 9, 2007

**TRAVIS D. HUTCHENS,**  
Plaintiff-Appellant,

**vs.**

**ZEA L. BOND,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Buchanan County, Kellyann M. Lekar, Judge.

Travis Hutchens appeals from a district order denying his request for modification of physical care. **AFFIRMED.**

Daniel Swift of Swift & Swift Attorneys, Manchester, for appellant.

Shawn Harden of Harden Law Office, Independence, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**HUITINK, J.**

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

Travis Hutchens and Zea Bond are the parents of Zavic (age eleven) and Zane Hutchens (age eight). Zavic and Zane are the children at issue in this appeal. The parties were never married. Zea is now married to Curtis Bond and they have a daughter, Indica (age six). Travis is now married to Melissa and they have a son, Shawn (age one).

Travis and Zea entered into a stipulation which was filed on December 20, 2001. The trial court approved the stipulation and entered it as the decree, incorporating its terms by reference, on the same day. Pursuant to the terms of the decree, the parties shared joint custody of the children and Zea was awarded physical care. Travis was granted visitation every other weekend, five weeks in summer, and the parties were to alternate holidays according to a schedule set out in the stipulation.

On August 25, 2005, the Iowa Department of Human Services (DHS) issued a founded child abuse report against Zea and Curtis with regard to Zavic, Zane, and Indica. Travis filed a petition for modification of child custody and support on October 4, 2005. He cited the issuance of the founded child abuse report as the substantial change in circumstances which warranted a transfer of physical care to him. A contested evidentiary hearing was held on October 11 and 12, 2006. The trial court heard testimony from both parents, both step-parents, the children's past and current teachers, their principal, the school counselor, and the DHS workers who provided services to the Bond family. At the time of the hearing, the founded child abuse report was the subject of an

intra-agency appeal. The trial court denied the modification petition. On appeal, Travis argues:

- I. The trial court erred in denying appellant's request for a change of physical care of the minor children.
- II. The standard of review for the court's determination as to "physical care" should properly be the best interests of the child.

## **II. Standard of Review.**

We review equity cases de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues presented for review. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

## **III. Discussion.**

The best interests of the children are the first and governing consideration in determining the children's primary caregiver and physical care. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998). Custody of children who are receiving proper care should not be disturbed absent cogent or compelling reasons. *In re Marriage of Erickson*, 491 N.W.2d 799, 803 (Iowa Ct. App. 1992). Prior cases have little precedential value with respect to custodial issues, and the court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995). The person requesting a modification of physical care "must 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 make the requested change." *In re Marriage of Frederici*,

338 N.W.2d 156, 158 (Iowa 1983). “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.* A party seeking to change a custodial provision of a decree must prove an ability to minister more effectively to the children’s well-being. *In re Marriage of Moore*, 526 N.W.2d 335, 337 (Iowa Ct. App. 1994). The party must also show the ability to provide superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994).

We initially reject Travis’s request to change the well-established burden of proof in modification cases of a substantial change in circumstances. See *State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 577-78 (1957) (explaining that when a holding of a court of last resort is contested, it is the province of the same court to overrule the holding).

Travis contends a substantial change in circumstances has occurred because DHS issued a founded child abuse report against Zea and Curtis. Travis also appears to argue that Zavic and Zane have had some behavioral problems and problems with school and that those problems militate in favor of transferring primary physical care to him. Additionally, Travis asserts Zea does not keep him sufficiently updated about the children’s medical care, education, extracurricular activities, and religious instruction and does not consistently seek his participation in making decisions involving the aforementioned topics.

The basis for the report was a denial of critical care for failing to provide proper supervision. The child abuse report states the following as evidence of the Bonds’ failure to provide proper supervision: (1) Zea and Curtis allowed someone to store belongings in their home without knowing what they were

storing; (2) Indica had a severe case of head lice as of August 18, 2005; (3) there was a section of glass missing from the window in Zane and Zavic's bedroom, and a Rubbermaid lid had been put in place of the missing section; (4) Curtis admitted to smoking marijuana a month prior to the investigation; and (5) Curtis stated he had shot and killed a bat in the living room with a BB gun. Amy Lyons was the child protection worker who investigated the Bonds. She noted on her report that Zea and Curtis would not permit an inspection of their friend's belongings. Lyons also noted she had requested all the children be taken to the doctor to be checked for lice. Lyons requested that Zea and Curtis participate in family-centered services and provide random drop-ins and random urine analyses as part of those services. Hair stat tests were also conducted on each of the children, and all the test results were negative for the presence of drugs.

According to Lyons' report, Zea and Curtis signed the application for social services on August 18, 2005, the same day Lyons went to visit the home. None of the children were removed from the home, and there was never a petition for children in need of assistance filed against Zea or Curtis. Zea and Curtis were discharged from services in April 2006 because they had successfully completed all their goals.

With respect to the items stored in the basement, Curtis testified he did not want Lyons to go through his friend's belongings because he did not think it was necessary. Zea also wrote a letter to DHS on September 7, 2005. In that letter, she contested mistakes she found in the child abuse report. She stated she was unaware that storing someone else's belongings could constitute

neglect. She also stated that, per Lyons' request, the children had not been allowed to go the basement since the day Lyons visited.

All three children were taken to the doctor and examined for lice. Neither Zavic nor Zane were found to have head lice. The doctor prescribed a special medicine for Indica. Lyons' report indicated the Bonds did not obtain the prescribed medicine, but Zea states in her letter to DHS that the medicine was not available at any of the local pharmacies and the pharmacist had recommended a different medicine in its place. With regard to the window in Zavic and Zane's bedroom, Lyons stated that by the time of her next visit, a wooden board had been put in place of the Rubbermaid lid as per her request. There is no indication anywhere in the record that there was any broken glass lying around. Zea also addressed the use of the BB gun in the home in her letter to DHS. She stated the children had been removed from the area when Curtis discharged the gun.

In its findings of fact, the trial court stated there was no evidence "provided to show that [Curtis] uses marijuana around the children or that he is continuing to use marijuana at this time." The record indicates Curtis completed a substance abuse evaluation and a treatment program at Pathways Behavioral Services. His discharge summary indicated he completed all his assignments and he "displayed good effort and participation throughout his treatment."

Travis asserts the boys have had some behavioral problems and problems with schoolwork. He also asserts he has seen them in torn and tattered clothing and they have body odor when he picks them up for his visits. In particular, Zavic brought his stepfather's pocket knife to school one day, has

lied to his mother and stolen money from her, and had a problem controlling his temper. Zane has been stubborn about getting up and going to school in the morning, has refused to complete his homework, and has difficulty reading.

Both Joseph Olsen, a retired school social worker for the area education agency, and Stephanie Grzybek, the family-centered services provider from DHS, have worked with Zavic and Zane. Olsen testified “they are delightful boys [with] lots of energy and lots of feistiness, and that can be good, it can be bad.” He testified he could not remember any time when either boy was wearing dirty or torn clothing or had a problem with hygiene. He also testified both boys had made progress by the time he ended his work with them. Grzybek provided therapy and skill development to both boys. She visited the Bond home every other week and met with Zavic at school on alternate weeks. Grzybek had no concerns about the cleanliness of the boys. She also testified her services were no longer needed in the home because the family had met the goals she had set out. A counselor at Zavic’s school testified Zavic seemed very embarrassed about bringing a knife to school. Zavic had taken the knife from a display shelf several feet above the family’s computer desk. She stated she thought Zavic was just “intrigued” with it because it “was a very unique looking instrument.” She thought it was just an example of a kid being a kid. Zavic’s and Zane’s teachers and their principal testified at the hearing. Zane’s teachers and the principal stated that while Zane could be stubborn, he is a fairly typical boy. Zavic’s teachers stated they had no behavioral problems with him.

Finally, Travis contends Zea has not always kept him informed about the children’s medical care, educational and behavioral problems, or religious

instruction and makes decisions without his input. Zea agrees she has not always contacted him before making a decision. She says they normally communicate when the boys are picked up or dropped off. She testified she is not able to make phone calls because Travis has a restriction to block unknown telephone numbers, including hers. She testified she has informed Travis about this restriction several times and he has left it on. Travis claimed he was not aware of any block on his telephone; however, a cell phone was used to call his home. The cell phone was put on speaker phone and a message was played that the particular telephone number did not accept calls from unknown numbers. Furthermore, Zea stated Travis is not allowed to enter her home anymore. She testified about an incident where Travis came out of the bathroom completely nude and propositioned her. Both parties testified they once had a fairly good relationship and it has deteriorated.

Lyons stated in her report that Zea told her Travis had made the report through his attorney because he would do anything to get the boys back. We are concerned that Travis told Lyons he chooses not to use car seats, even though he is aware of the change in the car seat law. We are not impressed with Travis's testimony that he would not buy the children additional clothing to take home with them because he "pay[s] support, and she's unemployed. If she needed more money she could go get a job." Zea testified she does not work so she can spend time with her children. Travis testified he does not call Zea during the week to check up on the boys.

While the founded abuse report does create some cause for concern, it does not constitute a substantial change in circumstances. The boys were

approximately six and three years old when the original decree was entered. It is entirely reasonable to expect that children may have some behavioral problems as they grow up. Our review of the record indicates Zea and Curtis fully cooperated with DHS during the investigation and while they were receiving services. We give them credit for readily agreeing to services and for attempting to remedy the potential safety hazards in their home in a timely manner. It appears from the testimony at the hearing that Zea has made appropriate attempts to remedy the children's behavior. Furthermore, Travis has not shown he could provide superior care or minister more effectively to the children's needs. We remind both parties they have an obligation to communicate with each other and to follow the terms of the original decree. Accordingly, we affirm the trial court's order denying modification of physical care.

**AFFIRMED.**