

IN THE COURT OF APPEALS OF IOWA

No. 7-287 / 06-1449

Filed June 27, 2007

IN RE THE MARRIAGE OF RANDY L. JIMENEZ, JR. AND KATIE JIMENEZ

**Upon the Petition of
RANDY L. JIMENEZ, JR.,**
Petitioner-Appellant,

**And Concerning
KATIE BEERBOWER, f/k/a
KATIE JIMENEZ,**
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Paul R. Huscher,
Judge.

A father appeals from the district court's denial of his application to modify
custody and visitation. **AFFIRMED AS MODIFIED.**

Theodore F. Sporer of Sporer & Ilic, P.C., Des Moines, for appellant.

Tiffany Koenig, Indianola, and Christopher Kragens Sr. of Kragens &
Associates, Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

A father appeals from the district court's denial of his application to modify custody and visitation. He contends the court "erred by failing to fashion a custody and visitation award that serves the best interest of the minor child." We affirm as modified.

Randy and Katie married in 1995. Their son, Nathan, was born in 1999. When the parties divorced in 2000, the court awarded (1) joint legal custody, (2) physical care to Katie, and (3) visitation to Randy. In 2003, Randy filed an application for rule to show cause. The parties consented to modification of the visitation provisions of the decree. In April of 2005, Randy again filed an application for rule to show cause. After a hearing, the district court found no contempt and dismissed the application. In November of 2005, after hearing that Katie's husband was going to enlist in the military, Randy filed a petition to modify, seeking sole legal custody of Nathan.

After a hearing, the court ruled from the bench. The court found there was not a substantial change in circumstances warranting a change in custody. The court did not award any attorney fees but ordered Randy to pay the court costs. The court denied Randy's motion to amend or enlarge its ruling.

On appeal, Randy contends the court "disregarded the preponderance of credible evidence in failing to find Nathan's best interest served by placement in Randy's primary care." We review de novo. Iowa R. App. P. 6.4; *In re Marriage of Montgomery*, 521 N.W.2d 471, 473 (Iowa Ct. App. 1994).

Custody. The legal principles governing modification actions are well established.

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. 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. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)).

Randy has not provided 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.” *Id.* We find no change in circumstances that would warrant modifying custody. We also find Randy has not demonstrated he can offer Nathan superior care. *See In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). If the parents are found to be equally competent to minister to the children, custody should not be changed. *Id.* “The district court has reasonable discretion in determining whether modification is warranted, and we will not disturb that discretion unless there is a failure to do equity.” *In re Marriage of Maher*, 596 N.W.2d 561, 565 (Iowa 1999). We affirm the decision of the district court not to modify the custody provisions of the decree.

Although we have not modified the custody provisions of the decree, we note the stipulated modification imposed a duty on the parties to implement certain mandates concerning Nathan's best interest. Included in those mandates

are equal access to information; equal participation in decisions concerning Nathan's legal status, medical care, education, daycare, extra-curricular activities, and religious training; acting to foster the relationship between Nathan and the other parent, and notice of important matters and consultation about decisions concerning Nathan. We are concerned by some of Katie's actions, such as not properly informing Randy of her contemplated move out of Iowa, telling Randy the wrong time for a school conference or open house, and enrolling Nathan in a wrestling program in competition with the program Randy coaches only after he asked that Nathan be in the program he was coaching.

Visitation. In order to modify visitation, Randy must show a change in circumstances justifying the modification. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). This burden is substantially less than the burden required to modify custody. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). Liberal visitation rights are in the best interests of the children. See *In re Marriage of Drury*, 475 N.W.2d 668, 670 (Iowa Ct. App. 1991). In determining the appropriate amount of visitation, we are guided by the principle a court should order such visitation as will ensure a child the opportunity for maximum continuing physical and emotional contact with the noncustodial parent. See Iowa Code § 598.41(1) (2005); see also *id.* § 598.1. The district court did not find a change in circumstances that warranted modification.

We find circumstances have changed since the last modification of the dissolution decree in 2003. Katie's weekend work schedule does not allow her any significant weekend time with Nathan, yet she refuses to allow Randy to take Nathan on "her" weekends. Katie has said her husband, Matt, should have the

time with Nathan and she appears more interested in fostering the relationship of Nathan with her husband and his child from another relationship. While we recognize it is important for a child to have a good relationship with a stepparent in a custodial home we are concerned about Katie's willingness to put Nathan's relationship with his stepfather and stepbrother ahead of his relationship with his birth father. We modify the visitation provisions of the parties' decrees to add that Randy shall have weekend visitation from Friday at 6:00 p.m. to Sunday at 6:00 p.m. on weekends when Katie works, in addition to his regular alternating weekends. If Katie is working on any of the weekends or holiday weekends specified in the modified decree, Randy shall have weekend visitation as specified above. Furthermore, if Randy still coaches a wrestling program he should have visitation during that period so Nathan can be on his team. Randy shall provide all transportation associated with the additional visitation.

Attorney fees and costs. We do not award any appellate attorney fees. Costs of this action are taxed equally between the parties.

AFFIRMED AS MODIFIED.