

**IN THE COURT OF APPEALS OF IOWA**

No. 8-027 / 07-0890  
Filed February 13, 2008

**IN RE THE MARRIAGE OF STEVEN W. SWENSEN AND KYLA LEE  
SWENSEN**

**Upon the Petition of  
STEVEN W. SWENSEN,**  
Petitioner-Appellee,

**And Concerning  
KYLA LEE SWENSEN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Webster County, Kurt L. Wilke,  
Judge.

Mother appeals the district court's ruling denying her request to modify a  
dissolution decree and keeping physical care with the father. **AFFIRMED.**

William H. Habhab, Fort Dodge, for appellant.

Kurt T. Pittner, Fort Dodge, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

**EISENHAUER, J.**

When Steven and Kyla Swensen separated in 1997, they decided Steven would care for Michael (October 5, 1990) and Kyla would care for Victoria (December 31, 1992). In 1998, Kyla dropped Victoria off at Steven's home telling him she wanted him to take care of both children because she needed time to put her life in order. Steven took over the physical care of both children. On June 16, 2000, the marriage was dissolved by stipulated decree. They agreed to joint legal custody with physical care to Steven. After the decree was entered, Steven consistently provided visitation for Kyla significantly exceeding the decree's provisions, both during the school year and during summer vacation.

Steven is a veterinarian who worked in the Fort Dodge area until recently. Kyla moved to Cedar Falls after the separation and does not work outside the home. She has remarried and has two children, ages five and three.

When Steven lost his job in Fort Dodge, he searched unsuccessfully for a new job in Iowa. Eventually, he expanded his job search and obtained a veterinarian position in Arizona with a significant increase in salary. Steven and the children moved to Arizona in January 2007.

Kyla filed a petition to modify the dissolution decree seeking physical care. After a hearing in April 2007, the court declined to modify physical care, but did modify visitation. Kyla appeals the court's modification order.

We review this equity action de novo. Iowa R. App. P 6.4. We have a duty to examine the entire record and "adjudicate anew rights on the issues properly presented." *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa

1981). We give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. Iowa R. App. P. 6.14(6)(g).

The only issue is whether the physical care of the children should be changed from Steven to Kyla because of Steven's move to Arizona. In seeking to modify the physical care arrangement, Kyla has a heavy burden. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). She must establish "by a preponderance of the evidence, a substantial change in circumstances justifying [her] requested modification." See *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, Kyla has the burden of showing she will render superior care. See *In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). These requirements stem from the principle that once custody has been fixed, "it should be disturbed only for the most cogent reasons." *Id.* The best interests of the children are the controlling considerations. *Thielges*, 623 N.W.2d at 235.

When the basis for seeking modification is relocation of the custodial parent, the heavy burden required to modify custody does not change. *Id.* at 236. The stability of the relationship with the primary caregiver is more important than the physical setting of the children. *Id.* If Kyla proves only a substantial change in circumstances, then Iowa law "contemplates only a visitation modification." See *id.* at 237. We conclude that is the situation presented here.<sup>1</sup> Under the current arrangement, with Steven freely allowing more visitation than required in the decree, the parties have raised normal, well-adjusted and

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<sup>1</sup> Under Iowa Code section 598.21D (2007), if a custodial parent moves 150 miles or more from the former custodial home, this may be considered a substantial change in circumstances.

emotionally-healthy children. The evidence does not show the move will be detrimental to their long-range best interests. At most, the record shows Steven and Kyla are both good parents who can provide the same level of care for their children. Since Kyla has not met her heavy burden of proving she will give superior care; we will not place the children in her physical care. It is in the children's best interests to continue living with Steven who has been their primary caregiver for ten years.

While the children testified they desired to remain in Iowa and live with Kyla, they both stated Steven had done a good job in raising them and are happy he has never attempted to restrict their contact with Kyla. Both have made new friends in Arizona, enjoy their new house and swimming pool, and can walk to their new schools. Placement with Kyla would similarly require a change to a new and different school system. We have considered their testimony, but such testimony "is entitled to less weight in a modification action than would be given in an original custody proceeding." *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). Additionally, "the analysis involved in deciding custody is far more complicated than asking children with which parent they want to live." *Id.* at 101-02. Under the circumstances of this case, we will not defer to the children's stated preferences.

Additionally, the record shows the district court is correct in finding: "Of particular concern is this court's feeling that Kyla has much less concern for providing Steven significant contact with the children than he has provided to her through all these years." For example, during the nine weeks the children were in Arizona prior to trial, Steven flew them back at his expense for two visitations

totaling fifteen days. Kyla, meanwhile, proposes a modification where Steven will have the children two weeks of the summer and whenever he can fly back to Iowa to see them.

Kayla's proposal ignores the fact "it is generally in the children's best interests to have the opportunity for maximum continuous physical and emotional contact with both of their parents." *Thielges*, 623 N.W.2d at 238. Where a long-distance relocation has occurred, the court can assure this contact "by granting the non-relocating parent extended visitation during summer vacations and school breaks and scheduled telephone contact." *Id.* The district court continued significant contact with both parents by modifying the visitation schedule to require: (1) Steven to fly the children back to Iowa every sixty days; (2) Kyla to have the children for all but two weeks of summer vacation; (3) Kyla to have the children for all of spring break and one-half of Christmas vacation; and (4) each party to allow regular telephone and internet contact. These changes are appropriate and fair, as is the court's ordering of shared travel expense.

The district court's ruling continues physical care in the parent who has undeniably supported the children's relationship with their non-custodial parent and who, by his recent actions, has demonstrated he would continue to do so. We conclude the children have been assured the opportunity for maximum continuous physical and emotional contact with both Steven and Kyla and affirm the district court.

**AFFIRMED.**