**IN THE COURT OF APPEALS OF IOWA**

No. 3-620 / 12-2235
Filed August 7, 2013

**IN RE THE MARRIAGE OF TINA SHAFFER AND LEE WILLIAM SHAFFER**

**Upon the Petition of**
**TINA SHAFFER,**
Petitioner-Appellee,

**And Concerning**
**LEE WILLIAM SHAFFER,**
Respondent-Appellant.

---

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

A father appeals the district court's refusal to modify the physical placement provisions of the dissolution decree. **AFFIRMED**.

Lynne C. Jasper, Bettendorf, for appellant.

Patricia Zamora of Zamora, Taylor, Woods & Frederick, Davenport, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

**MULLINS, J.**

Lee Shaffer appeals the district court's denial of his request to modify the physical care provisions of the decree dissolving his marriage to Tina Shaffer. Lee claims the district court erred in concluding he had not met his burden to demonstrate a superior ability to care for the children and in finding the children's best interests do not preclude Tina's relocation to Texas. For the reasons stated below, we affirm the decision of the district court.

## I. BACKGROUND FACTS AND PROCEEDINGS.

Tina and Lee were divorced in 2007. The dissolution decree provided for joint legal custody for their two minor children, Austin (born 2001) and Emilee (born 2002). The decree designated Tina as the physical caretaker of the children and provided Lee with visitation every other weekend and for a few hours two evenings each week. In 2011, the decree was modified to provide Lee with additional visitation, including overnight visits during the week. The parties have both lived in Davenport, Iowa, since the dissolution. Lee has since remarried and has a daughter with his second wife.

On January 11, 2012, Tina filed a petition to modify visitation, as she had accepted a job in Corpus Christi, Texas, and planned to move there with the children. The district court denied Lee's request for a temporary injunction to prevent the relocation, and Tina made the move with the children in February 2012. Lee filed an amendment to his answer to Tina's petition, seeking a modification of the decree to grant him physical care of the children. The district court found the move to Texas created a substantial change in circumstances.

The court, however, concluded Lee had not demonstrated he possessed a superior ability to care for the children and denied his request for a modification of physical care. The court granted Tina's petition for modification of visitation, granting Lee visitation for eight weeks in the summer, on each spring break, and on alternating school winter breaks. Lee now appeals from the district court's refusal to modify the physical care provisions of the decree.

## II. SCOPE AND STANDARD OF REVIEW.

Because an action to modify a dissolution decree is heard in equity, our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). We give weight to the district court's findings of fact, especially with regard to witness credibility, but we are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, as we must base our decision on the particular circumstances of the case before us. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987).

## III. MODIFICATION OF PHYSICAL CARE.

Courts may modify the custody or care provisions of a decree only where the record reveals "a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child." *Melchiori*, 644

N.W.2d at 368. The burden is on the party seeking modification to show by a preponderance of the evidence a substantial change that the children's best interests make a modification expedient. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). In addition, the party seeking modification must demonstrate that he or she possesses a superior ability to minister to the needs of the children. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). This heavy burden results from the principle that once a custodial arrangement is established, "it should be disturbed only for the most cogent reasons." *Frederici*, 338 N.W.2d at 158. As in any custody or care determination, our paramount concern is the best interests of the children. *See* Iowa R. App. P. 6.904(3)(o); *In re Marriage of Bergman*, 466 N.W.2d 274, 275 (Iowa Ct. App. 1990).

On appeal, Lee contends the district court erred in denying his request for a modification of physical care. Specifically, he claims he possess a superior ability to minister to the needs of Austin and Emilee by virtue of Tina's relocation. He argues Tina's primary motivation for relocation was retaliation against him for successfully obtaining the earlier modification of the decree, and her other reasons for the move were insufficient to justify the impact on the children and on the custodial arrangement.

The district court found, and the parties do not dispute, Tina's move to Texas constitutes a relatively permanent, substantial change in circumstances relating to the welfare of the children. We agree. *See* Iowa Code § 598.21D (2011) (permitting courts to consider the relocation of a custodial parent of 150

miles or greater a substantial change in circumstances in modification proceedings).

Having found a substantial change of circumstances, we must next determine whether Lee has met his burden to show he can offer superior care. *See Whalen*, 569 N.W.2d at 628. When the custodial parent plans to relocate, the burden is on the noncustodial parent "to demonstrate the move will detrimentally affect the child's best interests." *In re Marriage of Montgomery*, 521 N.W.2d 471, 474 (Iowa Ct. App. 1994). In determining whether to disallow removal of the children from their present home, the court must consider all of the surrounding circumstances—including the reasons for the removal, the new location, the distance to the new location, the relative advantages and disadvantages of the new location, the impact on the children, and the impact on the joint custodial and access rights of the other parent. *Frederici*, 338 N.W.2d at 160.

Lee contends Tina's reasons for moving are not sufficient to permit relocation of the children to Texas. He claims Tina's primary motivation for the move was retaliation against him after the recent modification of the decree increasing his visitation time. The record reveals Tina had been concerned about the stability of her position at the Rock Island arsenal for several years due to the possibility of defense cutbacks. In 2005, she moved to a new position in order to avoid being transferred to Michigan. Although her position was never eliminated or transferred, Tina had a reasonable concern that it could be.

In addition to job concerns, Tina sought to move to Texas to be closer to her family. She is originally from Texas, and much of her extended family still resides there. Lee challenges this motivation by pointing out that her family lives several hours from Corpus Christi. This contention misses the mark, for a travel time of a few hours to her family is much less than the time required to travel between Iowa and Texas. Tina's parents, moreover, have ready access to private aircraft, which reduces their travel time significantly. We find Tina's legitimate concerns about the security of her job and the proximity to her family prompted her move to Texas, not simply a desire to exact revenge on Lee for his successful modification of the decree.

We also consider the comparative advantages and disadvantages of the new location, the effect of the move on the children, and the impact on the rights of the non-custodial parent. *Frederici*, 338 N.W.2d at 160. Undoubtedly, the move puts a considerable distance between the parties. As with any relocation of a custodial parent, it requires adjustment by the children and imposes additional burdens on the custodial arrangement. Particularly in this case, the move reduces the amount of time Austin and Emilee are able to spend with their half-sister. Many of Lee's extended family also live nearby in Davenport. The district court helped to mitigate these burdens by granting Lee considerable extended visitation during the summer and other school breaks. Tina has fostered open communication between Lee and the children through phone calls, Skype, and pictures.

The record also reveals the children's new environment in Texas is a stable and safe one. Prior to the move, Tina researched and found what she believed was the best school district in the area. She looked for and found a house in a safe neighborhood. Although the children have had to withdraw from their extracurricular activities in Iowa, Tina has encouraged them to pursue other activities in Texas. Lee claims these activities are not of the same caliber of those in Iowa, but we are confident Tina will continue to encourage the children's participation in stimulating activities that they enjoy. Lee also points out Austin has been bullied at his new school. However, there is evidence the new school is helping him with the transition and that both children are performing well academically.

It also appears from the record that the preference of both children is to live in Iowa. The preference of a child is a relevant but non-conclusive factor in custody determinations. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985); *see also* Iowa Code § 598.41(3)(f) (permitting consideration of a child's wishes regarding a custodial arrangement, taking into account the child's age and maturity). We give less weight to a child's preference in a modification action than in an original custody determination. *See In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987). The district court here, in deciding how to weigh the children's preferences, considered their age and educational level, the strength of their preference, their intellectual and emotional character, their relationships with family members, and the reasons for their preference. *See Ellerbroek*, 377 N.W.2d at 258–59. The district court took their preference into

consideration but found Austin and Emilee were not of the age and maturity level to understand what is in their long-term best interests. We defer to the district court's findings and conclude the children's preference to live in Iowa does not require an award of physical care to Lee.

Upon our de novo review of the record, we find this is not a case where "the adverse impact of the move on the children" outweighs "the reasons for moving the children and the quality of the new environment" so as to justify a custody modification. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). Having considered the circumstances surrounding Tina's relocation, we conclude Lee has not met his burden to show the move to Texas is detrimental to the children's best interests. Other than the circumstances and consequences of Tina's relocation, Lee has presented no other evidence to demonstrate he possesses superior parenting abilities. Accordingly, we find the district court did not err in denying Lee's request for a modification of physical care.

**AFFIRMED.**