**IN THE COURT OF APPEALS OF IOWA**

No. 8-1011 / 07-1540
Filed February 4, 2009

**KELVIN HARRELL,**
Petitioner-Appellee,

**vs.**

**TIFFANY FORD,**
Respondent-Appellant.

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Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

A mother appeals from the decree modifying the child custody provisions of a 2000 custody and visitation decree and placing the parties' child with the father. **AFFIRMED.**

Robert Engler of Schulte, Hahn, Swanson, Engler & Gordon, Burlington, for appellant.

Andrew Howie and Roger Hudson of Hudson, Mullaney & Schindler, P.C., West Des Moines, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

**PER CURIAM**

Tiffany, the mother of eleven-year-old M.H., appeals from the decree modifying the child custody provisions of a 2000 custody and visitation decree and placing M.H. with the father, Kelvin. Tiffany contends Kelvin did not carry "the heavy burden required to modify primary physical care." On de novo review, we affirm.

**I. Background Proceedings.**

Tiffany and Kelvin are the parents of M.H., who was born in May of 1997. In 2000, the parties consented to the court's entry of a custody and visitation decree. It awarded the parties joint legal custody, placed M.H. in Tiffany's primary physical care, and set Kelvin's visitation.[1] Following Kelvin's allegations of contempt in 2004, the parties reached a mediated agreement on disputed issues.

In 2006 Kelvin filed a petition to modify the custody and visitation decree, seeking primary physical care of M.H. and attendant modification of visitation and child support. Following a hearing, the court concluded Kelvin demonstrated a material and substantial change in circumstances warranting a change in custody in M.H.'s best interest and Kelvin established his is able to minister more effectively to M.H.'s well-being than Tiffany. The court modified primary physical care, placing M.H. with Kelvin instead of Tiffany. It established visitation for Tiffany and ordered her to pay Kelvin monthly child support of $237.59. Tiffany appeals the modification of primary physical care.

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[1] Kelvin's paternity was established and child support set by administrative order prior to the custody and visitation decree.

**II. Scope and Standards of Review.**

We review modifications of child custody de novo. Iowa R. App. P. 6.4; *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa Ct. App. 1996). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*). Prior cases have little precedential value; we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). The "first and governing consideration" is the best interest of the child. Iowa R. App. P. 6.14(6)(*o*).

The burden to modify the custody provisions of a decree is heavy. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). To change the custodial provisions of a decree, the party seeking modification must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the child'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 change must be more or less permanent, relate to the welfare of the child, and must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The question is not which home is better, but whether the parent seeking modification can provide superior care. *Id.*; *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa 1997). The moving party must show an ability to minister more effectively to the child's needs. *Whalen*, 569 N.W.2d at

628. If both parents are found to be equally competent to minister to the child, custody should not be changed. *Id.*

**III. Merits.**

Tiffany contends the court erred in concluding that Kelvin demonstrated a material and substantial change in circumstances warranting modification. She claims none of the three reasons the court cited in determining there was a material and substantial change in circumstances supports the court's determination, specifically: (1) Tiffany's history of involvement with men who possess a criminal history that includes abusing her, (2) Tiffany's poor judgment in selecting a daycare provider, and (3) "other parenting issues, when considered together."

*Material Change in Circumstances.* Tiffany's involvement with one of the two "live in boyfriends," Mr. Tutt, precedes the date of the decree, so we do not consider it in determining whether circumstances since the decree have changed. We have concerns, however, about her relationship with Marvel Jones, the father of Tiffany's younger child. He has been charged with domestic abuse assault with Tiffany as the victim and has been forced to move from her home. He moved back in with Tiffany after pleading guilty to the lesser charge of disorderly conduct or violent behavior with Tiffany as the victim. Mr. Jones was involved in an altercation with Kelvin when Kelvin came to Tiffany's home to pick M.H. up. Although at the time of trial Mr. Jones was not living with Tiffany and the children, they maintain a relationship because they have a child, M.H.'s

younger half-sibling. Mr. Jones has spanked M.H. hard enough to cause bruising.

After Mr. Jones moved out, Tiffany's brother moved in. Like Mr. Jones, her brother has a significant criminal history, including violent offenses. Tiffany chose to leave her children in his care often. At trial, he admitted he would not want someone with his criminal history watching his own children. We conclude Tiffany has shown poor judgment in the men she has living with her and caring for her children since the entry of the decree.

Tiffany also is on the central abuse registry based on a founded child abuse investigation for denial of critical care. In 2006 she placed M.H. and her other child with an unlicensed daycare provider whose home and care were the subject of an investigation by the Iowa Department of Human Services. The investigation resulted in a founded child abuse report, the closure of the facility, and the provider's placement on the central abuse registry. We need not detail the conditions in the home, but the testimony and exhibits very clearly show it was a horrible place to leave children. We conclude Tiffany showed very poor judgment in her choice of childcare provider.

Based on the foregoing evidence, we conclude Kelvin met his burden of proof to demonstrate a material and substantial change in circumstances since the decree that warrants modification of the custody provisions of the decree. Our analysis next turns to a determination of whether Kelvin has demonstrated he can provide superior care or that he has an ability to minister more effectively to M.H.'s needs.

*Parenting Comparison.* The factors courts consider in awarding custody are set forth in Iowa Code section 598.41(3) (2007), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The factors considered for determining child custody are applied in modification proceedings. *In re Marriage of Hubbard*, 315 N.W.2d 75, 80 (Iowa 1982).

Tiffany argues Kelvin has not demonstrated he is more capable of providing for M.H.'s needs. She sets forth her argument under each of the first eight factors listed in *Winter*, claiming M.H. has thrived in her care and the court should not disturb the primary physical care established by the 2000 decree. Tiffany further argues the court "completely overlooked" the fact she has been the primary caregiver for all of M.H.'s life, while Kelvin has never been the primary caregiver or cared for M.H. for any sustained period of time.

From our de novo review of the record, we agree with the court's conclusion Kelvin has established that he has the ability to minister more effectively to M.H.'s well-being than Tiffany. The court noted:

> Tiffany is not capable of continuing to provide for the physical care of [M.H.]. She has a history that she will continue to do as she has done in the past. She does not realize the importance of changes that need to be made, or how her actions affect [M.H.] and her well-being. She does not have a positive stable home environment to allow [M.H.] to grow. She has shown a consistent background of modeling negative behavior. She does not recognize the need or importance of making changes for the welfare of the parties' child. Her actions demonstrate that she is not interested in exhibiting a positive influence. She has shown a lack of concern for [M.H.]'s physical and emotional well-being. Her moral judgments affect [M.H.]. Those actions have shown a negative pattern of selecting abusive boyfriends who have criminal backgrounds, and have contact with [M.H.]. Tiffany does not perceive the benefit in

> allowing a positive relationship with her father, Kelvin, nor does she demonstrate a willingness to have regular and ongoing communication with Kelvin concerning [M.H.]'s best interest. The evidence establishes that Kelvin's parenting skills are superior to Tiffany's. Thus, it is in [M.H.]'s best interests to be placed in the primary physical care of Kelvin with Tiffany having visitation . . . .

A preponderance of the evidence supports the conclusions quoted above. We do not minimize the disruptive effect of modifying primary physical care, recognizing M.H. will leave her half-sibling, her school, and her friends. However, her "emotional, social, moral, material, and educational needs" are best served by placing her in Kelvin's care. *See* Iowa Code § 598.41(3); *Winter*, 223 N.W.2d at 166. We therefore affirm the modification of M.H.'s physical care.

**AFFIRMED.**