

IN THE COURT OF APPEALS OF IOWA

No. 8-535 / 07-2092
Filed November 26, 2008

**BRYAN L. BEAUBIEN, on behalf of
BEAU VINCENT BEAUBIEN, A minor
child,**

Petitioner-Appellant,

vs.

JUNE RENE ALDEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Floyd County, Paul W. Riffel,
Judge.

Father appeals the district court's ruling denying his request to modify
physical care. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des
Moines, and Lori A. Ubbinga, Sioux City, for appellant.

Roger L. Sutton of Sutton Law Office, Charles City, for appellee.

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

EISENHAUER, J.

Bryan Beaubien and June Alden met in the spring of 2002 through an internet dating service. The following spring they became parents of a son, Beau, who has lived with June since birth. Bryan and June never married and have always lived over 200 miles apart. Bryan petitioned the court seeking physical care of Beau and child support from June. After a hearing in May 2005, the court awarded the parties joint legal custody with physical care to June. Bryan was ordered to pay child support. Bryan was granted liberal and specific visitation, including two separate two-week summer visits. Bryan appealed the decision and the district court's judgment was affirmed in August 2006.

June met David Berriault, a Canadian police officer, on the internet and they began dating. In early 2007, June was pregnant with David's child and wanted Beau to accompany her when she visited Canada. However, Bryan refused to sign a passport application.

In March 2007, June e-mailed Bryan stating she and David wanted to give Beau a fuller life as a family in Canada. In April 2007, Bryan filed a motion to modify custody due to a material change in circumstances. Bryan sought physical care of Beau because: (1) June is having a baby in Canada while leaving Beau with her parents who are in questionable health; (2) June is seeking a passport for Beau while refusing to tell Bryan sufficient information about David, who will be around Beau; (3) June does not consult with Bryan "concerning the minor child's legal status, medical care, education"; and (4) June does not support the relationship between Beau and Bryan.

June and David became parents of a son, Jasper, who was born in Canada in May 2007. In July 2007, June sought permission to allow Beau to travel with her to Canada. In August 2007, after a hearing, the court allowed Beau to travel to Canada and Beau visited Canada with his mother.

A two-day hearing on Bryan's motion for modification was held in October 2007. Both June and Bryan are in their forties and both live with their parents. Bryan has a master's in special education and teaches at a shelter in Sioux City. Bryan has never been married and Beau is his only child. June received two degrees from a community college before earning a degree in human services from Buena Vista College. June is not employed outside the home and relies upon child support and some public assistance for Beau.

June's twenty-one-year old son, Eric, testified he is a pharmacy student in the fourth year of a seven-year program. Eric is a resident assistant in the university dorms supervising fifty-four students on his floor. Eric stated June raised him, was "the best" mother, and they enjoy a close relationship. Eric further testified June was never critical of Eric's father in his presence.

June testified she had allowed Bryan additional visitation over and above the court's decree by giving him extra weeks in April, in May, and in June, as well as extra time on his two, two-week visitations. Further, June stated:

I've given him more time during Christmas. I even asked him if he'd like to have my holiday because I know it's important for them to be together. And our family, because Eric couldn't come home during Christmas, we were going to have it another time – that he could have my holiday.

Bryan confirmed he had “always gotten more than what was actually in the decree.”

David testified he has been separated from his wife for approximately two and one-half years, they have no children, and he expected their divorce to be concluded within a month. David stated he wanted June to live with him in Canada and “it was a commitment that I at least understood that would have led to marriage.” David owns a three-bedroom home and he noted Beau and Jasper would each have their own room.

The district court ruled:

Despite Bryan’s claims to the contrary, the court concludes that June has been supportive of his relationship with Beau. . . . The court also concludes that June has for the most part been cooperative with Bryan in making arrangements for visitation. Bryan acknowledged that he has had more visitation than was awarded in the previous order. June could have been more flexible in expanding Bryan’s visitations when she was in Canada during the summer of 2007. Bryan could have been more cooperative with June with respect to Beau’s passport which would have enabled him to accompany his mother on trips to Canada. . . .

June’s change of residence for her and Beau from . . . Iowa to . . . Canada is a substantial change in circumstances. The relocation does not warrant a change in Beau’s physical placement but does warrant a modification of the visitation provisions of the previous order. The relocation is motivated by June and David’s shared desire to get married and raise their family in [Canada.] Their marriage would serve Beau’s best interest and outweigh the adverse impact of the move on him. Bryan, June and Beau never did live together as a family. June and David are attempting to build upon their relationship which appears to be positive for all concerned, including Beau.

To foster contact when Beau is in Canada, the court added a new telephone requirement: June “making Beau available for telephone contact with [Bryan] every Wednesday and Sunday evening.” Additionally, the court ordered

the parties to share the transportation expenses for Bryan's *increased* visitation of (1) all of spring break; (2) two separate *three-week* summer visits; and (3) one-half of Christmas break. The new visitation plan awards Bryan additional days with Beau -- fifty-six days now versus fifty or fifty-four days in the prior plan, depending on alternating Christmas break. Bryan also was awarded visitation in Canada at his expense upon reasonable notice. Further, June was ordered to immediately contact Bryan and arrange visitation if she and Beau visit Iowa.

Bryan appeals the court's modification order seeking physical care. 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 Beau should be changed from June to Bryan. In seeking to modify the physical care arrangement, Bryan has a heavy burden. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). He must establish "by a preponderance of the evidence, a substantial change in circumstances justifying his requested modification." See *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, Bryan has the burden of showing he 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 child are the controlling considerations. *Thielges*, 623 N.W.2d at 235.

When the basis for seeking modification is relocation of the custodial parent,¹ 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.* Additionally, the burden is on Bryan to demonstrate how the move will detrimentally affect Beau’s best interests. See *In re Marriage of Montgomery*, 521 N.W.2d 471, 474 (Iowa Ct. App. 1994). If Bryan proves only a substantial change in circumstances, then Iowa law “contemplates only a visitation modification.” See *Thielges*, 623 N.W.2d at 237. We conclude that is the situation presented here.

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. While Bryan has proved a material change of circumstances, the evidence does not show the move will be detrimental to Beau’s long-range best interests. Under the current arrangement, the parties have raised a normal, well-adjusted and emotionally-healthy child. At most, the record shows June and Bryan are both good parents, each with some faults, who can provide the same level of care for their son. Since Bryan has not met his heavy burden of proving he will give superior care; we will not place Beau in his physical care. It is in Beau’s best interests to continue living with June.

¹ Bryan’s other arguments for modification of physical care were addressed and resolved in June’s favor in the prior proceedings and the record does not support a need for additional analysis.

The district court's ruling continues physical care in the parent who has already successfully raised one child to young adulthood and who has already allowed more visitation than was awarded in the prior court order. Beau has been assured the opportunity for maximum continuous physical and emotional contact with both June and Bryan by the visitation modification and we affirm the district court.

AFFIRMED.

Doyle, J., concurs. Sackett, C.J., dissents.

SACKETT, C.J. (dissents)

I respectfully dissent. I would modify the custody decree and grant Bryan primary physical care of his son. I believe he has shown there is a substantial change in circumstance and, more importantly, he has shown that he can render superior care.

This court, in what it determined to be a close case, affirmed the district court's initial decision awarding primary physical care of Beau to his mother, June. In doing so we specifically said that June "must continue to cooperate with Bryan and be forthright with him, something she has not always done in the past." My review of the record here convinces me June continues to be uncooperative and less than forthright with Bryan; and I note that the district court here has concluded only that she "has for the most part been cooperative with Bryan in making arrangements for visitation." I do not believe that June shall foster the position Bryan should have in his child's life, especially considering the distance she has put between Bryan and Beau.

Furthermore, I am not willing to accept that June's current living arrangement is stable, based on June's past history and the status of her current relationship. June sought to get pregnant with a married man and is willing to move with Beau to Canada to live with him, though at the time of the hearing his divorce was still not final. June has a pattern of slipping in and out of relationships. She discussed marriage with Bryan, and prior to the original custody trial she contended she was moving to marry a gentleman she met though an internet contact, but that engagement was subsequently terminated.

Her history causes me to question the stability of her current relationship, which apparently has her relying on her current boyfriend for her support and the support of their child. June's move takes Beau some distance away from his father and his father's parents, as well as June's parents, all people who have played a major part in Beau's life.

Bryan is educated as a teacher and works well with children. He has stability in employment. He has strong family support to assist him with his child's care. He has taken advantage of all opportunities to assist with Beau's care since the child was born and has contributed to the child's financial support.