

**IN THE COURT OF APPEALS OF IOWA**

No. 9-568 / 09-0452  
Filed July 22, 2009

**IN RE THE MARRIAGE OF BONNI LYN BLACK  
AND BRETT ALAN BLACK**

**Upon the Petition of  
BONNI LYN BLACK,**  
Petitioner-Appellant,

**And Concerning  
BRETT ALAN BLACK,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Montgomery County, Charles L. Smith III, Judge.

Petitioner appeals from the district court's order modifying the physical care provisions of the parties' decree of dissolution. **REVERSED AND REMANDED.**

Joseph Hrvol, Council Bluffs, for appellant.

Stephen Ebke, Council Bluffs, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Mansfield, JJ.

**MANSFIELD, J.**

Bonni Black appeals from an order of the district court, modifying a decree of dissolution so as to provide that her ex-husband, Brett Black, would receive physical care of their twelve-year-old twin children. After reviewing the record, we conclude there has not been a material and substantial change in circumstances warranting this change in physical care, nor has the ex-husband demonstrated the ability to provide superior care. Therefore, we reverse and remand.

**I. FACTS.**

Brett Black was born in 1965 and was forty-three years old at the time of the modification proceeding. Bonni Black was born in 1970 and was thirty-eight years old at the time of the proceeding. Brett and Bonni were married in January 1996. In October 1996, they had their only children, twins who were born prematurely. Although the son weighed less than three pounds when born and the daughter weighed less than two pounds, they are both doing well and are now twelve years old.

In July 1998, Brett and Bonni separated and, in March 1999, their marriage was dissolved. In the decree of dissolution, Bonni was awarded physical care of the children.

For the last decade, Bonni has taken care of the children as a single mother. She has been working at ConAgra since November 2006, earning \$33,106 during 2008. The children live with Bonni in the house she owns in Omaha, Nebraska. They attend the sixth grade at the Millard public schools (a

school district in suburban Omaha). The children are doing very well in school, where the daughter receives some special education services.

Brett lives in the basement of his parents' home in Red Oak. He is employed in his father's lawn care business where his earnings were \$10,600 in 2008. Brett acknowledges that he was abusing alcohol at the time of the dissolution of marriage, but since undergoing residential treatment in 2005, this has not been an issue. Brett has visitation with the children on alternate weekends, and otherwise stays in contact with them by phone.

In 2002, Brett moved for a modification of physical care, but subsequently dismissed his petition.

In July 2008, Brett filed the present petition for modification of physical care. Although the petition raised several grounds, only one was supported by the record. In particular, there is evidence that Bonni has left the children at home alone, such as on certain weeknight evenings, so she can spend time with her boyfriend.<sup>1</sup> This has upset the children, and they have communicated with their father about it. This has also been a source of concern to Bonni's mother.

A guardian at litem was appointed in this case. Although Bonni was asked to do so, she did not attempt to make contact with the guardian at litem until a week before the hearing. Therefore, the guardian did not have Bonni's input when he prepared his report. According to the guardian at litem, the children expressed to him that they were concerned about being left alone.<sup>2</sup> They said

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<sup>1</sup> It was not disputed that Bonni had her cell phone so she could be reached by the children when she was away from the house.

<sup>2</sup> Bonni testified that, prior to the hearing, the children told her they would like to stay in their existing home, but wanted to see their father on more weekends.

they wanted to live with their father because they would not be left alone, given that Brett's mother is always home. The guardian at litem stated in his report that he was "incredibly frustrated with Bonnie's (sic) failure to contact me" and that he "[took] this as a reflection upon her parenting skills." At the hearing, Bonni testified that she did not contact the guardian at litem because she was "debilitated" about the proceeding and "scared" of losing her kids. In any event, the guardian at litem recommended that the decree be modified so that Brett would be awarded physical care of the children.

Following the modification hearing in January 2009, the district court found there had been a material change of circumstances not contemplated by the court which entered the decree of dissolution. Accordingly, the court awarded physical care of the children to Brett. As the court explained:

[T]he Court is most concerned with the fact that the children are being left alone too much by Bonni . . . . [T]he level of care and attention given by their mother has deteriorated since the entry of the decree and is not in their best interest.

Bonni appeals.

## **II. ANALYSIS.**

We review an order modifying the custodial terms of a decree de novo. Iowa R. App. P. 6.907 (2009). We give weight to the factual findings of the district court but are not bound by them. Iowa R. App. 6.904(3)(g). Our overriding consideration is the best interests of the children. Iowa R. App. P. 6.904(3)(o); *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

Modification is appropriate only when there has been a material and substantial change of circumstances since the time of the decree that was not

contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the children. *Id.* The applicant also must carry the heavy burden of showing an ability to offer superior care. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). “[O]nce custody of children has been fixed it should be disturbed only for the most cogent reasons.” *Frederici*, 338 N.W.2d at 158.

We review this case with some sympathy for the views of the district court. As Bonni concedes in her appellate brief, she is “not without fault in this matter,” both for leaving her children alone and for not making contact in a timely manner with the guardian ad litem. However, on our de novo review, we do not believe the best interests of the children would be served by modifying physical care.

Overall, for the last ten years the children have flourished in Bonni’s care. They are well-adjusted and are doing well in school. They participate in numerous activities. Meanwhile, Bonni has held full-time outside employment, and established a home for her children at her own expense. Brett lives in the basement of his parents’ home, has not had to pay a mortgage or rent, and has had only very modest paying jobs working for his father.

According to Brett, the problems that led to his filing the petition for modification started in spring of 2007, and lasted for a couple of months. Then, after Brett expressed his concerns to Bonni, he admits that things got better for a while, but in spring of 2008 the problems resumed. A diary entitled “Mom’s Gone” and prepared by the daughter at Brett’s request documented approximately ten instances in October/November 2008 where Bonni left her

twelve-year-old children alone at the house for periods of time, often coming back home early in the morning, long after the children would have been asleep.

We agree with the district court that Bonni's recent conduct is not a model of good parenting. However, we do not believe that the change of circumstances here has been sufficiently material or permanent to warrant transfer of physical care to Brett.<sup>3</sup> For the last ten years, Bonni has done a good job of helping the children get to where they are now. Bonni's recent behavior needs to be placed in that context. As Bonni's mother testified:

I remember being 12 and thinking, you know, lots of times things would be a lot better somewhere else and being upset with my mom and thinking, well, if I lived such and such, I'd be able to do that.

At the same time, we do not believe that Brett has demonstrated the ability to provide superior care. The children would be moving into the basement of Brett's parents' home. For a number of years, Brett has depended on his parents to support him, and it appears that his plan for the children would also require his parents' ongoing support and involvement.

For the foregoing reasons, we reverse the district court's order modifying the original decree that awarded physical care of the children to Bonni. We remand for further proceedings in accordance with this opinion.

**REVERSED AND REMANDED.**

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<sup>3</sup> We emphasize that this decision, like other custody cases, turns on its own peculiar facts. See *In re Marriage of Melton*, 256 N.W.2d 200, 205 (Iowa 1977).