IN THE SUPREME COURT OF IOWA

CASE NO. 22-0686

IN RE: THE MARRIAGE OF MARY C. STREICHER AND SHANNON L. FRAZIER

MARY C. FRAZIER,
n/k/a MARY C. STREICHER,
Petitioner-Appellant

v.

SHANNON L. FRAZIER,

Respondent-Appellee.

APPEAL FROM THE COURT OF APPEALS DECISION
DATED JUNE 21, 2023
(J. Schumacher dissenting)

APPLICATION FOR FURTHER REVIEW

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QUESTION PRESENTED FOR FURTHER REVIEW

DOES IOWA CODE CHAPTER 598 AUTHORIZE THE COURT TO ACT AS A "JUDICIAL TIEBREAKER" FOR PARENTS HAVING JOINT LEGAL CUSTODY OF MINOR CHILDREN?

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STATEMENT SUPPORTING FURTHER REVIEW

This Application for Further Review is from a Court of Appeals decision on June 21, 2023 (J. Schumacher dissenting) (the "Decision"). On this question of first impression the Court of Appeals erroneously ignored the text of the statute and created an entirely new cause of action under Iowa Code Chapter 598, allowing the court to act as a post-divorce decree "judicial tiebreaker" for the parents of minor children who disagree about joint legal custody matters requiring their "equal participation" under Iowa Code § 598.1(3) and § 598.41(5)(b). Mary and Shannon were divorced in 2014. The Court of Appeals allows Mary to reopen their divorce without filing a petition for modification or proving a substantial change in circumstances.

No such cause of action exists, has ever existed, or should exist, because it interferes with divorced parents' rights specifically and exclusively reserved to the parents (not the court) by the Iowa Legislature. In creating this entirely new cause of action, the Court of Appeals ignored the actual text of the statute and relies upon *dictum* from an entirely unrelated Iowa Supreme Court case, *Harder v. Anderson*, 764 N.W.2d 534, 538 (Iowa 2009), taken completely out of context, in a way never intended by the Legislature nor this Court.

Secondly, the Court of Appeals completely failed to address the decisive and fatal procedural question of whether Mary properly invoked the

jurisdiction of the district court by filing a petition, as required by Iowa R. Civ. P. 1.301(1). Mary filed a document entitled "Application for Determination" which Mary admits is not a petition nor a pleading. Based on the clear language of Rule 1.301(1) requiring the filing of a petition to commence a new civil case, Mary failed to invoke the district court's authority to decide this case.

This case warrants further review under Rule 6.1103(1)(b)(1) and (2) as follows:

1. The Decision conflicts with prior Court of Appeals' decisions on an important matter concerning the unbundling of parental rights reserved by the Iowa Legislature exclusively and equally to divorced parents holding joint legal custody. See *Armstrong v. Curtis*, 2021 WL 210965, at *3 (Iowa App. 2021) (stating that "joint custody is an all or nothing proposition"); *In Re Marriage of Comstock*, 2021 WL 1016601, at *2 (Iowa App. 2021) (reversing a temporary order unbundling parent rights by giving one parent "tiebreaking" authority over joint parental rights); *In Re Marriage of Sokol*, 2022 WL 3440256, at *3 (Iowa App. 2022) (prohibiting unbundled joint legal custody parental rights) (affirmed on unbundling but reversed on alimony award, *In Re Marriage of Sokol*, 985 N.W.2d 177, 182 (Iowa 2023)).

2. The Decision conflicts with prior Court of Appeals' decisions regarding creation of new causes of action by failing to leave the decision to the Iowa Legislature or the Iowa Supreme Court. See *Brooks v. Brooks*, 2004 WL 240207, at *2 (Iowa App. 2004) ("We leave it up to the legislature or our supreme court to establish new causes of action event when they appear to have merit"); *Moses v. Rosol*, 2019 WL 2145709, at *6 (Iowa App. 2019) ("Under the appellate rules, cases are transferred to the court of appeals for application of exiting legal principles or if they are appropriate for summary disposition. As we have found, it is not for our court to change existing legal principles.") (citations omitted); *Rinker v Wilson*, 623 N.W.2d 220, 227 (Iowa App. 2000) ("We leave it up to the legislature and/or our supreme court to establish rules regarding the use of "Doe" plaintiff petitions in the courts of this state); and

3. The Decision raises an important question of law has not been, but should be, settled by the Iowa Supreme Court, concerning whether parental rights granted pursuant to joint legal custody and reserved exclusively to the parents by the Legislature can be second-guessed by a court acting as a "judicial tiebreaker". Mary has skirted the requirement to file a petition for modification and prove a substantial change in circumstances. The policy implications are obvious.

The Court should grant further review to reverse the Court of Appeals and affirm the decision of the district court dismissing Mary's Application for Determination.

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION BECAUSE MARY FAILED TO FILE A PETITION OR PAY A FILING FEE TO COMMENCE A NEW CIVIL ACTION.

The Court of Appeals completely failed to address the decisive and fatal procedural decision made by the district court, holding that Mary had not invoked the jurisdiction of the court by filing a petition for modification. Iowa R. Civ. P. 1.301 unambiguously states, "For all purposes, a civil action is commenced by filing a petition with the court." (Emphasis added). Nothing could be clearer. Here, no petition was filed by Mary; rather, she filed a document titled "Application for Determination," which Mary admits is not a petition or even a pleading. See Iowa R. Civ. P. 1.401 (Allowable Pleadings). Further, Iowa Code § 602.8105(1) requires every party filing a petition to pay the applicable filing fee. Mary did not pay the filing fee necessary to invoke the jurisdiction of the court, thus her Application must be dismissed on procedural grounds.

Without requiring a petition for modification, Mary is able to skirt the requirement to prove a substantial change in circumstances to modify custody

arrangements, as would be her burden of proof. *In re Marriage of Mikelson,* 299 N.W.2d 670, 671 (Iowa 1980) (circumstances must have "materially and substantially changed" since the decree); *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa 1985) (petitions "bears the burden of proving a change of circumstances to justify modification of the decree"). The Court of Appeals ignores the lack of a petition for modification and confusingly discusses the court's inherent jurisdiction involving the custody of minor children. (Decision, p. 5). Shannon is not arguing the court lacks subject matter jurisdiction over a petition for modification, but rather that Mary has not properly invoked that jurisdiction by commencing a civil action by filing a petition for modification and paying the required filing fee. As this Court explained in *Christy v. Rolscreen*:

> The issue here is not whether the district court lacks subject matter jurisdiction. Rather the issue is whether the court lacked authority to hear the two cases. Subject matter jurisdiction refers to 'the authority of a court to hear and determine cases of the general class to which the proceedings in question belong, not merely the particular case then occupying the court's attention.' *Wederath v. Brant*, 287 N.W.2d 591, 594 (Iowa 1980). Clearly, here, the district court had subject matter jurisdiction . . .
>
> A court may have subject matter jurisdiction for one reason or another may not be able to entertain the particular case. In such a situation we say the court lacks authority to hear that particular case. Sometimes we have referred to a "lack of authority to hear the particular case" as a lack of jurisdiction. See, e.g., *City of Des Moines v. Des Moines Police Bargaining Unit*, 360 N.W.2d 729, 730 (Iowa 1985).

448 N.W.2d 447, 450 (Iowa 1989). The Court of Appeals erroneously concludes that "the district court should consider the dispute as an additional determination *within the original dissolution proceedings*" (Decision, p. 4) (emphasis added). Without requiring a petition for modification the Court of Appeals pretends that Mary's and Shannon's divorce case was never closed, the their decree was never final, and the district court could consider entirely new matters never raised in the original divorce case acting as some sort of super-parent under the guise of a judicial tiebreaker. The Court of Appeals chose not to consider Rules 1.1012 and 1.1013 or Chapter 598 concerning modifying final divorce judgements in its rush to its conclusion.

Because Mary failed to file a petition for modification and pay the required filing fee to commence a civil action, there is nothing for the court to decide and the Court of Appeals should have affirmed the decision of the district court and dismissed Mary's Application for Determination for failing to follow the procedural requirements to commence a new civil action.

II. IOWA LAW DOES NOT RECOGNIZE A CAUSE OF ACTION FOR A SUPER-PARENT JUDICIAL TIEBREAKER UNDER IOWA CODE IOWA CODE §598.1(3) AND §598.41(5)(B).

Iowa Code § 598.1 provides:

> *"Joint custody"* or *"joint legal custody"* means an award of legal custody of a minor child to both parents jointly under which both

> parents have legal custodial rights and responsibilities toward the child and under which neither parent has legal custodial rights superior to those of the other parent. Rights and responsibilities of joint legal custody include but are not limited to equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

Iowa Code § 598.1(3) (emphasis added).

> Iowa Code §598.41 provides:
>
> If joint physical care is not awarded under paragraph *"a"*, and only one joint custodial parent is awarded physical care, the parent responsible for providing physical care shall support the other parent's relationship with the child. Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child. Rights and responsibilities as joint legal custodian of the child include but are not limited to equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

Iowa Code §598.41(5)(b) (emphasis added). Nowhere did the Legislature add the words "*but if the parents disagree about these rights, the court can act as a judicial tiebreaker.*" The Court of Appeals found something nobody had noticed before hidden within Chapter 598 and created an entirely new cause of action entitled something like "*Judicial Tiebreaking When Divorced Parents Disagree About Reserved Joint Legal Custody Parental Rights.*" [1]

[1] The Court of Appeals brushes aside the very real concern of a flood new cases by dissatisfied parents on every imaginable subject from teen dating to religion, nor does it even consider how a court could possibly decide these cases acting in its capacity as a super-parent.

In a stunning departure from Iowa legal precedent, the Court of Appeals (1) failed to examine the actual text of Chapter 598 to determine if such a cause of action exists; (2) failed to follow its own precedent leaving it to the Legislature or the Iowa Supreme Court to establish new causes of action even when they appear to have merit; and (3) failed to analyze whether a new cause of action should be recognized under factors established by the Iowa Supreme Court.

First and foremost, the Court of Appeals is simply wrong when it stated that "[o]ur Supreme Court recognized the judiciary's tiebreaking authority in *Harder v. Anderson*, 764 N.W.2d 534, 538 (Iowa 2009): 'When joint legal custodians have a genuine disagreement concerning a course of treatment effecting a child's medical care, the court must step in as an objective arbiter, and decide the dispute by considering what is in the best interest of the child.] (Decision, p. 3). The quoted *dictum* from *Harder* recalls the idiom *loose lips sink ships*.

Harder has absolutely nothing to do with joint legal custody parental disputes or judicial tiebreaking. *Harder* involved a claim by one parent against a third-party social worker seeking access to her child's therapy records under an entirely different statute, Iowa Code § 598.41(1)(e). *Harder* even recognized that parents with joint legal custody "have the right to equally

participate in decisions effecting a child's medical care" under Iowa Code § 598.1(3). See *Harder*, 764 N.W.2d at 538. The *dictum* from *Harder* quoted by the Court of Appeals was paraphrased by this court from a New Jersey divorce appeal concerning the initial custody and child support in a divorce case. See *Id.* (citing *Pascale v. Pascale*, 140 NJ 583, 660 A.2d 485, 494 (1995)). Neither *Harder* nor *Pascale* involved a post-decree disagreement about joint legal custody parental rights or the judicial tiebreaking of such a disagreement. The quoted language from *Harder* is pure *dictum* and is not binding precedent.[2]

This court must make clear that *Harder* does not stand for the proposition that Iowa has created a "judicial tiebreaker" as a new cause of action under Chapter 598. There is no appellate decision in Iowa that recognizes judicial tiebreaking authority in a post-divorce decree parental dispute outside of the context of a properly filed petition for modification. The reason for this is simple, no such cause of action exists under Iowa law.[3]

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[2] *Boyles v. Cora*, 6 N.W.2d 401, 413 (1942) (defining dictum as "passing expressions of the court, wholly unnecessary to decision of the matters before the court").

[3] Every case cited by Mary in her briefs or by the Court of Appeals involves either an initial divorce petition or a subsequent petition for modification. None involve a post-divorce decree dispute concerning joint legal custody parental rights without a petition for modification. See *In re Marriage of Comstock*, 2021 WL 1016601, *2 (Iowa App. 2021); *In re Marriage of Bakk*, 2013 WL 5962991, *2 (Iowa App. 2013); *Gaswint v. Robinson*, 2013 WL

Further, the Court of Appeals determined that the original divorce case remains open:

> Parents cannot conceive of every possible disagreement they may encounter and settle it during the initial custody proceedings. Nor will every dispute arise to the requisite change in circumstances to warrant modification. . . . Under these circumstances, the district court should consider the dispute an additional determination within the original dissolution proceedings.

(Decision, p. 4). Thus, the Court of Appeals concludes that no divorce case is ever final and a dissatisfied parent can, at any time years or decades later (in the case nearly 10 years), apply to the court and request judicial tiebreaking about joint legal custody parental rights. The Court of Appeals is saying that divorced parents are never able to exercise their joint parental rights without fear of second-guessing by a court acting as some sort of super-parent. According to the Court of Appeals, this divorce case remains open forever, even though the decree was final and the case was closed in 2014, nine years ago. Any dissatisfied parent can simply file an Application for Determination and, presto, the court will hear the claim without a petition for modification, a filing fee or proof of a "change of circumstances so as to justify a modification of the decree." *In re Marriage of Jerome*, at 305.

4504879, *5 (Iowa App. 2013); *In re Marriage of Laird*, 2012 WL 1449625, *2 (Iowa App. 2012).

Iowa R. Civ. P 1.1012 and 1.1013 and Chapter 598 provide applicable procedures for modifying a final judgment in a divorce case. The cases cited by the Court of Appeals provide no help. See *In Re Marriage of Teepe*, 271 N.W.2d 740 (Iowa 1978) (allowed reopening of the original divorce proceeding when a subsequent child was born because neither party was aware of the pregnancy); *In Re Marriage of Smith*, 269 N.W.2d 406, 408 (Iowa 1978) (allowing ongoing divorce proceedings to determine the permanent custody of a child with a third-party). Neither of these cases involved a post-decree parental joint legal custody dispute with the court acting as a tiebreaker and are not applicable to this matter.

Examining the relevant statutes leads to the inescapable conclusion that this case must be dismissed. In Iowa, divorce law is purely statutory. See *Clough v. Clough*, 84 N.W.2d 16, 17 (Iowa 1957); *Elliott v. Elliott*, 147 N.W.2d 907, 909 (Iowa 1967); *Bitner v. Bitner*, 176 N.W.2d 162, 164 (Iowa 1970). Thus, there is no common law of divorce since it is purely a legislative creation, and the Court is compelled to follow the policies established by the Legislature regardless of whether the court believes the matter has merit.

Joint legal custody is defined under Iowa Code § 598.1(3) and Iowa Code § 598.41(5)(b). The Legislature has determined that certain changed circumstances may be considered a substantial change in circumstances. Iowa

Code § 598.21D (relocation 150 miles away) and § 598.41A (conviction of a sex crime). Otherwise, the petitioner must prove a substantial change in circumstances to justify the modification the custody provisions of the original decree. *In re Marriage of Harris*, 877 N.W.2d 434, 440 (Iowa 2016) ("A party seeking modification of a dissolution decree must prove by a preponderance of the evidence a substantial change in circumstances occurred after the decree was entered"). By allowing Mary to skirt the requirements for modification, she is not required to prove anything, other than there is a disagreement about reserved parental rights. Nowhere in Chapter 598 did the Legislature provide that the court may act as a judicial tiebreaker to resolve a disagreements concerning joint legal custody parental rights without a change in the joint legal custody after proving a substantial change in circumstances. In fact, the Legislature stated just the opposite, giving each parent the right to "equal participation" and stating explicitly that "Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child" Iowa Code 598.41(5)(b). The goal of statutory construction is to determine legislative intent. *State v. Dohlman*, 725 N.W.2d 428, 431 (Iowa 2006). The court determines legislative intent from the words chosen by the Legislature. *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016).

Further, the Court of Appeals has previously held that the reserved parental rights under joint legal custody cannot be "unbundled" and are "all or nothing." *Kocinski v. Christiansen*, 2021 WL5106051, at *4 (Iowa App. 2021); *Armstrong v. Curtis*, 2021 WL210965, at *3 (Iowa App. 2021) (considering but not deciding the propriety of unbundling joint legal custody rights); *In Re Marriage of Comstock*, 2021 WL1016601, at *2 (Iowa App. 2021) (rejecting temporary order for unbundling parental rights); *In Re Marriage of Sokol*, 2022 WL3440256 (Iowa App 2022) (rejecting unbundled parental rights when both parents are joint legal custodians) (affirmed as to unbundled parental rights but reversed on alimony, *In Re Marriage of Sokol*, 965 N.W.2d 177, 182 (Iowa 2023)).

It is clear that the Legislature intended both parents to have equal rights and responsibilities with regard to joint legal custody of their children's legal status, medical care, education, extracurricular activities and religious instruction. The statue does not state or even imply that a court can act as a judicial tiebreaker outside the context of a petition for divorce or a subsequent petition for modification.[4] It is the Legislature's prerogative to make policy decisions and "[it] is not the role of [the] court to alter a statutory requirement

[4] Shannon acknowledges the court might consider the reserved parental rights in the context of a petition for divorce or subsequent petition for modification a part of awarding custody of the children.

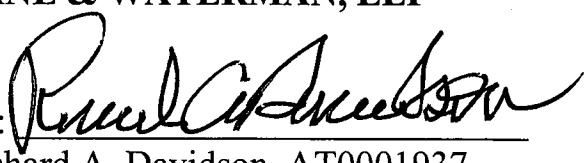
in order to effect policy considerations that are vested in the Legislature." *In Re Marriage of Thatcher*, 864 N.W.2d 523, 544 (Iowa 2015) (quoting *Kakinami v. Kakinami*, 260 P.3rd 1126, 1132-33 (Hawaii 2011)). As frustrating as it may be, disagreeing parents were instructed by the Legislature to work matters out between themselves, just like parents who were never married, or who are still married. What the Court of Appeals has done here is, in essence, restrict equal parental rights for divorced parents while preserving equal rights for unmarried parents or married parents.

Courts do not offer remedies to all matters in life and the courts are not authorized to create new judicial remedies under the guise interpreting the statutory causes of action created by the Legislature in Chapter 598. As this Court noted in *Shumate v. Drake University*, when considering whether a statute creates a cause of action, legislative intent remains the ultimate issue and, unless legislative intent can be inferred from the language of the statute, a cause of action simply does not exist. 846 N.W.2d 503, 509 (Iowa 2014) *Id. (*quoting *Thompson v. Thompson*, 484 U.S. 174, 179 (1988)). If the Legislature did not intend to create a cause of action under Chapter 598 then "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 510 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)). It is perfectly clear that the

Legislature created two, and only two, causes of action under Chapter 598, namely (1) a petition for dissolution of marriage; and (2) petition for modification. If the Legislature thought it was necessary to create another cause of action under Chapter 598, it would have done so. Policy decisions are the prerogative of the Legislature for good reason, they are elected by the people to act as their representatives. By granting Mary's Application for Determination, the Court of Appeals has not only usurped the Legislature's prerogative to make policy, but also the parents' prerogative to decide certain matters for their children without impermissible interference from the Court.

Respectfully submitted,

LANE & WATERMAN, LLP

By: 

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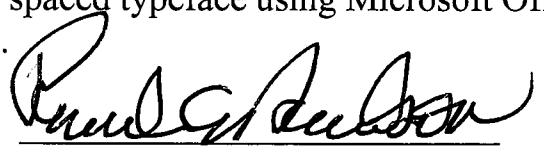
CERTIFICATE OF COMPLIANCE

This Application for Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Application for Further Review contains 4,047 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Application for Further Review complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Application for Further Review has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 point Times New Roman.

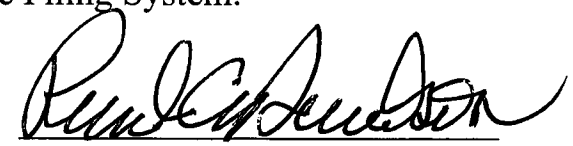


Richard A. Davidson

CERTIFICATE OF SERVICE AND FILING

I certify that on July 10, 2023, I filed Appellee's Application for Further Review with the Clerk of the Appellate Court by electronically filing the document through the EDMS Electronic Filing System.

I further certify that on July 10, 2023, I served Appellee's Application for Further Review on the Appellant by electronically serving Appellant's counsel through the EDMS Electronic Filing System.



Richard A. Davidson

IN THE COURT OF APPEALS OF IOWA

No. 22-0686
Filed June 21, 2023

IN RE THE MARRIAGE OF MARY C. FRAZIER AND SHANNON L. FRAZIER

Upon the Petition of
MARY C. FRAZIER, n/k/a MARY C. STREICHER,
Petitioner-Appellant,

And Concerning
SHANNON L. FRAZIER,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, John Telleen, Judge.

A parent appeals the denial of an application for vaccination determination.

REVERSED AND REMANDED.

Jacob R. Koller and Ryan C. Shellady of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for appellant.

Richard A. Davidson of Lane & Waterman LLP, Davenport, for appellee.

Heard by Tabor, P.J., and Schumacher and Chicchelly, JJ.

CHICCHELLY, Judge.

Mary Streicher, formerly known as Mary Frazier, appeals the district court's order dismissing her application for vaccination determination. Citing an impasse with her ex-husband, Mary requested the court decide whether their children should be vaccinated against COVID-19. The district court held it did not have jurisdiction to resolve a post-decree dispute between joint legal custodians absent a petition for modification. However, Iowa Code section 598.1(3) (2022) defines "joint legal custody" to mean that "neither parent has legal custodial rights superior to those of the other parent." To give effect to this statute, it is necessary for the court to break the occasional impasse between joint legal custodians and decide matters under the custodial umbrella.[1] When the parties' dissolution or other relevant decree does not address the issue, an application like Mary's is the appropriate vehicle to request the court's tie-breaking intervention. Accordingly, we reverse and remand with instructions that the district court hear Mary's application on the merits and make a determination consistent with the children's best interests.

Mary and Shannon Frazier divorced in 2014. At the time of their dissolution, the district court granted the parents joint legal custody of their two children. Mary was awarded physical care. The decree required the parents to attend mediation prior to initiating court proceedings should a conflict arise. Following an unsuccessful mediation, Mary filed an "Application for Vaccination Determination" on January 31, 2022. Shannon filed a resistance to the application, arguing that (1) Mary failed to properly invoke the district court's jurisdiction because she did not petition to modify the dissolution decree

[1] Under Iowa Code section 598.1(3), this would include "decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction."

and (2) the court lacks tie-breaking authority. The district court agreed with Shannon and denied the application. Mary filed a timely appeal, which we review de novo. *See* Iowa R. App. P. 6.907 ("Review in equity cases shall be de novo.").

Our supreme court recognized the judiciary's tie-breaking authority in *Harder v. Anderson*, 764 N.W.2d 534, 538 (Iowa 2009): "When joint legal custodians have a genuine disagreement concerning a course of treatment affecting a child's medical care, the court must step in as an objective arbiter, and decide the dispute by considering what is in the best interest of the child." We have held this authority extends beyond medical care. *See, e.g.*, *In re Marriage of Bakk*, No. 12-1936, 2013 WL 5962991, at *2 (Iowa Ct. App. Nov. 6, 2013) ("Our supreme court has previously held the courts must step in as arbiter when joint custodians disagree on issues with the care of a child. We find educational decisions fall within this category." (internal citation omitted)).

Despite the apparent consensus as to the court's tie-breaking authority during the original dissolution or custody proceeding, and appeals therefrom, the case before us begs the question whether the court subsequently has such authority. Shannon argues that any later tie-breaking authority is limited to petitions for modification. But in modification actions, is the court truly serving in a tie-breaking capacity? For purposes of modification, the court's inquiry is different because it first must determine whether the circumstances "have so materially and substantially changed that the children's best interests make it expedient to make the requested change." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

Moreover, what is there to modify in cases like these? *See Hemesath v. Bricker*, No. 09-1064, 2010 WL 446990, at *4 (Iowa Ct. App Feb. 10, 2010) ("Although we accept

our role as a final arbiter in disputes between legal custodians, when the decree does not address the issue in dispute, a modification action is not the appropriate vehicle to address the issue."). The parties' decree does not address vaccinations. Mary does not request a change to the award of joint legal custody or ask that the parties' decision-making authority be unbundled—nor may she. *See In re Marriage of Makela*, 987 N.W.2d 467, 471 (Iowa Ct. App. 2022) (concluding "the statutory definition of 'joint legal custody' leaves no room for a parceling of rights").

Parents cannot possibly conceive of every possible disagreement they may encounter and settle it during the initial custody proceedings. Nor will every dispute arise from the requisite change in circumstances to warrant modification. In *Vogt v. Hermanson*, No. 17-0303, 2017 WL 2875697, at *2 (Iowa Ct. App. July 6, 2017), a panel of our court concluded a child should remain in the school district stipulated by the parents' decree because the party requesting modification failed to prove a material change in circumstances. What if the decree had not named a school district? Our courts still find it necessary to resolve such deadlocks. *See Hemesath*, 2010 WL 446990, at *4 (determining that although modifying the decree was inappropriate, it was necessary to consider the issue of school determination). Under these circumstances, the district court should consider the dispute an additional determination within the original dissolution proceedings. *See In re Marriage of Teepe*, 271 N.W.2d 740, 742 (Iowa 1978) (concluding the court properly considered the parties' custody dispute to be within their original dissolution proceeding because the wife was pregnant and unaware of it at the time of the dissolution); *In re Marriage of Smith*, 269 N.W.2d 406, 408 (Iowa 1978) (treating custody action as incident to original dissolution proceeding rather than a modification).

Further support for settling this dispute outside the realm of modification stems from the court's general equity powers described by Justice Carter's special concurrence in *In re Quirk*, 504 N.W.2d 879, 882 (Iowa 1993):

> The question that the present case really presents is how a legal challenge to such unilateral action is to be mounted. . . . On further reflection, I submit that the correct view should be that the authority of a court to referee disputes over the initial naming of a child, in which the parents cannot agree, is found among the court's general equity powers. While those powers may be properly exercised in a pending dissolution action to resolve a then current dispute over a child's original name, there is no reason why they may not also be exercised in an independent action brought for the single purpose of resolving an original naming dispute. . . . It is not necessary nor legally appropriate for this court to suggest that this issue be settled by filing a modification petition in the now final dissolution action. There is no provision concerning the child's name in the original decree to modify. Nor does the matter of a change of circumstances since the original decree (the *sine qua non* for success in a modification action) have anything to do with the issues of naming the child. This is an original issue that has not before been ruled on.

Similarly, our supreme court has recognized "that a court of equity has inherent power and jurisdiction in all proceedings involving the custody of minor children, and, that in exercising that power and jurisdiction i[t] acts in the capacity of parens patriae, as a department and agency of the State." *Helton v. Crawley*, 41 N.W.2d 60, 71 (Iowa 1950).

Shannon argues that permitting applications like Mary's will result in a flooding of joint custody disputes in the courts. He points out that disputes could range from choosing a religion to participation in extracurricular activities. However, this concern is more appropriately a matter of public policy to be taken up with the legislature. And in the event the relationship between joint legal custodians becomes too contentious, courts can and will determine when it is appropriate to modify the arrangement and award sole legal custody. *See In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996) (concluding

parties' inability to cooperate warranted modification from joint to sole legal custody). Furthermore,

> [m]ost litigants in dissolution proceedings do not want the court to micromanage their lives, nor does any judicial officer wish to invade such parental decision[-]making issues. Nevertheless, if the parents have reached impasse, the final arbiter is the court, not the physical caretaker. To conclude otherwise would result in the abdication of the other joint legal custodian's right to "equal participation" in such decisions.

Gaswint v. Robinson, No. 12-2149, 2013 WL 4504879, at *5 (Iowa Ct. App. Aug. 21, 2013).

Prohibiting applications like Mary's effectively gives greater authority to the road-blocking party in any custodial dispute. It further encourages contempt proceedings, which are of no assistance in the actual making of the decision and do not protect the parents' equal rights or the children's best interests. *See In re Marriage of Rigdon*, No. 19-1497, 2020 WL 7868234, at *2 (Iowa Ct. App. Dec. 16, 2020) (Ahlers, J., specially concurring) ("The quasi-criminal nature of contempt actions, with the corresponding burden of proof being beyond a reasonable doubt, may raise the bar too high to give meaningful protection to the joint custody rights of the parent who does not have physical care of the child."). The court's tie-breaking authority is necessary to fulfill the "equal participation" mandate set forth in Iowa Code section 598.1(3). Applications for determination of issues undecided by the original dissolution or custody proceeding are an appropriate and necessary vehicle to invoke the court's tie-breaking authority. Mary properly invoked this authority. Therefore, we reverse and remand with instructions that the district court hear Mary's application on the merits and make a determination consistent with the children's best interests.

REVERSED AND REMANDED.

Tabor, P.J., concurs; Schumacher, J., dissents.

SCHUMACHER, Judge (dissenting).

In oral argument, counsel for Mary framed this case as follows:

> From a fact specific perspective this case is about the COVID vaccine. But this isn't really a case about the COVID vaccine. It's much bigger than that. It's about whether the court has the ability to decide disputes between divorced parents as joint legal custodians when they have a dispute concerning a child's legal status, medical care, education, extra-curricular activities, or religious instruction.

I respectfully dissent from the majority opinion that holds that a modification petition is not required under these facts.

First, a determination must be made as to whether Mary properly invoked the district court's jurisdiction by filing what she captioned as an "Application for Vaccination Determination." On this record, I would conclude she failed to do so. District courts have original jurisdiction of the subject matter of Iowa Code chapter 598 (2022). *See* Iowa Code § 598.2. However, "[t]he issue here is not whether the district court lacked subject matter jurisdiction. Rather the issue is whether the court lacked authority to hear" the case. *See Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989). While often confused, the concepts have important distinctions. "Subject matter jurisdiction refers to 'the authority of the court to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* (citation omitted). In contrast, the authority of the court focuses on the ability of the court to decide a particular case. *Id.* That authority can be derived by following statutory procedures. *Id.* "A party who ignores one or more of the procedures does not invoke [the court's] authority." *Id.*

While the district court had subject matter jurisdiction of the claim, Mary failed to invoke the court's authority. "For all purposes, a civil action is commenced by filing a

petition with the court." Iowa R. Civ. P. 1.301(1) (emphasis added). Mary did not petition for modification, but filed an application for determination.[2]

While Mary cites a few examples of such applications being used, none of them involved an actual dispute concerning the validity of instituting a proceeding on the basis of an application for determination rather than a petition for modification. *See, e.g.*, *In re Marriage of Jacobs*, No. 16-2005, 2017 WL 5185435, at *1 (Iowa Ct. App. Nov. 8, 2017) (noting an application for determination was used to modify a child support obligation to a postsecondary education subsidy four years prior to the instant action); *In re Marriage of Bieber*, No. 10-1273, 2011 WL 1136273, at *1 (Iowa Ct. App. Mar. 30, 2011) (treating an "application for determination of school district" as a petition to modify physical care); *In re Marriage of Beal*, No. 05-0636, 2006 WL 1279054, at *1 (Iowa Ct. App. May 10, 2006) (observing the parents had instituted two applications for determination in prior proceedings). Based on the clear language of rule 1.301, Mary failed to properly invoke the district court's authority to decide the case.

The parents also disagree on whether they reserved the district court's authority in their dissolution decree. I would determine they did not. While frowned upon, "[i]n some circumstances, a district court can reserve jurisdiction to modify the custodial provisions of the decree in the absence of proof of a material and substantial change in circumstances." *In re Marriage of Hute*, No. 17-0046, 2017 WL 3283382, at *1–2 (Iowa

[2] Counsel for Mary argues that the filing of an application for the court to act as a tie-breaker is a common practice. Counsel for Shannon argues it is not common and not permitted by statute, and that the remedy is to modify the rights of the parents once legal custodial status has been established. The oral arguments highlight the lack of uniformity across the judicial districts on this issue, at least between these two neighboring districts, judicial districts six and seven.

Ct. App. Aug. 2, 2017). "To effectively reserve jurisdiction, the decree must explicitly provide the parties are relieved of the burden to show a material and substantial change in circumstance as a prerequisite to modification of the custodial provisions of the decree." *Id.* at *2. Such language is lacking in the parties' decree. Instead, the decree merely notes that the parties must engage in mediation prior to beginning legal proceedings. The decree thus did not reserve jurisdiction for the district court.

Finally, Mary claims that the district court's determination that the court lacked jurisdiction undermines case law that commands district courts to act as the final arbiter in certain matters when joint-legal custodians come to an impasse. *See, e.g.*, *Harder v. Anderson*, 764 N.W.2d 534, 538 (Iowa 2009). The majority has joined in this rationale. But Shannon asserted in oral arguments that the language in *Harder* is dicta, as that case involved a request for injunctive relief. Shannon highlights, by allowing parents to file these applications without a petition to modify custody, a district court is placed in a position to decide issues ordinarily left to joint custodians, such as which religion a child should be raised in, or whether a child will participate in sports.

Since *Harder*, this court has repeatedly noted district courts cannot unbundle custodial rights between the parents by allowing one joint-custodian more power over certain matters than the other. *See, e.g.*, *Armstrong v. Curtis*, No. 20-0632, 2021 WL 210965, at *3 (Iowa Ct. App. Jan. 21, 2021) (collecting cases and noting that "joint custody and sole custody [are] all-or-nothing propositions"); *see also In re Marriage of Comstock*, No. 20-1205, 2021 WL 1016601, at *2 (Iowa Ct. App. Mar. 17, 2021) (reversing a temporary order following the filing of a petition for modification that gave the parent with physical care "tie-breaking" authority).

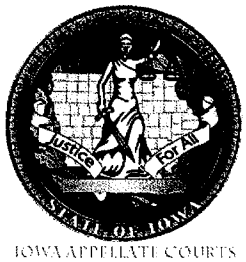
And our supreme court recently endorsed the determination that custodial rights cannot be unbundled, upholding a decision on custody by this court that reversed a provision in a dissolution decree because it granted one joint-custodian final decision-making authority over the rights of the other joint-custodian. *See In re Marriage of Sokol*, 985 N.W.2d 177, 182 (Iowa 2023) (affirming as to the court of appeals's decision on joint custody, but reversing as to the court's alimony determination). While not framed as a request to unbundle, Mary is asking the court to override Shannon's opposition to the COVID vaccine. In the original decree, the parties were granted joint legal custody, which would include medical decisions. While the majority opinion asserts vaccinations were not addressed in the decree, joint legal custody concerning medical decisions would appear to cover this issue.

Shannon asserts that by making a ruling on the merits, the court would effectively be depriving one parent joint-decision-making authority on the matter. Even putting that issue aside, the district court's authority must still be properly invoked. As the district court noted,

> All the cases cited [by Mary] involved situations where the court was forced to step in to decide a dispute concerning things such as schooling or medical care in situations where the parties were properly before the court on either a trial of the initial dissolution action or through an application for modification of the decree. We have neither here.

Mary did not seek to modify the legal custodial status. And she does not allege a material and substantial change since the entry of the decree in her application. Mary's application can be read as a request to unbundle a medical decision from the joint legal custodial status. And to the extent Mary did not petition for modification, her application

for determination failed to invoke the district court's authority. Accordingly, I would affirm the district court dismissal.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
22-0686	In re Marriage of Frazier

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IN THE IOWA DISTRICT COURT FOR CLINTON COUNTY

MARY CATHERINE FRAZIER Petitioner, vs. SHANNON LEO FRAZIER Respondent.	Case No: 07231 CDCV040786 **ORDER** **Denying Petitioner's Application for Vaccination Determination**

The Court has carefully considered the Petitioner's Application for Vaccination Determination and Respondent's Resistance. The issue before the Court is not whether the parties child should or should not be vaccinated but whether the Court at this juncture has any jurisdiction to make this determination in the absence of a Petition for Modification. The Decree clearly gives the parties joint legal custody. As such, until that provision of the decree has been modified, each party has the right to equal participation in decisions concerning medical care. No application for modification of the decree has been filed. All the case cited in Petitioner's Brief involved situations where the court was forced to step in to decide a dispute concerning things such as schooling or medical care in situations where the parties were properly before the court on either a trial of the initial dissolution action or through an application for modification of the decree. We have neither here. The Court adopts the reasoning in Respondent's Brief in Resistance to Application for Vaccination Determination and concludes it is without jurisdiction to resolve this dispute.

Nothing is this decision should be read to express any opinion on the merits of vaccination of children. Indeed, as one who is fully vaccinated and boosted, if the Court was making the decision for his own child, the Court would choose vaccination. But unless and until the present Decree's language providing for joint legal custody is changed after a trial, the Court is without authority to step into this dispute.

It is Ordered that Petitioner's Application for Vaccination Determination is denied.

ALL ABOVE IS SO ORDERED this 18th day of April, 2022.

Clerk to notify all self-represented litigants and attorneys of record.

State of Iowa Courts

Case Number	**Case Title**
CDCV040786	FRAZIER, MARY C VS FRAZIER, SHANNON
Type:	OTHER ORDER

So Ordered

John Telleen, District Court Judge,
Seventh Judicial District of Iowa

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