

IN THE COURT OF APPEALS OF IOWA

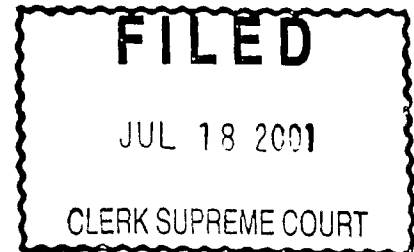
No. 1-308 / 00-1765

Filed July 18, 2001

IN RE THE MARRIAGE OF DANIEL LEE MALLOY
AND MARIE CARMEL MALLOY

Upon the Petition of
DANIEL LEE MALLOY,
Petitioner-Appellant,

And Concerning
MARIE CARMEL MALLOY,
Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Petitioner appeals from the district court order denying his modification
petition in regard to child custody and granting it in regard to child support and
visitation. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Patrick H. Payton of Patrick H. Payton & Assoc., P.C., Des Moines, for
appellant.

Susan L. Ekstrom of Ekstrom & Burkey, Des Moines, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

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MILLER, J.

Petitioner Daniel Lee Malloy appeals from the district court ruling that denied substantial parts of his petition to modify the decree dissolving the parties' marriage. He contends the court erred in (1) not changing physical care of the parties' three minor children, or in the alternative one of the minor children, from the respondent, Marie Carmel Malloy, to him, and (2) not recognizing his retirement from the National Guard as good cause to reduce his child support. Marie requests both trial and appellate attorney fees. We affirm in part, reverse in part and remand.

I. BACKGROUND FACTS AND PROCEEDINGS

The marriage of Daniel and Marie Malloy was dissolved in late December 1998. The parties have three minor children together, Justin Malloy, born April 3, 1989, Abigail Malloy, born August 8, 1992, and Lauren Malloy born July 8, 1994. The decree provided that the parties had joint custody of the children and placed their physical care with Marie. In January of 2000 Daniel filed a petition for modification. He sought physical care of the children, a recalculation of child support, a change of visitation, and attorney fees and costs.

At the time of trial Marie was thirty-five years old and had married Daniel Stein in July 2000. She resided with him in Des Moines. They were expecting their first child. Marie was employed at Iowa Network Services with a gross annual income of approximately \$32,131. Daniel was forty-two years old at the time of trial and worked for Iowa Bearing, where he has worked since 1987. Daniel had also remarried, to Julia Malloy, in June of 2000. He resides with her and two of her three children in a home in West Des Moines. Daniel was a

member of the Iowa National Guard at the time of the dissolution but retired after having served his twenty years and obtaining his "20-year letter" making him eligible to receive his pension at the appropriate age. Daniel testified at the modification hearing that the reason he retired from the National Guard was so he could spend more time with children as his Guard duties interfered with his weekend visitation with the children. He had so informed his commanding officer before retiring. His commanding officer had convinced him to stay about one year longer than he wished after weekend visitation problems developed, in order to eventually be eligible for retirement benefits.

Justin and Abigail appear to be fairly happy and healthy children who are doing well in school at St. Theresa's. Abigail appears to be the most well adjusted to their parents divorce. Justin however, has had more difficulty with the divorce and has suffered some behavior and stress problems due to the surrounding circumstances. The youngest child, Lauren, has a congenital, degenerative neurological disease known as Rett's Syndrome. This disease affects the victim's ability to use their hands and feet, to talk and walk, and causes difficulty in swallowing. This is an extremely serious disease and the evidence in the record indicates that children with Rett's have a life expectancy of only five to thirteen years. Lauren attends Smouse School which provides education for children who are so disabled they cannot be mainstreamed into the public school system.

The record regarding Lauren's condition shows a progressive deterioration due to the Rett's. She cannot talk, she must wear diapers, and she has very limited use of her hands and legs. Furthermore, she has some difficulty

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swallowing and thus obtaining proper nutrition. Due to her difficulty swallowing it became necessary for a gastrostomy tube (G-tube) to be placed directly into her stomach so she could receive supplemental nutrition through the tube.

The district court declined to modify the physical care provisions of the decree but granted Daniel a reduction in child support, from \$748.15 to \$716.67 per month for the three children, and granted him additional visitation. Daniel appeals, claiming the district court erred in not changing physical care of the three children to him, or in the alternative not changing Lauren's physical care to him. He also claims the district court erred in refusing to consider his loss of National Guard income in establishing his modified child support obligation.

II. SCOPE AND STANDARDS OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value with respect to custodial issues, and the court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

III. MERITS

A. Physical Care.

The legal principles governing modification actions are well established.

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

Petition of Anderson, 530 N.W.2d 741, 741-42 (Iowa Ct. App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Here, unlike in an original custody determination, the question is not which home is better, but whether the parent seeking the change has demonstrated he or she can offer the child superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). If both parents are found to be equally competent to minister to the child, custody should not be changed. *Id.* The burden upon the parent seeking to change custody is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children." *Id.* at 214. The children's preference concerning where to live is given some weight, but less weight in a modification than in an original custodial determination. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998); *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987).

Daniel claims the trial court should have changed physical care of all three children from Marie to him, or in the alternative should have at least placed Lauren with him. Daniel alleges Marie has refused him visitations, has made

decisions regarding Lauren's medical care without him, and has disregarded, obstructed and ignored his rights with respect to the children. He asserts Marie has failed as the caregiver of the children, especially in regard to meeting the heavy burden of giving proper care to Lauren's special needs, and argues her care of Lauren has at times bordered on abuse or neglect. He believes he can care better for the children than Marie and better bring them to physical, mental, and social maturity.

In support of his argument with regard to Justin, Daniel presented a letter at trial that was purportedly dictated to Julia Malloy by Justin regarding Justin's feelings toward Marie. The letter made allegations regarding Marie, such as that she does not let Justin call his father and he gets in trouble if he talks to his dad at baseball games. The letter also supposedly expresses Justin's belief he will get into trouble with his mother because she knows he wants to live with his dad. There is not much evidence in the record with regard to Abigail other than that she is doing well at school and is physically and mentally healthy.

The majority of the evidence offered at trial related to Lauren, and Marie's alleged ability or inability to properly care for her. Several staff members from Smouse School testified regarding their concerns about Lauren's condition and Marie's ability to care for her. Specifically, there was testimony relating to Marie's failure to always tube feed Lauren in the evenings and Marie being "uncooperative" in supplying the school with supplies needed for Lauren such as diapers, feedings tubes, and a wheelchair. Marie herself testified that Lauren needs a great deal of care and she does have her hands full taking care of her.

Additionally, Daniel introduced several reports and notes written by staff at Smouse School regarding Lauren's condition and specifically her lack of weight gain. As mentioned above, Lauren has trouble swallowing as a result of her condition which makes eating difficult for her. Lauren was given a G-Tube to help increase her daily intake of calories after she had failed to gain weight for approximately one year. Lauren continued to eat some by mouth but was supplemented through the G-Tube while she was at daycare, school, and at home. One of the reports noted Marie's admission that at one point there was a period of seven days when she failed to tube feed Lauren in the evening. A different note states that when it was suggested to Marie she tube feed Lauren every night, instead of five out of seven nights, she stated "I'm alone w/3 kids! Some nites it just doesn't get done."

There was also an allegation at trial that Marie had failed to provide a wheelchair for Lauren while she was at school despite the request from school officials that Marie do so because Lauren needed one for her own safety. A wheelchair owned by the school was loaned to Lauren on a temporary basis. This loan turned out to be for a three year period. Marie testified that Lauren did not need a wheelchair when she first started at the school. It was when school personnel requested one to assist in Lauren's transportation at school that Marie borrowed the wheelchair from the school because she did not use one at home as she was reluctant to make Lauren dependent on a wheelchair. When a prescription for a wheelchair for Lauren was eventually written in March of 2000 Marie had Lauren fitted for one and ordered it. At the time of trial the wheelchair had arrived and had been taken to Smouse School for Lauren's use.

Furthermore, there was testimony from one of Lauren's teachers, Kathy Marean, that the school year before the immediately past school year she had trouble getting diapers from Marie for Lauren at school. The diapers are necessitated by Lauren's disease and are needed for her proper care and hygiene. Ms. Marean testified that she tried to contact Marie several times and left messages for her regarding this issue but received no response. When Marie did eventually return the call, Ms. Marean testified Marie was upset about Ms. Marean "pushing the issue on the diapers." Ms. Marean apparently then called Daniel who provided the diapers for Lauren to use at school.

We, like the trial court, are concerned with the apparent deficiencies in Marie's care for Lauren at times. Her lack of follow through in responding to staff members from Smouse and the seven-day period in which she apparently did not tube feed Lauren in the evenings are serious matters which we do not take lightly. They are events which should not recur. They must, however, be balanced against the other evidence in the record that Marie has been a good and caring mother to Lauren, and indeed all of her children, the great majority of the time. Such concerns must also be balanced against the prospect that the children, if placed with Daniel, would be moved away from the home and school they are familiar with and which has provided them continuity and security since the parties' dissolution in 1998.

We must also consider in the balance Daniel's willingness to place one of the children, Justin, in the middle of the dispute between the parties. Daniel's actions in encouraging or allowing Justin to dictate a letter regarding where he wishes to live and in telling Justin he would be able to live with him soon have the

real potential to, and probable effect of, causing a deterioration of Justin's relationship with Marie. We believe placing a child in the middle of the parents' disputes in this manner is highly inappropriate. Such actions are not only likely to increase Justin's confusion and emotional problems that are shown by the record, but are also an indication of how Daniel could manipulate the children's relationship with their mother and attempt to turn them against her if their physical care were to be placed with him.

One consideration in making determinations regarding physical care is the denial by one parent the children's opportunity to have meaningful contact with the other parent. See *Will*, 489 N.W.2d at 399. Daniel argues Marie has denied him his rights to visitation and has not cooperated with him in regard to his visitation schedule. Further, he asserts Marie has made it difficult for the children to contact him and has actually punished them for calling him. The record does not support Daniel's allegations. There was testimony at trial from both Daniel and his sister-in-law, who supervised the parties' visitation pick-up and drop-off, that Daniel had received visitation not specifically provided for by the schedule in the decree. Daniel also acknowledged that Marie had offered additional visitation with Lauren, but he refused because Marie would not put the offer in writing.

The record is clear that both Marie and Daniel love and care for all three of their children and either would be an appropriate person to have physical care of any or all of the children. After balancing numerous considerations the trial court determined Daniel had failed to meet his heavy burden to demonstrate a superior ability to care for the children on a permanent basis. After considering the entire record and conducting our own balancing, we find Daniel has at the very most

shown an equal ability to minister to the children's well being. Under such circumstances physical care of the children should not be changed. *Rosenfeld*, 524 N.W.2d at 213. Therefore, we conclude that Daniel's request for a modification of the physical care of the children must be denied.

David claims, in the alternative, that the trial court should have changed Lauren's physical care to him. He made no such alternative request for relief in his petition for modification, the trial court's ruling does not address or pass on such an issue, and Daniel apparently filed no rule of civil procedure 179(b) motion requesting a ruling on such an issue. We nevertheless address it.

Siblings should not be separated from one another without a showing of good and compelling reasons. *Doan Thi Hoang Anh v. Nelson*, 245 N.W.2d 511, 517 (Iowa 1976); *In re Marriage of Woodward*, 228 N.W.2d 74, 75-76 (Iowa 1975). We start with a presumption that siblings should not be separated. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). This presumption against split physical care exists because split physical care deprives the children of the benefit of constant association with one another. *Doan Thi Hoang Anh*, 255 N.W.2d at 517; *Pundt*, 547 N.W.2d at 245. Children should not be denied this benefit except when their interests require it. *In re Marriage of Wahl*, 246 N.W.2d 268, 270 (Iowa 1976).

The three children in this case are close in age, all having been born within about a five-year period. Lauren is less than two years younger than her sister, Abigail. There is no evidence that Lauren does not get along with her two siblings. All have been together their entire lives. Upon our de novo review of the record we find that Daniel has not shown good and compelling reasons for

separating Lauren from her siblings and has not shown that Lauren's interests or those of the other two children require it. We conclude it is not in the best interests of the children that Lauren be separated from the other two.

As a final note, we reiterate the trial court's observations regarding the behavior of the parties. Marie and Daniel have shown a pattern of conduct which at times puts their strained relationship ahead of the welfare of their children, one of whom is seriously ill. Their attitudes and actions cannot continue without grave consequences for their children. It would be best for all involved if they would at all times place their children's best interests above their own feelings. They should do this for the sake of the physical and mental well being of their children, especially Lauren, whose precious time should be of the highest quality possible.

B. Child Support

The original dissolution decree established Daniel's child support payments based on both his income from his full time job at Iowa Bearing and his supplemental income from his membership in the Iowa National Guard. After the dissolution Daniel continued his service in the National Guard for approximately one year, at which point he received his "20-year letter" making him eligible for retirement benefits at the appropriate age. The reason stated by Daniel at hearing for his retirement was so he could spend more time with his children because his Guard duties were often interfering with his visitation schedule.

The trial court found there had been a change in income by both Marie and Daniel which necessitated the recalculation of the parties' child support obligations. The court determined the change was mostly due to the increase in

Marie's income and not the decrease in Daniel's income, because although his income showed a reduction based on his National Guard retirement it also showed an increase in his Iowa Bearing income. The court found the reduction in Daniel's income due to his retirement to be a "voluntary reduction of income" and therefore declined to use it in recalculating his child support obligation. The trial court reduced Daniel's support payments from \$748.15 per month to \$716.67 per month for the three children, based on Marie's increase in income.

Daniel argues on appeal that the trial court erred in not recognizing his retirement from the National Guard as good cause to reduce his child support obligations because he did not reduce his income with the improper intent to deprive his children of support. In her appeal brief Marie contends the trial court erred in reducing Daniel's child support obligation because his reduction in income was voluntary and he had increased his disposable income by discharging his debts in bankruptcy.

A court may modify an order of child support when a "substantial change in circumstances" has been shown to exist. Iowa Code §598.21(8) (1999); *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). "Changes in the employment, earning capacity, income or resources of a party" is one factor which may be considered by the court. Iowa Code §598.21(8)(a); *Walters*, 575 N.W.2d at 741. This, of course, is the factor relied upon by Daniel here in his request to have his support obligation reduced. The party seeking the modification must prove the change in circumstances by a preponderance of the evidence. *Walters*, 575 N.W.2d at 741.

Nevertheless, a parent may not rely on a claim of decreased income to obtain a modification of a support order if the parent's

reduced earning capacity and inability to pay support is self-inflicted or voluntary. Therefore, parents who reduce either income through an improper intent to deprive their children of support or in reckless disregard for their children's well-being are not entitled to a commensurate reduction in child support payments.

In re Marriage of Swan, 526 N.W.2d 320, 323-24 (Iowa 1995) (citations omitted).

A primary factor to be considered in determining whether support obligations should be modified is whether the obligor's reduction in income and earning capacity is the result of activity, which, although voluntary, was done with an improper intent to deprive his or her dependents of support.

In re Marriage of Rietz, 585 N.W.2d 226, 229 (Iowa 1998).

Daniel testified that the main reason he decided to get his 20-year letter and retire from the National Guard was due to the conflicts it caused with his visitation schedule. Under the original dissolution decree Daniel had visitation with the children every other weekend. Daniel introduced evidence at trial that there were ten weekends during 1998 when he was to have visitation with the children but due to his Guard obligations was unable to exercise this visitation.

Daniel's commander from the National Guard, Lieutenant Colonel Berg, also testified at the modification proceedings. He stated he was familiar with the conflicts Daniel was having between his visitation and his Guard duties as they often were on the same weekend. He stated he had tried to work around these conflicts with Daniel but that he was not always able to and ultimately Daniel had to give up his Guard duties. He also testified these conflicts began to occur approximately one year before Daniel was eligible to obtain his 20-year letter and he convinced Daniel to stay in the Guard until he could get this letter "so that he would be locked into retirement for the time that he spent in the Guard." Marie herself testified that during the year after dissolution of the parties' marriage it

had been very hard for Daniel to exercise visitation because of his Guard schedule, and he had decided to retire early from the Guard because of visitation problems.

Based on the evidence in the record, we conclude Daniel did not intentionally reduce his income to avoid his child support obligations. We do not consider Daniel's action of taking his timely and earned retirement from the National Guard indicative of a reckless disregard of his support obligations or the children's well-being. The reason for this practical decision was to allow him to exercise visitation with the children, as established by the court in the dissolution decree, which he would not be able to do otherwise because of the conflict created by his Guard obligations. We believe this case is distinguishable from others where this court and our supreme court have held that an intentional reduction in income precluded modification of support obligations. See *Walters*, 575 N.W.2d at 741-42 (citing cases where modification of support obligations was not appropriate based on obligor's voluntary reduction in earning capacity).

Upon our de novo review we find that Daniel did not reduce his income with an improper intent to deprive his children of support or in reckless disregard of their well-being. Therefore, we conclude the trial court improperly held that Daniel's retirement from the Guard and resulting loss of income should not be taken into account in recalculating his child support obligation. We reverse that part of the trial court's ruling.

In establishing Daniel's modified child support obligation the trial court used a present net monthly income for the respondent (Marie) of \$1,832.14, a figure which appears in a child support guidelines worksheet which Marie

provided. The trial also used a "prior net monthly income of the Respondent" [sic, Petitioner?] of \$2,021.56. This figure included National Guard pay in an amount that the record does not make clear. The trial court did not make a finding as to how much gross or net income Daniel lost as a result of retiring from the National Guard. The evidence shows only that he was earning some \$2,000 to \$4,000 per year in the Guard. Under such circumstances we cannot determine what Daniel's net income without Guard pay is and apply the child support guidelines. We find it appropriate to remand to the trial court to recalculate Daniel's child support obligation. In doing so the trial court must consider Daniel's loss of Guard pay in determining his net income. It shall do so on the basis of the existing record or the existing record plus such additional evidence as it finds necessary to accurately determine Daniel's net income.

We find Marie's claim that the trial court erred in reducing Daniel's child support is not properly before us because she did not appeal or cross-appeal on this issue. See Iowa R. App. P. 5.

C. Marie's Request for Trial and Appellate Attorney Fees

Marie's appeal brief requests \$5,000 for her trial and appellate attorney fees. The trial court ordered that the parties were to be responsible for their own attorney fees. Therefore, Marie's request for trial attorney fees is a challenge to the trial court's refusal to award her such fees. However, she has not appealed or cross-appealed from that ruling. Thus, for the same reason her challenge to the trial court's reduction of Daniel's support obligations is not properly before us, Marie's request for trial attorney fees on appeal is also not properly before us. See Iowa R. App. P. 5.

Appellate attorney fees are discretionary and depend on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). We consider the needs of the party making the request, the ability of the party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). After considering these relevant factors, we conclude each party should be responsible for their own appellate attorney fees.

IV. CONCLUSION

We conclude the trial court was correct in finding Daniel failed to establish, by a preponderance of the evidence, that his ability to minister to the children's needs and well-being is superior to Marie's. Therefore, we affirm the trial court's decision to deny Daniel's request to modify the physical care of the parties' children.

We further find the trial court erred in failing to take into account Daniel's reduction in income because of his retirement from the National Guard in calculating his support obligation. Daniel did not intentionally reduce his income to avoid his child support obligations and deprive his children of support. We reverse the court's determination regarding Daniel's child support obligation and remand to the trial court to take this reduction in income into account. Marie's claim that the trial court erred in lowering Daniel's support payments and her request for trial attorney fees are not properly before us because she did not appeal or cross-appeal. Marie's request for appellate attorney fees is denied.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.