IN THE COURT OF APPEALS OF IOWA

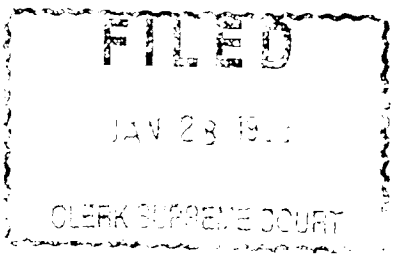
No. 7-691 / 97-0298

000305

IN RE THE MARRIAGE OF DENISE RACHELE SCHMITZ AND KELLY SCHMITZ

Upon the Petition of
DENISE RACHELE SCHMITZ, n/k/a
DENISE RACHELE MITCHELL

Petitioner-Appellant,



And Concerning
KELLY SCHMITZ,

Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Peter A. Keller, Judge.

Petitioner appeals from the district court's denial of her application to modify the decree to award her primary physical care of the children. **AFFIRMED.**

Joseph W. Seidlin of Berger & Culp, P.C., Des Moines, for appellant.

Dorothy L. Dakin of the Dakin Law Office, Boone, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Denise and Kelly Schmitz's marriage was dissolved on April 4, 1995. The court granted Kelly primary physical care of the parties' two children, Michael, born December 4, 1987, and Brittany, born November 14, 1990.

On February 2, 1996, Denise filed a petition for modification claiming there had been a substantial change in circumstances requiring a transfer of custody to her. She claimed Kelly was using drugs and alcohol, manipulating the children, and neglecting necessary medical treatment. Kelly counterclaimed, seeking an increase in Denise's child support obligation.

At trial, Denise detailed her conversations with Kelly regarding his drug and alcohol abuse and its effect on his health. She also introduced many cassette tapes of those conversations, made without Kelly's knowledge.

Kelly testified although he did tell Denise he was using drugs and alcohol, he did so only to hurt her or to tell her what he thought she wanted to hear. He denied any such abuse. Denise did not present evidence to corroborate her claims Kelly was abusing drugs and alcohol. Kelly presented evidence the children were doing well in school. Other testimony tended to show Kelly could not be doing what he described on the tapes.

The court denied Denise's petition. It determined there was no independent evidence to corroborate Denise's allegations, and even if Kelly's statements about

alcohol and drug abuse were true, the conversations ended in early 1996 and are not permanent in nature. The court also found substantial evidence Denise's allegations were false. Regarding the latter conclusion, the court noted if Kelly was "drunk all the time" and a drug addict, it would be likely that Kelly would not be able to hold a full-time job, the children would not be flourishing, Kelly would not be financially stable, and Kelly's conduct and demeanor would reflect such a lifestyle. The court also denied Kelly's request for increased child support.

Denise appeals, asserting the trial court erred in not finding a substantial change in circumstances warranting a modification of the custody provisions of the decree. We affirm by memorandum opinion pursuant to Iowa Supreme Court rule 9.

We review modification proceedings de novo. Iowa R. App. P. 4; *In re Marriage of Hester*, 565 N.W.2d 351, 353 (Iowa App. 1997). We give weight to the findings of the trial court, especially concerning credibility, since the court had the opportunity of listening to and observing the parties and witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Once custody has been determined, we are reluctant to disturb it except for the most cogent reasons. *Petition of Anderson*, 530 N.W.2d 741, 742 (Iowa App. 1995). The parent seeking the change must establish "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." *In re Marriage of Frederici*, 338

N.W.2d 156, 158 (Iowa 1983). The change must not be temporary. *Id.* The parent seeking custody must demonstrate an ability to minister more effectively to the children's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). Our first consideration in proceedings to modify custody is the best interest of the children. *In re Marriage of Junkins*, 240 N.W.2d 667, 668 (Iowa 1976).

Although the allegations raised by Denise are serious, we do not find support for them in the record. The evidence, other than the tapes and Denise's testimony concerning them, shows Kelly to be ministering to the needs of his children effectively. Even if Kelly's statements on the tapes were true, there is no evidence in the record any substance abuse has continued. Denise has not carried her burden to show a material and substantial change in circumstances to support her request to modify custody.

AFFIRMED.