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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-141 / 88-1384

IN RE THE MARRIAGE OF STEPHANIE SUE HEBARD AND KEVIN MARSHALL HEBARD

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Upon the Petition of

STEPHANIE SUE HEBARD,

Petitioner-Appellant,

And Concerning

KEVIN MARSHALL HEBARD,

Respondent-Appellee.

Appeal from the Iowa District Court for Jackson County, Margaret S. Briles, Judge.

Petitioner appeals the decision of the district court which granted respondent's petition for modification of the parties' decree of dissolution and awarded him physical care of the parties' minor children. Petitioner claims: 1) the district court erred in modifying the dissolution decree by transferring physical care of the parties' minor children; and 2) she should be awarded attorney fees for the trial court proceedings and on appeal. **REVERSED AND REMANDED.**

Mark R. Lawson of Peckosh & Lawson, Maquoketa, for petitioner-appellant.

Corliss C. Baty of Baty, Keeley & Pape, Maquoketa, for respondent-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

DONIELSON, P.J.

Stephanie Hebard and Kevin Hebard were granted a decree of dissolution on February 4, 1986. They were awarded joint legal custody and Stephanie was given primary physical care of the minor children. The children are: Chad Marshall, born June 5, 1973, Megan Lelaine, born February 28, 1981; and Curtis Grant, born August 11, 1982. Chad has cerebral palsy and has some motor skill problems, but attends school and participates in physical activities. Megan has a speech problem and needs continued speech therapy. At the time of the dissolution Stephanie was a teacher's aid and had a net income of $5400. In order to earn more money Stephanie decided to move to Phoenix, Arizona, in June 1987. When Kevin picked up the children for their eight-week summer visitation in June of 1987, Stephanie told him of her plans to move to Phoenix and that she was going to attempt to interview and train for a job with America West Airlines. Stephanie planned to reside with her sister and brother-in-law while she received her training. In September 1987 she began intensive training to become a customer service representative for America West Airlines. Stephanie graduated from training with America West on January 13, 1988. She began her actual employment with America West in February of 1988. She now earns $14,000 per year. Stephanie now lives with her fiance, Larry Meyer, in a

three bedroom home in Phoenix. Throughout her training period in Phoenix, Stephanie maintained contact with her children. She would call them regularly and she used her flight privileges through America West to visit her children and to have them visit her in Phoenix. Shortly after Stephanie began her training program, Kevin began contacting her regarding a permanent change of custody. Stephanie refused to sign papers that would transfer permanent custody to Kevin.

Kevin filed his application for modification in April 1988. At the time of the decree Kevin was a high school teacher in Sabula, Iowa, earning a net salary of $14,688. He taught in Vinton, Iowa, for the 1987-88 school year. In the later part of July 1988 he moved with the children to Boyton Beach, Florida, where he is employed as a high school teacher and coach, for a net salary of about $20,400. Kevin bought a three bedroom home in Boyton Beach. The district court found there had been a substantial change of circumstances and granted Kevin's application for modification, finding that it would not be in the children's best interests to move again. Kevin was granted primary physical care of the children. Stephanie was given visitation rights and ordered to pay $50 per week in child support. Stephanie appeals the decision of the district court.

Stephanie contends that Kevin did not demonstrate a substantial change of circumstances to justify a change of custody of the children. Stephanie did not intend to leave the children with Kevin permanently, but as the trial court found, it was better to leave the children with Kevin while she was in training. She worked long hours and was paid very little during that period of time. Since it was February when she began her employment with America West, she decided to let the children stay with Kevin for the rest of the school year. Stephanie feels she was punished for trying to provide a better life for herself and the children. She argues that Kevin has not shown a superior ability to care for the children and that he has not shown a substantial change in circumstances. Stephanie asked for attorney fees in district court and this was denied. She renews her request and asks for attorney fees for this appeal.

A modification action is an equitable proceeding and review by this court is de novo. Iowa R. App. P. 4.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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 only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

As a joint custodian in the dissolution decree, Kevin is benefited in seeking physical care in that he has previously met the requirements for joint custody. However, in seeking a change in physical care he carries a burden similar to that imposed on a parent seeking a change of custody. Kevin has the burden to establish by a preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to transfer their physical custody to him. In re Marriage of Behn, 416 N.W.2d 100, 101 (Iowa App. 1987). Of course, the first and governing consideration is the best interests of the children. Iowa R. App. P. 14(f)(15).

I. **Modification.** When Kevin sought modification of the physical custody of the children he premised his claim on the fact that Stephanie was residing in Arizona and that she had left their minor children in his full-time care. Two weeks prior to the hearing on Kevin's petition for modification, he moved with the children to Boyton Beach, Florida. The trial court judge concluded that the parties themselves had created a substantial change in

circumstances and that the best interests of the children warranted the transfer of physical custody to their father. The trial court was correct in considering the effect of Kevin's move to Florida when making its decision. The trial court was not confined to the circumstances existing at the time the petition for modification was filed; it could consider all facts up to the time of the hearing. In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979).

The trial court emphasized that the break-up of the parties' marriage had been disruptive to the children as was the decision of Stephanie to go to Phoenix in June of 1987 and to leave the children with Kevin. Since the children had been residing with their father from June 1987 until the time of the hearing, August 1988, the court felt it would only cause further disruption for the children to deny Kevin's petition and thereby return the children to Stephanie.

The focus of the trial court should have been whether Kevin had met his burden of establishing that there had been a substantial change of circumstances that made a change in physical custody expedient. The change of circumstances alleged must be more or less permanent, and not temporary. Frederici, 338 N.W.2d at 158. Stephanie's conduct in leaving the children in Kevin's care so that she might obtain training for new employment was temporary.

She intended to obtain her training with America West and once she began full-time employment with the airline, she intended to resume physical care for her children. The temporary nature of her decision to leave the children with Kevin is reflected in the fact that she resisted Kevin's attempts to make the changes permanent. Stephanie's decision to leave the children with Kevin and to seek training with America West was one of economic survival. Since her divorce in February of 1986, Stephanie had held a series of low-paying jobs that held little opportunity for advancement. She recognized that only through specialized job training would she be able to ensure financial security for herself and her three children. Stephanie chose not to move the children to Phoenix with her because of the irregular hours and low pay that accompanied the training period. Stephanie began her new job in February of 1988, but she did not seek the return of physical custody at that time because it was in the middle of the children's school year. Before the school year was completed Kevin filed his petition for modification.

Stephanie's decision to obtain job training in Phoenix did not sever her relationship with her children. She kept in regular contact with them, she used her flight privileges to visit them, and likewise her children also used these flight privileges to visit her in Phoenix.

When making child custody determinations prior case law has little precedential value; In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). Custody decisions must be based on the particular circumstances of the parties in each case. Id. However, a brief review of past cases will provide some perspective as to how changes in residence and transfers of physical custody have been viewed by our courts.

Past decisions suggest that a change in the geographic location of the custodial parent will not alone justify a change of physical care of the children. In re Marriage of Frederici, 338 N.W.2d 156, 160 (Iowa 1983); In re Marriage of Behn, 416 N.W.2d 100, 101 (Iowa App. 1987). But see In re Marriage of Green, 417 N.W.2d 252, 253 (Iowa 1987) (court concluded that change of residence was change in circumstances sufficient to justify modification of decree).

This case now before the court involves a factual situation that is more complicated than a mere move by a custodial parent and his or her children. Here Stephanie moved to Phoenix by herself leaving the children with Kevin. The court does not question her intention to eventually have the children resume their residence with her. The issue this court must address is to what extent may a custodial parent rely upon the other parent to temporarily care for their children without such conduct warranting a modification of the decree.

This case is unlike that in Eddards v. Suhr, 193 N.W.2d 113 (Iowa 1971). In Eddards the father had spirited away his children from their mother who had custody of them. The mother was aware of their presence in Iowa, yet she paid them little attention and had little contact with them for nearly two and one-half years. In finding that a change of circumstances warranted a change of custody in favor of the father, the Iowa Supreme Court noted that the mother's lack of contact with her children seemed to result from the fact that she had far more concern with her own welfare than with that of her children. Id. at 117. In this case, Stephanie was in Phoenix for less than a year when her husband sought modification of the decree. She left her children so that she might obtain job training and secure employment that would provide a secure income for her and her children. Rather than continue in low-paying jobs, Stephanie demonstrated initiative and foresight. By leaving her children with Kevin while she obtained her training, she allowed them to stay in familiar surroundings. Her training in Phoenix provided her with little free time and income, and she is to be commended for allowing her children to remain in Iowa with their father during that period. Her actions, in leaving her children with their father while she had her training, were taken in her children's best interests.

Furthermore, Stephanie kept in contact with her children during her absence and they had numerous visits. The circumstances which warranted a change of custody in Eddards do not exist in this case.

The case of In re Marriage of Key, 336 N.W.2d 422 (Iowa 1983), is of little application in this matter. In Key, the mother had consented to a de facto change of custody of the couple's son. For approximately three years the son stayed with his father. When the mother seized him and returned him to Iowa, the father sought modification. Despite the fact that the mother had apparently consented to the father's permanent custody of their son for three years, the court wouldn't grant the father's petition for modification. In approving the retention of custody with the mother, the Iowa Supreme Court did not focus on the fact that she was technically the parent who had been awarded physical custody of her son. Rather, the court noted the presence of a sibling in the mother's home and emphasized the strong need to keep siblings together.

The unique circumstances of Key (the mother had signed an agreement to transfer permanent custody of her son to the father, the fact that the father had physical custody of the son for three years, and the presence of a sibling in the mother's home) render that decision to be of little guidance in resolving the modification matter now before the court.

Stouwie v. Stouwie, 222 N.W.2d 435 (Iowa 1974), involved a case in which the mother was awarded custody of the children. For six months following the divorce the mother had primary custody of the children. At that point she left them with their father for about six months. The mother visited them during that time. When the mother requested the return of the children, the father refused and filed a petition for modification. The father was granted temporary custody and trial on the modification issue was not held until nearly three years later. The trial court found a substantial change of circumstances and awarded the father physical custody of the children. In affirming the trial court, the supreme court noted that the trial court was correct in considering the fact that the father had had custody of the children for three years before trial on the modification matter was finally held. The court felt the effect of living with their father for such a long time span could not be ignored, especially in light of the young ages of the children. The court noted that for two years of that period the mother would not have had a stable environment within which to receive the children. Furthermore, the court indicated that the mother's lack of effort in accelerating the time for the hearing rendered it fair to consider what effects the delay in having the hearing had upon the children.

Stouwie is distinguishable because of the heavy emphasis that decision placed on the effects of the children's residence with their father for nearly three years prior to trial on the issue of modification. In this case now before the court, hearing on the modification matter was held within four months of the filing of the petition for modification. Reliance on Stouwie would be misplaced in this matter.

In re Marriage of Green, 417 N.W.2d 252 (Iowa App. 1987), involved a couple who were divorced in 1984. Although the mother was awarded physical care of the children, it was agreed that the children would reside with their father during the 1984-85 school year. Custody was alternated on a weekly basis during the 1985 summer. In 1985, the mother retained physical custody of the children and the eldest child began school in the school district where her mother lived. Shortly thereafter the mother moved to Sioux City to take a new job and she returned the children to their father. During the 1986 summer, the father retained custody and the mother exercised extended weekend visitation. The mother then moved to Dakota City, Nebraska. She expressed her desire to keep the children during the 1986-87 school year. The father resisted, kept the children, and filed for modification of the decree. In affirming the trial court's decision to grant the modification, the court noted the mother's indecision in

both 1985 and 1986 as to whether she would resume full-time physical custody of her children. Id. at 253. Furthermore, in Green, the mother had apparently consented to subjecting the children to the primary physical custody of their father for two years before he sought modification of the decree.

The record in this case distinguishes it from Green. Stephanie left her children with Kevin so that she might obtain specific job training. The trial court recognized that she could not have had the children with her and completed the training without a support mechanism. No such mechanism seemed available at that time. Nothing in Green explains why the mother could not have continued the physical care of her children when she moved to Sioux City. Stephanie intended for the placement of the children with Kevin to be temporary. By February, she had completed her training and had obtained full-time employment, but she chose to wait until the children had completed their school year in Iowa before seeking their return. This case does not involved the placement of the children with their father for a time span similar to that involved in Green, and that decision is not persuasive in disposing of this matter. We find that every consideration made by Stephanie was made by her with due accord to the best interests of the children.

This court cannot conclude, upon a review of the entire record and case law relevant to this matter, that Stephanie's physical separation from her children in order to obtain job training, constitutes a permanent and substantial change in circumstances which warranted modification of the divorce decree. Physical care of the children is returned to Stephanie. In light of the change in the parties' residences that has occurred since the original decree was entered, this case is remanded to the trial court to establish a visitation schedule for Kevin.

II. **Attorney Fees.** Attorney fees are not recoverable as a matter of right, but rest within the court's discretion and depend upon a spouse's ability to satisfy them. In re Marriage of Phipps, 379 N.W.2d 26, 29 (Iowa App. 1985). The court's discretion in fixing fees is considerable. In re Marriage of Willcoxson, 250 N.W.2d 425, 426 (Iowa 1977). This court finds no reason to disrupt the trial court's decision with regard to attorney fees in this matter. Stephanie also requests attorney fees on appeal. An award of attorney fees on appeal may be granted based on the parties' respective abilities to pay. In re Marriage of Stanley, 411 N.W.2d 698, 703 (Iowa App. 1987). Having reviewed the record to determine each party's respective ability to pay these fees, we find that respondent Kevin Hebard should pay $1,500 of petitioner's legal fees incurred on appeal. Costs of this appeal are to be assessed against respondent Kevin Hebard.

REVERSED AND REMANDED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I would affirm the trial court's decision to modify the decree to leave custody of the children with Kevin.

Our focus in this case, as in all proceedings, is on the best interests of the children. Stephanie's decision to leave the children with Kevin for a year was a substantial change of circumstances and justifies modification of the decree if Kevin can show a superior ability to care for the children. I find he has, and their best interests dictate we not disturb the stable lifestyle he has established with the children. He has, as a single parent, assumed responsibility for the children while maintaining taxing employment as a public school teacher.

I take issue with the majority's position that a decision to leave one's children for a year is a temporary absence. A year is a long time in a young child's life and a time during which they adopt to a parent's lifestyle. Although a year passed between the time Kevin took custody and the time the application for modification was filed, Stephanie had not made an effort to have physical care returned to her.

While I join the majority in commending Stephanie for her desire to improve her station in life, there obviously were opportunities that were available for her that would have enabled her to include her children.

I cannot ignore the fact Stephanie, while allegedly not being able to have time for her children while she trained in Arizona, has in fact had time to establish a relationship with Larry Meyer, with whom she now lives. Larry Meyer's presence in her home would require additional adjustments for her children.

The trial court should be affirmed in all respects.