FILED
JAN 29 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-551 / 91-535

IN RE THE MARRIAGE OF KATHY ANN BOGER AND KEVIN LEE BOGER

Upon the Petition of

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KATHY ANN BOGER,

Petitioner-Appellee/Cross-Appellant,

And Concerning

KEVIN LEE BOGER,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Crawford County, James L. McDonald, Judge.

The parties appeal and cross-appeal the trial court's denial of a change in custody in this modification proceeding. **AFFIRMED.**

Robert Kohorst, Harlan, for appellant/cross-appellee.

Michael R. Mundt of Franck, Mundt & Franck, Denison, for appellee/cross-appellant.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

Kathy Boger Poldberg and Kevin Boger were formerly married to each other. They are the parents of one boy, Derrick, born in December 1983.

The marriage was dissolved in 1984. The 1984 dissolution decree placed the child in joint legal custody and in Kathy's primary physical care. The 1984 decree also directed Kevin to pay $140 per month in child support. In 1988 Kevin voluntarily increased his support payments to $160 per month.

Kevin later sought to modify the 1984 decree, asking that the child be transferred to his primary physical care. Kathy also filed a modification petition, asking that her child support award be increased. After a hearing, the trial court denied both requests. Kevin has appealed and Kathy has cross-appealed.

Kevin contends the trial court should have transferred the parties' child to his primary physical care. He argues that circumstances have changed since the 1984 decree. The change is due to Kathy's romantic involvement with an alcoholic man who physically abuses both Kathy and the child. Kevin also argues that Kathy herself abuses alcohol. He asserts he can give the child more contact with extended family members, including Kathy's own relatives.

In her cross-appeal, Kathy contends her child support award should be increased from $160 per month to $280 per

month under Iowa's child support guidelines. She argues the trial court erred by departing from the guidelines. The trial court indicated its departure was because her move to Nebraska imposed extra visitation costs on Kevin. Kathy asserts the extra visitation costs are not substantial.

Kathy also contends the district court should have awarded her attorney's fees. Finally, she requests attorney's fees on appeal.

Both parties have submitted affidavits concerning Kathy's live-in boyfriend. As none of these affidavits are part of the record, we do not consider them on this appeal.

Our review 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)).

The trial court decided to leave custody of the couple's child with Kathy. It determined Kevin had not

established the necessary factors by a preponderance of the evidence. The trial court found conditions since the decree have not so materially and substantially changed that Derrick's best interest requires the requested change. When we apply the factors set forth above in Frederici, we concur.

Like the trial court, we are concerned with the "drinking habits, the temper and the general conduct" of Kathy's male friend and her present reluctance to voluntarily remedy the situation. We agree with the trial court that the conduct of Kathy's boyfriend should be monitored carefully to ensure there is not a repeat performance of physical abuse. We have searched the record and are unable to discern any favorable information about her boyfriend. We strongly suggest that should her boyfriend again appear on the scene and persist in like conduct, Derrick's best interest would most likely be served by considering the filing of a child in need of assistance petition. In this respect, we are also concerned about Kathy's own problems with alcohol.

The evidence establishes that Kathy maintains an adequate home for Derrick and her other child. Her two children, who are half-brothers, have been raised together. They have established a bond and we believe it would be ill-advised to split this relationship.

The social worker conducted a home study instigated by Kevin and concluded that Kathy's home was adequate. The

trial court found the attorney appointed to represent Derrick questioned the need for a change in the custodial arrangement as a result of his investigation and findings.

The evidence reveals that Kathy makes adequate provisions for the care of Derrick during the period she is working. He is doing well in school and appears to have adjusted to his surroundings.

The trial court was in the best position to view the parties and hear the testimony of the witnesses. Although we are not bound by the findings of the trial court, we do give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We affirm on the custody issue.

Kathy next argues the trial court erred in not applying Iowa's uniform child support guidelines. To support her contention, she relies solely on the guidelines. We reach this conclusion for in her brief she fails to point out any change in circumstances insofar as her and Kevin's earnings are concerned from the date of the last modification to the date of trial.

The child support guidelines now in effect do not--standing alone--constitute a change in circumstances as to a child support order entered pursuant to section 598.21 before October 12, 1989[1]. The dissolution decree

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1. A substantial change of circumstances does exist for a child support order entered pursuant to section 598.21 on or after October 12, 1989, when such order deviates from the guidelines for a reason other than that

here was entered prior to that date. In addition, from the record we fail to be convinced that the enforcement of the child support provision in the decree would be attended by positive wrong or injustice because of a change of income of either party. In re Marriage of Dawson, 467 N.W.2d 271 (Iowa 1991).

We affirm the trial court's decision on attorney fees. Each party shall pay his or her own attorney fees on appeal. Costs on appeal are assessed one-half to the appellant and one-half to the appellee.

AFFIRMED.

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stated in the order. In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991). A change in the guidelines themselves since the entry or subsequent modification of the original order is an exception to this rule. Id.