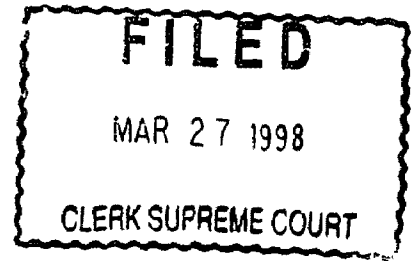


IN THE COURT OF APPEALS OF IOWA

No. 7-710 / 97-801



**IN RE THE MARRIAGE OF MATTHEW LEE LINDELL AND KIM MARIE
LINDELL**

000201

Upon the Petition of
MATTHEW LEE LINDELL,
Appellee,

And Concerning
KIM MARIE LINDELL n/k/a KIM MARIE COEN,
Appellant.

Appeal from the Iowa District Court for Story County, William J. Pattinson,
Judge.

On appeal from the modification of a dissolution decree. **AFFIRMED.**

Thomas P. Lenihan, West Des Moines, for appellant.

Donald G. Juhl, Nevada, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

VOGEL, J.

On appeal from the modification of a dissolution decree, the appellant, Kim Marie Lindell n/k/a/ Kim Marie Coen, argues the district court erred in: 1) denying her request to modify custody; 2) ordering her to pay child support; and 3) awarding attorney fees to the appellee. Matt requests an award of appellate attorney fees.

Background facts. Matthew and Kim were married in April 1990, but separated in September 1990. Their daughter, Savanna, was born in January of 1991, after Kim had moved to Missouri. Kim has a son, Josh, from a prior marriage. After a two-month reconciliation in Iowa, Kim returned to Missouri and the dissolution decree was entered in Iowa in November 1992, granting the parties joint custody with Kim to have primary physical care of Savanna.

After registering the Iowa decree in Missouri, Matt commenced a modification action in June of 1993 based on Kim's interference with Matt's visitation with Savanna. Kim then moved with the children to Georgia to be close to her family. In March 1994, a Missouri court modified the Iowa dissolution decree and granted primary care of Savanna to Matt. Matt declined to seek child support from Kim. The ruling was affirmed on appeal by the Missouri Court of Appeals.

Kim filed an action in Iowa in December 1995 seeking to modify custody. Matt requested a modification of support and visitation. In an order filed February 18, 1997, the district court declined to grant Kim's petition, but granted Matt's petition

to modify the visitation provisions of the Iowa and Missouri decrees with respect to Savanna. It found Savanna had flourished in her father's care and it was in her best interests to remain there. The court ordered Kim to pay \$275.65 in monthly child support. It also ordered her to pay \$2000 of Matt's attorney fees.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

I. Primary physical care. Kim argues the court erred in failing to restore the primary physical care of her daughter, Savanna, to her, and contends it improperly considered evidence from the parties' prior proceedings and expert evidence offered in violation of Iowa Rule of Civil Procedure 125(c).

The district court explained it did not want to "revisit the wisdom of a Missouri trial court's decision." Kim argues the court improperly considered evidence offered by Matt that was part of the Missouri modification action. However, Kim's counsel repeatedly questioned the propriety, wisdom, and procedure of the Missouri modification proceeding. Kim cites *Wells v. Wells*, 168 N.W.2d 54 (Iowa 1969), and other cases for the proposition that in a hearing for modification, little, if any

consideration is usually given testimony from the original trial. First, the trial court has discretion in these matters. *Id.* Second, the *Wells* case also states, “On the other hand, that does not irrevocably close the door to presentation, in a supplemental proceeding, of any prior divorce testimony reasonably deemed by the court to be relevant and helpful in resolving an always troublesome child custody problem.” *Id.* at 58. This similarly enables a modification court, in its discretion, to allow prior evidence provided it is relevant to its determination. In this vein, we find the district court properly exercised its discretion as the evidence Matt offered was relevant as to Kim’s parenting abilities, ultimately bearing on which parent could more effectively minister to the long-range best interests of Savanna.

Kim also contests the admission of Dr. Roland’s (licensed psychologist) testimony, allegedly in violation of Iowa Rule of Civil Procedure 125(c). Rule 125(c) relates to the duty of a party to supplement discovery of experts “as soon as practicable, but in no event less than thirty days prior to the beginning of trial *except on leave of court.*” *Id.* (Emphasis added.) The court, in its *discretion, may* exclude or limit the testimony of the proposed testimony if there is a failure to comply with the rule. *Id.* The trial court’s ruling on post-trial motions found Kim had access to information about Matt’s expert ten days prior to trial and was not disadvantaged, nor surprised by the late identity of Dr. Roland. Kim’s counsel was able to convey a copy of Dr. Roland’s opinion to her own expert, who extensively reviewed it and critiqued

it in her own testimony at trial. We do not find the district court abused its discretion in admitting the written report and testimony of Dr. Roland.

We now focus on the primary physical custody of Savanna. The controlling consideration regarding placement of the children is their best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The court determines placement according to which parent can minister more effectively to the children's long range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *Kunkel*, 555 N.W.2d at 253. We do give weight to the trial court's assessment of the parties. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

Our supreme court has stated:

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 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).

After thoroughly reviewing the record adduced at trial, we are unable to conclude Kim has demonstrated a material and substantial change in circumstances to effect a change in Savanna's primary care. The testimony by Dr. Roland, as well as Savanna's gymnastics instructor, Savanna's kindergarten teacher, Savanna's WINGS instructor, and her former preschool teacher, reveals Savanna to be a happy, well-adjusted, well-mannered child who has flourished in her father's care. We have little doubt both Matt and Kim love Savanna greatly. However, we often look to a parent's past performance as indicative of the quality of future care that parent is capable of providing. *See In re Marriage of Winnike*, 497 N.W.2d 170, 175 (Iowa App. 1992). We find Matt to be the more appropriate parent for Savanna's long-term primary physical care. We find no reason proffered in the record to disturb Savanna's primary physical placement with Matt, and we accordingly affirm the district court in this regard.

II. Child support. Kim contends her support obligation should not have been modified as there was no evidence demonstrating a change in circumstances. Based on our foregoing discussion, we cannot agree.

While Matt never sought child support from Kim in the prior Missouri action, we are mindful Iowa law imposes a mutual duty on parents to financially support their children. *State Dep't of Human Serv. v. Poggenpohl*, 522 N.W.2d 118, 119 (Iowa

App. 1994). The substantial change in circumstances was implicit in the trial court's ordering child support. Although Kim only works part-time as a cosmetologist, the trial court imputed income to her based on her earning capacity and a forty hour work week. *See In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa App. 1995) (citing *In re Marriage of Bonnette*, 492 N.W.2d 717, 722 (Iowa App. 1992) and stating it is appropriate to consider the earning capacities of the parents in setting an award of child support). From this amount of income, child support was set. There is a rebuttable presumption the amount of child support calculated in accordance with the Child Support Guidelines is the correct amount to be awarded. *See Iowa Code* §598.21(4)(a). We find based on the evidence presented, and based on the guidelines, the district court correctly calculated the \$275.65 per month child support amount Kim must pay for Savanna's care. We thus affirm on this issue.

III. Attorney fees. Kim argues she should not have been ordered to pay any of Matthew's attorney fees and she should have been awarded trial attorney fees. Matthew requests an award of appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to consider the needs of the party making the request, the ability of the other 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 Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). Iowa Code section

598.36 grants the district court discretion to require the unsuccessful party in a modification proceeding to pay the other's attorney fees. We find the district court correctly assessed payment of attorney fees to Kim in this action. We award no attorney fees on appeal. Costs assessed to Kim.

Having carefully considered all issues before us on appeal, we affirm the decision of the district court.

AFFIRMED.