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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-80/88-1135

IN RE THE MARRIAGE OF THERESA A. THOMPSON AND GARY E. THOMPSON

Upon the Petition of

THERESA A. THOMPSON,

Petitioner-Appellant,

And Concerning

GARY E. THOMPSON,

Respondent-Appellee.

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Appeal from the Iowa District Court for Buchanan County, Roger F. Peterson, Judge.

Petitioner appeals from the decision of the district court which granted respondent's application for modification and transferred custody of the parties' minor children to respondent. **AFFIRMED AS MODIFIED.**

Terry Diane Parsons of Olsen, Parsons & Ament, Cedar Falls, for petitioner-appellant.

James L. Wagner of Gartelos & Wagner, Waterloo, for respondent-appellee.

Steven K. Ristvedt of Ristvedt & Peters, Independence, for the children.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

Appellant appeals the district court's modification of the custody provisions of the dissolution decree. Appellant asserts: (1) the district court improperly allowed and considered a report by the attorney for the children without providing for cross-examination; (2) the best interests of the minor children require their continued placement with her; (3) the district court improperly modified the property settlement; (4) the visitation schedule does not permit her to have maximum contact with her children; and (5) the level of child support fixed by the district court is inequitable. We affirm as modified.

Theresa A. Thompson and Gary E. Thompson were married on July 19, 1975. Their marriage produced two children: Scott Edward Thompson, born June 18, 1976, and Jason Eugene Thompson, born October 23, 1978. On December 20, 1982, their marriage was dissolved, with Theresa being awarded custody of the minor children. The marital home was deemed to be held by the parties as tenants in common, but with Theresa having the right to possession so long as she did not cohabit or until she remarried.

Theresa's boyfriend, Jeffrey Clark, moved in with Theresa during the winters of 1985 and 1986. In the fall of 1987, Theresa and the children moved from the marital homestead, located in Jessup, into Jeffrey's house in

Lisbon, Iowa. Since the dissolution, Scott has had trouble in school. School officials believed Scott had unresolved feelings about the dissolution. The children have also been subjected to inappropriate physical discipline and verbal abuse by Jeffrey. Theresa was fully cognizant that such activities were taking place.

Gary filed an application for modification seeking custody of the children as well as the sale of the marital home. Since the dissolution, Gary has remarried. He and his wife were expecting a child in June of 1988. He moved into the marital home following Theresa's move to Lisbon. Theresa has become a registered nurse and is seeking a master's degree. Her gross income is $1,183 per month. Her current work schedule requires her to work three days in a row, have a day off, work three more consecutive days, and then have a week off. Gary and his wife are both employed. He currently earns a gross income of $1,829 per month.

The children both expressed a dislike for Jeffrey and a desire to live with their father. After the hearing, the district court received a letter from the attorney for the children recommending placement of the children with Gary. The district court found that a material change in circumstances had occurred and modified the decree to give custody of the children to Gary. Theresa was given visitation rights and ordered to pay $25 per child per week

in child support. The district court also ruled that Gary could purchase the marital home by paying Theresa one-half of its equity.

Our review of these matters is de novo. Iowa R. App. P. 4. We give weight to the district court's findings of fact, but are not bound by them. Iowa R. App. P. 14(f)(7). The first and governing consideration of the courts in determining custody issues is the best interests of the child. Iowa R. App. P. 14(f)(15). See In re Marriage of Fish, 350 N.W.2d 226, 229 (Iowa App. 1984). A dissolution decree may be modified when there has been a substantial change in circumstances. Iowa Code § 598.21(8) (1989).

Theresa claims the trial court erred in considering a letter from the attorney for the children without first permitting her the opportunity to cross-examine the attorney and submit rebuttal testimony. The attorney did not testify at trial. His letter constituted nothing more than his written argument to the court concerning what he deemed to be in the best interests of the children. However, since the attorney for the children states in the letter's preamble that his "observations" were based in part upon his out-of-court visits, absent some agreement or stipulation the letter should not have been considered by the district court. See In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979). Under such circumstances, we

will disregard the letter and review the record. Cf. In re Marriage of Gravatt, 365 N.W.2d 48, 49, after remand 371 N.W.2d 836 (1985).

The Iowa Supreme Court has set out the following standard to be applied in modification proceedings:

> 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.

In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). The trial court found such a material and substantial change in circumstances. We agree. The tensions between the children and Theresa's boyfriend, stemming from his acts of overt corporal punishment and verbal abuse of the boys, when combined with Scott's trouble in school, give rise to a material and substantial change in circumstances. See In re Marriage of Junkins, 240 N.W.2d 667, 668-69 (Iowa 1976). These circumstances were not present at the time of the original decree. In addition, the children have expressed their desire to live with their father. Such wishes, in a proceeding to change custody, are entitled to some consideration. Id. at 668. We further agree with the trial court that, considering the attendant environment in the appellant's home, Gary is in a

better position to attend to the children's well being. Accordingly, we affirm the district court's decision to modify custody of the boys.

Theresa also challenges the district court's decision that Gary could purchase the marital home by paying Theresa one-half of its equity. Theresa claims that the court's order constitutes a prohibited modification of a property provision. See In re Marriage of Johnson, 299 N.W.2d 466, 467 (Iowa 1980). The dissolution decree provided that upon the occurrence of certain events, "then the home shall be sold, with the Petitioner receiving one-half of the net proceeds, and the Respondent the other half of the net proceeds." The decree was silent as to the parties' respective rights to purchase the homestead. A trial court has the power to clarify and construe a dissolution decree so long as the court does not alter or vary the substantive rights of the parties. See Ulrich v. Ulrich, 400 N.W.2d 213, 218 (Minn. Ct. App. 1987). The substantive rights of the parties here were not affected by the court's ruling. If the marital homestead was sold to a third party, all that Theresa would be entitled to receive under the decree is one-half of the net proceeds. This is the same amount she will receive from Gary. As such, the district court's ruling as to the marital home does not amount to a prohibited modification of the decree's property provisions.

Theresa also takes exception to the visitation provided her by the trial court's ruling. Iowa Code section 598.1(6) (1989) defines "best interests of the child" to include "the opportunity for maximum continuous physical and emotional contact possible with both parents . . ." The trial court awarded Theresa two weeks of visitation in the summer and visitation on alternating weekends. Theresa argues that she should be permitted to have visitation with the children for those weeks during the children's summer vacation that she has off from work. We find merit in her argument. The trial court failed to take into account Theresa's unique work schedule which allows her to have every other week off from work. As this court noted, in dictum, in the case of In re Marriage of Hickey, 386 N.W.2d 141, 143 (Iowa App. 1986):

> If it were possible for one parent to care for the child during the week at a time in which the child would otherwise be with a third-party baby-sitter, division of the child's time between the parents' residences during the week or month would be justified for the child's best interests. In this manner, the child could spend the maximum time with parents and minimum time with third parties.

Just such a result is possible in this case due to Theresa's work schedule. We believe it would be in the best interests of the children to grant Theresa visitation with the children for those weeks during the children's summer vacation period that she has off from work. If, however, such a visitation period would interfere or conflict with appellee's vacation, then appellee's wishes

shall prevail. These weekly visitations, during the summer, will be in lieu of those visitation provisions contained in the modification ruling pertaining to weekend visitation. The district court's ruling is otherwise affirmed as to visitation.

Appellant also disputes the trial court's order requiring her to pay $25 per week per child in child support. Both parties have a duty to support their children, although not necessarily equally, but in accordance with their respective abilities to pay. See In re Marriage of Anderson, 400 N.W.2d 84, 86 (Iowa App. 1986). The amount ordered by the trial court was equitable considering the respective incomes of the parties. As such, we shall not disturb it.

Finally, appellee seeks attorney fees on appeal. Attorney fees are discretionary and depend upon the financial needs of the requesting party and the other party's ability to pay. See In re Marriage of Orgen, 375 N.W.2d 710, 714 (Iowa App. 1985). We believe each party should pay his or her own respective attorney fees. As to costs, we assess them equally between the parties.

AFFIRMED AS MODIFIED.