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IN THE COURT OF APPEALS OF IOWA

No. 8-109 / 97-1212

IN RE THE MARRIAGE OF STACIE MICHELLE OLIVER AND TROY DANIEL OLIVER

Upon the Petition of
STACIE MICHELLE OLIVER,
Appellant,

And Concerning
TROY DANIEL OLIVER,
Appellee.

FILED
APR 1 [illegible]
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ray A. Fenton, Judge.

A mother appeals the modification of a dissolution decree and claims the court erred in modifying the custody of the parties' children. **AFFIRMED.**

Ronald A. Baybayan, Des Moines, for appellant.

Delbert C. Binford, West Des Moines, for appellee.

Heard by Streit, P.J., Vogel, J., and Habhab, S.J.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

VOGEL, J.

Stacie Oliver appeals the modification of a dissolution decree and claims the court erred in modifying the custody of the parties' children. Because we find that Troy has carried his burden, showing a material and substantial change of circumstances, we affirm.

Background facts. Stacie and Troy were divorced on December 15, 1992. They are the parents of two children, Ashley born in September 1987, and Chad born in April 1990. Stacie was given the primary physical care of the children.

Stacie remarried and in August 1994 it was alleged her new husband, Todd, had sexually abused Ashley. After a juvenile court hearing, the children were adjudicated children in need of assistance and placed in the care of Troy. They have remained with Troy more than three years since their removal from Stacie.

In May 1996, after the district court was granted concurrent jurisdiction with the juvenile court, Troy petitioned to modify the dissolution decree, requesting primary physical care of the children. In May 1997, the district court found a material and substantial change in circumstances and granted "primary custody" of the children to Troy.

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. Stacie claims the district court erred in modifying the decree as she is the proper parent to have the primary physical care of the children, Ashley and Chad. In response, Troy contends issue preclusion is applicable and the adjudication of custody by the juvenile court is binding in the modification action.

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). "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." *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 party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. *Id.; see* Iowa Code § 598.21(8) (1995).

A. Issue preclusion and concurrent jurisdiction. Troy argues Stacie is precluded from arguing that the children's primary physical custody be transferred to her as the juvenile proceeding has already determined the children's best interests are

served by remaining with Troy. The juvenile court granted concurrent jurisdiction to the district court specifically "in regard to matters effecting primary permanent physical custody of the minor children, provided nothing contained herein will be construed as to limit or diminish the exclusive jurisdiction of the juvenile court as to matters concerning temporary physical custody and visitation rights during the pendency of the above captioned juvenile matter."

Iowa Code section 232.3 provides in relevant part:

> 1. During the pendency of an action under this chapter, a party to the action is estopped from litigating concurrently the custody, guardianship, or placement of a child who is the subject of the action, in a court other than the juvenile court.
>
> 2. The juvenile court with jurisdiction of the pending action under this chapter, however, may, upon the request of a party to the action or on its own motion, authorize the party to litigate concurrently in another court a specific issue relating to the custody, guardianship, or placement of the child who is the subject of the action.

A determination of the placement of the children in juvenile court does not preclude a determination of primary physical care of the children in district court, except if inconsistent with the juvenile court's actions and by the limiting language of the order granting concurrent jurisdiction.

A party is only precluded in district court from arguing specific allegations previously litigated in the juvenile court proceeding. In this case, the allegation that Todd abused Ashley was determined in juvenile court and that issue may only be

challenged on appeal. Issue preclusion[1] prevents it from being relitigated in district court. *See, e.g., In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa App. 1992).

B. Primary custody. We next examine whether a substantial change in circumstances existed to support granting Troy primary physical custody of the children. We look to a parent's past performance as indicative of the quality of future care that a parent is capable of providing. *See In re Marriage of Winnike*, 497 N.W.2d 170, 175 (Iowa App. 1992). We are most troubled by Stacie's conduct in connection with Todd's abuse of Ashley. The record indicates Stacie influenced Ashley's ability to tell the truth regarding the sexual abuse in an attempt to protect Todd. One social worker, Binnie LeHew stated, "Stacie needs to be aware of the influence her feelings and behaviors have on Ashley and to stop "'triangulating' her with her adult relationships. . . [and] become more aware of the impact of her daughter's victimization . . . ."

Stacie chose to stay with Todd after he sexually abused Ashley. This reflects poor judgment while obviating the unfortunate fact that Stacie has put her needs

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[1] Issue preclusion applies when four elements are met:

> a) The issue concluded is identical;
> b) The issue was raised and litigated in the prior action;
> c) The issue was material and relevant to the disposition of the prior action; and
> d) The determination of the issue in the prior action was necessary and essential to the resulting judgment.

Winnike, 497 N.W.2d at 173.

above the best interests of her own children. Stacie's conduct bears on her questionable parenting abilities. While we acknowledge that Stacie made efforts to get involved with her children's education and exposed them to religion, her efforts to modify her behavior did not occur until *after* the action for modification was filed and scheduled for hearing. This likely is indicative of Stacie's principal motivation. Her divorce from Todd and progress in her life occurred belatedly, at the expense of the children.

Ashley and Chad have lived with Troy since August of 1994. Not only do the children have a stable, active, and safe home life with Troy, but Troy has extended family that assists in their care. Conversely, Stacie's family facilitated Todd's contact with Stacie despite a no-contact order in effect from the juvenile court.

We accordingly agree with the district court's determination that there has been a substantial change of circumstances, that Troy will better promote the children's bests interests and is therefore the most appropriate parent to have primary physical custody of the children.

Appellate attorney fees. Troy requests an award of $3000 in appellate attorney fees. In her reply brief Stacie asks the court to reject Troy's request and instead award her 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). Stacie earns substantially more income than Troy. We determine Stacie shall pay $1500 of Troy's attorney fees. Costs are assessed to Stacie.

Having considered all issues properly before us, we affirm the district court.

AFFIRMED.