

IN THE COURT OF APPEALS OF IOWA

No. 1999-61 (9-216) / 98-1645

Filed April 30, 1999

**IN RE THE MARRIAGE OF SHERRI KAY WALT
AND GREGG ALLEN WALT**

**Upon the Petition of
SHERRI KAY WALT,**

Petitioner-Appellee,

**And Concerning
GREGG ALLEN WALT,**

Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas,
Judge.

Respondent appeals a district court ruling denying his application for
modification of the primary physical care and the court's award of attorney fees to
petitioner. **AFFIRMED.**

Matthew J. Brandes and Paul P. Morf of Simmons, Perrine, Albright &
Ellwood, Cedar Rapids, for appellant.

James L. Benz, Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

MAHAN, J.

Respondent appeals a district court ruling denying his application for modification of the primary physical care and the court's award of attorney fees to petitioner. We affirm.

Gregg Allen Walt and Sherri Kay Walt were married in October 1989. They have two children: Nathan, born December 28, 1991; and Trevor, born January 17, 1993. Gregg and Sherri were granted a dissolution of marriage in June 1995. The parties stipulated to joint legal custody with Sherri having primary physical care of the boys and Gregg having substantial and liberal visitation. The parties agreed Gregg's child support obligation should be calculated with an eleven percent deviation from the child support guidelines due to the amount of time the boys would be in Gregg's home each month.

Gregg, born in January 1963, is an engineer at Rockwell Collins. In June 1995, Gregg was earning approximately \$45,000 per year. By the time of the modification hearing in August 1998, Gregg's annual earnings were around \$66,000. Gregg has been married to Keli since September 1997; he lived with her for about one year before the marriage. Keli earns approximately \$30,000 per year.

Sherri, born in September 1967, works for Apache Hose & Belting. She earns approximately \$26,000 per year. Sherri has another child, Alex, born in February 1997. Sherri has not remarried; since the dissolution she has had relationships with five or six men, some or all of whom have stayed overnight in Sherri's home. The most troubling of these relationships was with Mark, who had a sexual abuse

conviction involving a nine-year-old boy. Mark had been a childhood friend of Sherri's and they had become re-acquainted in September 1997. Sherri terminated this relationship in late September 1997 after realizing she could lose her children over it.

Sherri has a history of mental health problems. She was hospitalized twice in 1990 and had been diagnosed with depression and personality disorders. Gregg was aware of Sherri's mental health issues at the time of the stipulation.

Sherri filed an application to modify child support in June 1997. Gregg filed an application to modify the primary physical care and child support provisions of the dissolution decree in October 1997, after learning of Sherri's relationship with Mark.

At the modification hearing, Gregg, Keli, and Keli's mother testified the boys, who were then five and six years old, were easily distracted, did not always follow the rules, and sometimes said "no" when they were asked to do something. They also testified the boys had difficulty adjusting to changing households. Gregg interprets this behavior as signs of Sherri's relationships with men having a negative effect on the boys. No custody evaluation was performed.

Gregg hired Dr. Kathryn Hall to evaluate Sherri's mental health. Dr. Hall reviewed Sherri's medical records and met with Sherri for three hours. She testified Sherri did not need medication for any psychiatric condition, Sherri could benefit from therapy regarding her relationships with men, and Sherri and Gregg could benefit from "communication enhancement." Dr. Hall declined to state an opinion

about whether Sherri had a personality disorder or whether her parenting skills were affected by her relationships with men.

The district court concluded there is nothing about Sherri's mental or emotional condition that makes her unfit for her role as parent, Gregg plans for Keli to be the primary caretaker if Gregg is awarded primary physical care, and the boys are normal, healthy, and have the usual problems of a normal childhood. The district court denied Gregg's application for modification of primary physical care, sustained the application for modification of child support, and ordered Gregg to pay \$6000 of Sherri's attorney fees.

Gregg appeals the denial of a modification of primary physical care and the award of attorney fees to Sherri. Sherri requests appellate attorney fees.

I. STANDARD OF REVIEW. Our review of child custody modifications is de novo. Iowa R. App. P. 4; *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N.W.2d at 28.

We review the award of attorney fees for abuse of discretion. *In re Marriage of Whalen*, 569 N.W.2d 626, 631 (Iowa App. 1997).

II. SUBSTANTIAL CHANGE. Gregg contends conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to award him primary physical care of the children. We disagree.

Custody, once fixed, should be disturbed only for the most cogent reasons. *Id.* at 628. To change a custodial provision of a dissolution decree, the party seeking modification 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. See *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 change must be more or less permanent and relate to the welfare of the children but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998).

The burden to modify custody provisions of a dissolution decree is a heavy burden. See *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998). The question is not which home is better, but whether the parent seeking modification can offer the children superior care. *Id.*; *Whalen*, 569 N.W.2d at 628. Gregg must show an ability to minister more effectively to the children's well-being. See *Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the children, custody should not be changed. *Id.*

We have reviewed the record and agree with the district court there is no showing Sherri is unfit to be a parent nor is there evidence her mental and emotional condition has deteriorated since the entry of the dissolution decree. Furthermore, Sherri testified she intended to follow through with relationship therapy and had

already made an appointment with Dr. Hall. Finally, we give weight to the district court's impression that Gregg intended Keli, not himself, to be the boys' primary caretaker if Gregg was awarded primary physical care.

The district court had an opportunity to observe the witnesses firsthand. The district court found, and we agree, Gregg failed to show he can offer the boys superior care or has an ability to minister more effectively to the boys' well-being. Therefore, we conclude, as did the district court, that primary physical care of the boys should not be changed.

III. ATTORNEY FEES. Gregg contends the award of attorney fees was improper because (1) Sherri never submitted an affidavit of financial status, and (2) the district court has effectively punished Gregg for attempting to protect the boys from a real and significant danger. We disagree.

Attorney fees are not recoverable as a matter of right but rest within the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. *Whalen*, 569 N.W.2d at 631. Any award of attorney fees depends on the financial circumstances and earnings of each party. *Id.* Considerable discretion is assigned to the trial court in the allowance of attorney fees. *Id.*

The district court explained ordering Gregg to pay a majority of Sherri's attorney fees as follows:

Most of the attorneys fees are in connection with the custody matter, in which Sherri prevailed. The balance of the fees would, of course, be in connection with the child support matter, where all that was required was an arithmetical calculation.

After review of the record, we conclude the district court did not abuse its discretion in ordering Gregg to pay \$6000 of Sherri's attorney fees.

IV. APPELLATE ATTORNEY FEES. An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Sherri is awarded \$500 for appellate attorney fees.

In summary, we have carefully reviewed the decision rendered by the district court. The record indicates Gregg has been aware of Sherri's psychological problems since 1990 and was certainly aware of them at the time of the original stipulation. The record further indicates Sherri's psychological condition was better at the time of trial than in 1990. Although Sherri has had a relationship problem with men, the record indicates she recognizes this problem and has taken steps to follow through with relationship therapy.

We agree with the district court's conclusion Gregg failed to prove a material and substantial change in circumstances since the entry of the original decree. We also agree with the court's reasoning in awarding Sherri attorney fees. We therefore affirm the decision of the district court.

AFFIRMED.

No. 98-1645. [1999-61 (9-216)] IN RE MARRIAGE OF WALT

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge. **AFFIRMED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Mahan, J. (7 pages \$2.80)

Gregg Walt appeals a district court ruling denying his application for modification of the physical care provisions of the decree. Gregg and Sherri have two boys together, born in 1991 and 1993. They were granted a dissolution of marriage in June 1995. Gregg was aware of Sherri's history of mental health problems at the time he stipulated to her having primary physical care of the boys. **OPINION HOLDS: I. Substantial Change.** We have reviewed the record and agree with the district court there is no showing Sherri is unfit to be a parent nor is there evidence her mental and emotional condition has deteriorated since the entry of the decree. Furthermore, Sherri testified she intended to follow through with relationship therapy and had already made an appointment to do so. Finally, we give weight to the district court's impression that Gregg intended his current wife, not himself, to be the boys' primary caretaker if Gregg was awarded primary physical care. We conclude, as did the district court, primary physical care of the boys should not be changed. **II. Attorney Fees.** Gregg challenges the district court order for him to pay \$6000 of Sherri's attorney fees. The district court explained "[m]ost of the attorney fees are in connection with the custody matter, in which Sherri prevailed. The balance of the fees would, of course, be in connection with the child support matter [brought by Sherri], where all that was required was an

arithmetical calculation." We conclude the district court did not abuse its discretion in ordering Gregg to pay \$6000 of Sherri's attorney fees. **III. Appellate Attorney Fees.** Sherri is awarded \$500 in appellate attorney fees.