FILED
MAY 25 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-207 / 92-1684

IN RE THE MARRIAGE OF DARYL W. DESART AND REBECCA M. DESART

Upon the Petition of

000091

DARYL W. DESART,

Appellee,

And Concerning

REBECCA M. DESART f/k/a **REBECCA M. WEESE,** n/k/a **REBECCA M. ACKELSON,**

Appellant.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

The respondent, Rebecca Desart, appeals a judgment denying her application to modify the parties' dissolution decree and award her primary physical custody of the minor children. **AFFIRMED.**

Carmen E. Eichmann, Des Moines, for appellant.

J. Michael Mayer, Des Moines, for appellee.

Heard by Oxberger, C.J., and Donielson, J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

000092

DONIELSON, J.

In June 1988, Daryl and Rebecca dissolved their marriage. The parties have two minor children: Daryl or "Buddy," born in September 1982; and Daniel or "Danny," born in September 1986. The decree of dissolution incorporated the parties' agreement that Daryl would have primary physical care of the two children.

Rebecca has her GED and is employed at a restaurant in Des Moines. In May 1990 she married Tracy Ackelson. Rebecca and Tracy have a daughter born in early 1991. Rebecca and Tracy were separated from July 1991 through May 1992.

Daryl has a high school education and is employed as a yard truck driver. In March 1989 he married Lori, his current wife. At the time of trial, Daryl lived in New Jersey with Lori, their two-year-old son, Lori's ten-year-old daughter, and the two boys.

In April 1990, Rebecca filed a contempt action against Daryl alleging she had been denied visitation of Buddy and Danny since February 1989. Daryl subsequently filed a contempt action based upon Rebecca's alleged failure to pay child support. Ultimately, the district court found Rebecca to be in contempt but withheld sentencing and allowed her to purge the contempt by paying $50 per week. The court ordered Daryl to comply with the visitation provisions under the decree.

In December 1991, Rebecca filed an application for injunctive relief requesting the court restrain Daryl from leaving Iowa with the children. Rebecca had learned Daryl intended to move his family to New Jersey. On January 13, 1992, the district court denied Rebecca's application and permitted Daryl to leave the state with the children. That same day, Rebecca filed an application to modify the decree of dissolution of marriage, requesting the court transfer primary physical custody of Buddy and Danny to her.

Trial was held in August 1992. Rebecca testified that eight months after the divorce, Daryl began destroying her relationship with the children. She alleged Daryl changed his residence several times without notification, denied her all contact with her children, and deliberately stopped her access to the children's school and medical records. Rebecca also presented two witnesses who testified the children were improperly dressed and often went unsupervised outside their house. Daryl testified Rebecca had been delinquent in her child support obligation and that she had an unstable home life.

In September 1992, the district court denied Rebecca's request to modify physical custody, but modified her visitation rights to accommodate the increased distance between the parties.

Rebecca now appeals. She contends the district court erred in dismissing her application to modify the decree

and award her primary physical care of the children. Rebecca also requests appellate attorney fees.

I. Modification of Primary Physical Custody. Rebecca first contends the district court erred in refusing to modify the decree and award her primary physical custody of Buddy and Danny.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the district court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

> 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. This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent

000095

reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

Rebecca's main contention is that Daryl's repeated denial of visitation since the time of the decree constitutes a substantial and material change of circumstance which warrants a modification of primary physical custody.

On our review, we agree both parties have been uncooperative in working with each other to achieve a liberal and workable visitation schedule. Daryl has consistently failed to encourage visitation with Rebecca. Rebecca often failed to follow the visitation agreement and often unilaterally scheduled visitations. Rebecca claims Daryl intentionally moved the children without ever informing her as to their whereabouts. Yet, the evidence at trial indicates that both times Daryl and Lori moved intrastate, they notified Rebecca and her father by certified letter of their new address. When Daryl moved to New Jersey, he again provided Rebecca with his address and phone number.

The determination as to whether Daryl had consistently and deliberately blocked Rebecca's access to the children hinged upon the credibility of the witnesses who testified at trial. We give considerable deference to the district court's assessment of the credibility of the witnesses:

> There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding

000096

> dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." . . . In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

In re Marriage of Vrbab, 359 N.W.2d 420, 423 (Iowa 1984) (citations omitted).

Daryl is reminded liberal visitation rights are in the best interests of the children. Iowa Code § 598.41(1) (1991); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). Unless visitation with the noncustodial parent will in some way injure the child, it is not to be prohibited. Fitch v. Fitch, 207 Iowa 1193, 1197, 224 N.W. 503, 504 (1929). Although this court strongly suggests both parties make a concerted effort to improve their communication and cooperation regarding visitation, we do not find these problems warrant a modification of primary physical custody. However, at this time we are concerned enough that we see sufficient grounds to warrant a transfer of custody if visitation is further denied to the mother. We expect full compliance by the father and mother, both as to visitation and child support. In the event there is not full and generous compliance, we expect the trial court to take swift action on the issue of custody.

Rebecca also has not demonstrated she is better able to minister to the children's well-being. Daryl has provided the primary care for Buddy and Danny since 1988. Daryl,

Lori, and the four children have lived together as a functioning family since 1989. At trial, Daryl demonstrated the children were well-adjusted and happy in their New Jersey home. Although the children have had academic problems, Daryl and Lori have worked with the children to help them adjust to the new school system. On the other hand, Rebecca's life has continued to be chaotic and unsettled. Prior to trial, Rebecca had separated from her husband for a period of almost eleven months. Rebecca has had several different residences and has not maintained stable employment. Furthermore, she has consistently struggled to stay current on her child support obligation.

On our review, we find Rebecca has failed to establish, by a preponderance of the evidence, there has been a material and substantial change of circumstances not contemplated at the time of the decree which warrants a change in primary physical custody. We affirm the district court on this issue.

II. Attorney Fees. Rebecca requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 Castle, 312 N.W.2d 147, 150

(Iowa App. 1981). Each party shall pay his or her own attorney fees.

The costs of this appeal are taxed to Rebecca.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED. 000098