FILED
OCT 05 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-394 / 93-248

IN RE THE MARRIAGE OF DEBRA GUILLIAMS AND RICHARD GUILLIAMS

Upon the Petition of

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DEBRA GUILLIAMS,

Appellee,

And Concerning

RICHARD GUILLIAMS,

Appellant.

Appeal from the Iowa District Court for Clinton County, David H. Sivright, Judge.

Richard Guilliams appeals the district court's denial of his petition to modify the parties' dissolution decree by awarding him physical care of the parties' minor children. **AFFIRMED.**

James D. Bruhn of Farwell & Bruhn, Clinton, for appellant.

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

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DONIELSON, P.J.

Debra and Richard Guilliams divorced in 1988, after a seven-year marriage. They had two children during the marriage: Garret, born February 7, 1984, and Kendra, born August 25, 1985. By stipulation and agreement of the parties the court awarded physical care of the children to Debra.

On April 9, 1992, Richard filed an application for modification of the dissolution decree primarily seeking to gain physical care of the children from Debra. Richard was thirty-eight and Debra was thirty-four at that time. Richard works as a process control technologist at Quantum and Debra is a registered nurse at Morrison Community Hospital in Illinois. Richard earns approximately $1160 net income every two weeks and Debra earns $283 net income weekly. Richard lives with his fiancee, Tina Varner, and her two children from a previous marriage: Brandon, age six; and Brianna, age two. Debra has a third child, Shelby, born July 22, 1991; Richard is not the father.

At the modification hearing, Richard presented evidence that Debra used drugs in the children's presence. Specifically, Garret's school teacher testified that after viewing a drug awareness video at school, Garret told her that he observed his mother's boyfriend and his mother smoke brown stuff from a can that smelled funny and made the boyfriend act strange. Debra allegedly punched Garret in the stomach after he accidentally dropped a taco on the

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kitchen floor. Debra's former baby-sitter testified she saw Debra kick Garret in the stomach. Finally, Richard asserted both children have expressed a preference to live with him. He further argued that Debra's own friends testified the children would be better off with their father.

Debra presented evidence that Garret's references to drugs were not specific and he would not repeat them to a counselor later. She asserted that none of Richard's witnesses had ever seen illegal drugs in her residence. Furthermore, Debra presented evidence that a DHS investigation into child abuse determined the report was unfounded. Finally, Debra testified the children are doing well in school and that she devotedly continues to perform the duties of a primary caretaker as well as pursuing her career.

The district court denied Richard's petition to modify the decree. Debra's counterclaim for an increase in child support was granted.

Richard appeals. He argues, among other things, that if he is awarded physical care, he should receive eighty-four dollars per week for the support and maintenance of the children.

Debra argues that a report of an evaluation ordered by the trial judge reflected she was not viewed as having a substance abuse problem. (Richard states this report is not a part of the record and he has not had an opportunity

to review it.) She also argues that since she supports Shelby, if there is a modification she should pay a lower level of support than suggested by Richard. Debra requests attorney fees on appeal.

I. 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 witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). 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).

When addressing custody issues our primary consideration is the long-term best interest of the child.

> 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. 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. 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.

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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)).

We do not feel appellant has carried his burden of proving a material and substantial change in the situation from the time of dissolution. The record does not reflect that appellant is able to minister more effectively than appellee to the children's daily and long-term needs. Appellee continues to meet the children's daily needs, even though she has completed her nurses' training and works full-time on swing shift. She has sought to increase her earning capacity. The children are doing well in school and are clean and well-fed. Appellee encourages the children to be involved in extra-curricular activities. Even assuming for the sake of argument that the claims of drug use by appellee's former boyfriend are true, the relationship is over and he is not an influence on her or the children. A court-ordered evaluation of appellee did not recommend treatment or counseling for drug or alcohol abuse. The only significant change we find is appellant's cohabitation with his fiancee and her two young children. The record suggests that her involvement with appellant influenced his decision to seek the modification. After a careful examination of the entire record, we must affirm the decision of the trial court concerning physical care of the children.

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II. The legislature amended Iowa Code section 598.21(9) effective July 1, 1992, to provide that a substantial change of circumstances exists when an order for support deviates by ten percent or more from the amount which would be due under current guidelines. The March 1988 dissolution decree provided that appellant pay $660.00 per month child support for the two children. The court found in its order on the petition for modification that appellant currently has a net income of $1160.00 every two weeks and appellee has a net weekly income of $283.00. Applying the current guidelines gives a factor of thirty percent for appellant's child support payments. Applying this factor sets child support under current guidelines at $754.00. This amount exceeds by more than ten percent the child support appellant was paying at time of the order. We affirm the trial court's decision to modify appellant's child support obligation to reflect current guidelines.

III. Appellee requests attorney fees on appeal. 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). Based on these factors, we determine appellant shall

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contribute $500.00 toward appellee's attorney fees for this appeal. Costs of this appeal are taxed to appellant.

AFFIRMED.