IN THE COURT OF APPEALS OF IOWA

No. 5-685 / 95-771

IN RE THE MARRIAGE OF MARY J. FARRAND AND WALTER FARRAND

Upon the Petition of

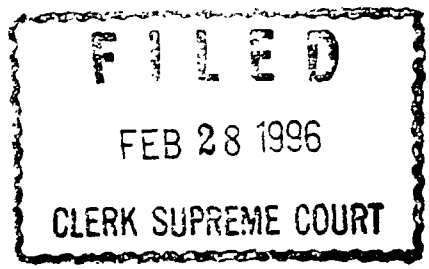
MARY J. FARRAND,

Petitioner-Appellant,

And Concerning

WALTER FARRAND,

Respondent-Appellee.



Appeal from the Iowa District Court for Webster County, M. D. Seiser, Senior Judge.

Mary Farrand appeals from the denial of her application to modify the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Ryan A. Genest of Borseth & Genest, Pleasant Hill, for appellant.

Trevor B. A. Nelson of Lipman Law Firm, Des Moines, until withdrawal, and then Ronald Vald, West Des Moines, for appellee.

Considered by Habhab, P.J., and Sackett and Huitink, JJ. Cady, J., takes no part.

HABHAB, P.J.

Mary and Walter Farrand were married in 1978. Each had children from prior marriages and they had one child together, Nicole, born December 27, 1983. On February 15, 1989, Mary and Walter's marriage was dissolved. The dissolution court found Mary and Walter "were extremely hostile and antagonistic." The court also found Mary and Walter had both "repeatedly tendered perjured testimony during the course of the trial when they thought it would serve their purpose." Mary had willfully and without just cause denied Walter visitation with Nicole pending the dissolution. Walter was found to have been Nicole's primary parent for most of her life at that time. The court found, in contrast to Mary, Walter had "not attempted to poison Mary's relationship with Nicole." Walter was awarded Nicole's physical care. The court determined the parties were unable to communicate and therefore joint custody was unworkable. Walter was granted sole legal custody.

About seven months after the dissolution was filed, Mary sought to modify the custody provisions. She made allegations Nicole was afraid of Walter, Walter denied Mary visitation and refused to allow maternal grandparent visitation, and Walter's failing eyesight affected his ability to care for Nicole. In June 1990, the court noted neither party's conduct had been exemplary. However, Walter had adequate parenting skills and Nicole was healthy and happy. Walter's primary physical care of Nicole was not changed. Mary was then receiving counseling and Walter was

agreeable to family counseling, so the court modified the decree to provide for joint custody.

Both Mary and Walter lived in Fort Dodge until 1993 and visitation between mother and child usually occurred. However, in July 1993, Walter moved to Tucson, Arizona, with Nicole and Walter's fiancee, Donna Swanson. Walter did not tell Mary they were moving. After Walter arrived in Arizona, he did write to Mary and tell her they had moved. He gave her a post office box address, but no street address and no telephone number. Mary did not see Nicole again until February 16, 1995.

Mary filed a petition to modify the primary physical care provisions and also filed an application for rule to show cause based on Walter depriving her of two of her three weeks of summer 1993 visitation. In December 1993, the district court ruled on the application for rule to show cause. The district court found Walter in contempt and was ordered to provide make-up visitation over the Christmas holiday.

Walter failed to comply with the order to provide make-up visitation. Mary filed a second application for rule to show cause in February 1994. An order was entered rescheduling the hearing on the second application for rule to show cause to be heard at the same time of the modification hearing.

In July 1994, Walter filed a motion to suspend visitation. This motion was overruled in October 1994.

In January 1995, Mary filed a motion for the return of Nicole for discovery purposes. The district court ordered Nicole to be transported back to Iowa on or

before February 15, 1995. On February 19, 1995, a third application for rule to show cause was filed by Mary due to Walter failing to deliver Nicole for discovery purposes on or before February 15, 1995. The second and third applications for rule to show cause were heard at the time of the modification hearing.

After the hearing on the petition for modification and the two applications for rule to show cause in February 1995, the district court found Walter had attempted to alienate Nicole from Mary, had intentionally violated the court's scheduled visitation order, and had violated a subsequent contempt order requiring make-up visitation. However, the court found that to transfer primary physical care would have taken law enforcement participation and would cause great emotional harm to Nicole. The court also found a transfer at that time would disrupt Nicole's school year and would not be in her best interest. Finally, the court found Mary had not shown she could care for Nicole more effectively than could Walter. Consequently, the court refused to modify the decree. Walter was given "one more chance to mend his ways and carry it out by providing Mary with visitation and phone conferences."

Walter was found in contempt of court for (1) violating the December 1993 contempt ruling; (2) violating the February 1995 orders; and (3) denying the 1994 visitation. As a result, Walter was ordered to serve three concurrent thirty-day terms in jail. The court allowed Walter to partially purge himself of the contempt by immediately providing a written agreement to comply with the court's orders related to phone calls and visitation and by serving seven days in the jail in Tucson.

Both parties' post-trial rule motions were denied. However, in response to Walter's motion for new trial on the contempt matters, the court noted it was doubting the correctness of its earlier decision in light of Walter's continued failure to provide the court assurance he intended to comply.

Mary appeals.

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 when considering custody issues, except to provide a framework for analysis, and we must, therefore, base our ruling on the particular facts and circumstances before us. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984); *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983); *In re Marriage of Pettit*, 493 N.W.2d 865, 867 (Iowa App. 1992).

Mary bears a heavy burden in attempting to obtain a modification of primary physical care. This is due to the principle that once primary physical care is fixed, it should only be disturbed for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980); *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994).

> 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.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing *Mikelson*, 299 N.W.2d at 671). In a discussion regarding the modification of custody provisions of a dissolution decree, our supreme court, in dicta, stated:

> The threshold question is always whether conditions since the dissolution decree was entered have so materially and substantially changed that the best interests of the children compel a change in custody. The object of the examination is not to relitigate matters settled at the divorce but to decide whether circumstances have materially changed since that time. To answer the question, the court must assess the current situation and project into the future.

In re Marriage of Cervetti, 497 N.W.2d 897, 901 (Iowa 1993) (citation omitted). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)).

The criteria for determining child custody are applied in modification proceedings. *In re Marriage of Hubbard*, 315 N.W.2d 75, 80 (Iowa 1982). In child

custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1993), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa App. 1993).

In determining whether there should be a modification of the primary physical care provisions of a dissolution decree, we are to look to whether conditions since the decree was entered have materially and substantially changed. In this particular case, this requires us to examine the parties' behavior both prior to and after the original dissolution proceedings.

The hostility between the parties has been extreme since the couple separated. The district court's ruling is enlightening as to the state of the parties' relationship prior to the original dissolution decree. The district court stated, in part,:

> If this ruling were to end all of the confrontations and dispose of the civil and criminal litigation that has been spawned by this domestic dispute, the court statistics in Webster County would show a

> marked improvement in the number of cases disposed of. In addition, the local peace officers might be able to furlough one of their members until another crisis arises.

Regarding the temporary custody of Nicole with Mary and the temporary visitation rights of Walter prior to the dissolution, the district court stated:

> In spite of the provisions of the order, the times that Walter has been denied visitation exceed the number of times that it has been allowed. Walter never got to spend either Thanksgiving or Christmas day with Nicole, even though he enlisted the aid of law enforcement officials. He has never been granted any visitation since prior to Thanksgiving.
>
> Mary has an unlisted phone number to prevent Walter from contacting her or Nicole. She has cut him off from Nicole and does not intend to deviate from the unlisted telephone number policy. Walter testified to many instances when Mary would pass by and give him "the finger" sign.

The district court further stated:

> The sheriff's office had been out so many times that they virtually gave up. Walter has had no contact with Nicole since prior to Thanksgiving. Neither counsel, nor the Court, nor law enforcement officers have been able to persuade Mary to consistently allow Walter to have visitation. She claims that he is an unsafe or inappropriate person to have the care of Nicole. He cared for Nicole for the major portion of Nicole's life. He was her primary parent for almost four [of Nicole's five] years. There is no evidence of abuse or mistreatment of Nicole. Any feeling that Nicole expressed was merely a reflection of what she was hearing from Mary or Mary's side of the family.
>
> For an extended period of time, Mary has demonstrated an unrelenting determination to alienate Nicole from Walter. This is not in Nicole's best interest, as she loves and wants to keep a close relationship with Walter, as well as with her mother.

The district court then made the following additional observation, which we feel is still the root of most of the problems these parties continue to experience, "There is

absolutely no communication between the parties. They have an inability to cooperate and communicate even on the most minute matters. This statement appears to be every bit as true today as it was when the district court filed the original dissolution decree.

Astonishingly, Mary is now experiencing much of the same difficulties she forced Walter to endure when she had temporary custody of Nicole prior to the dissolution. There has been absolutely no effective communication or cooperation between the parties, the noncustodial parent has been denied visitation, and there is no apparent attempt by the custodial parent to help foster a relationship between Nicole and the noncustodial parent. The acrimony, hostility, and antagonism between the parties has not changed in the least.

We seriously question whether a modification of primary physical care at this time would be in Nicole's best interests. A parent's past performance is a relevant factor to consider because it may be indicative of future behavior. *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa App. 1992). Mary's performance as a custodial parent was extremely poor. While Walter's performance has also been poor, the distance between Tucson and Fort Dodge has been a factor.[1] Mary has failed to

---

[1] While distance has been an additional factor worsening an already poor situation, we expressly find it is not as large an excuse as Walter would like this court to believe. We also note geographic relocation alone generally does not constitute a substantial change in circumstances necessitating a modification of a dissolution decree. *See In re Marriage of Smith*, 491 N.W.2d 538, 540 (Iowa App. 1992).

persuade us the situation would become better and Nicole's best interests would be served by uprooting Nicole and moving her back to Iowa. Mary has not met her "heavy burden" of providing "the most cogent reasons" for disturbing the stability of Nicole's current situation. *See Mikelson*, 299 N.W.2d at 671. We have no reason to believe the same situation would not continue to exist, only in reverse, if we chose to modify the district court's ruling. With this being the case, we affirm the ruling of the district court.[2]

Walter requests appellate 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 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. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). We determine each party should pay his or her own attorney fees for this appeal.

AFFIRMED.

---

[2] Like the district court, we have some reservations regarding Walter's desire to foster an environment conducive to better cooperation and communication between the parties. We likewise, however, question whether Mary has any similar desire. Consequently, we doubt a modification of the dissolution decree is going to improve the relations between Mary and Walter or create a better living environment for Nicole.