IN THE COURT OF APPEALS OF IOWA

No. 7-043 / 96-0749

IN RE THE MARRIAGE OF STACY LEA WODTKE AND BRUCE L. WODTKE

000402

Upon the Petition of
STACY LEA WODTKE n/k/a
STACY LEA COLSHAN,

Petitioner-Appellant,

And Concerning
BRUCE L. WODTKE,

Respondent-Appellee.

FILED
FEB 26 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Petitioner appeals from the district court's refusal to modify the custody provisions of the dissolution decree. **AFFIRMED.**

Jon C. Tack and Kermit L. Dunahoo of Dunahoo Law Firm, Des Moines, for appellant.

Irene A. Schrunk of Al Sturgeon Law Firm, Sioux City for appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ.

SACKETT, P.J.

Petitioner-appellant Stacy Lea Wodtke appeals from the district court's refusal to modify the custody provisions of the decree dissolving her marriage to respondent-appellee Bruce L. Wodtke. We affirm.

Stacy's and Bruce's marriage was dissolved on August 22, 1991. Bruce was awarded primary physical care of Amanda, born in 1983, and Samantha, born in 1985.

In August 1992, Stacy married Randy. No children were born to this marriage. On June 9, 1995, Stacy filed a modification petition seeking primary physical care of Amanda and Samantha.

At the time of the modification hearing in March 1996, Stacy was employed as a nurse. She testified she is a recovering alcoholic and had been sober for almost six years. Stacy lived with Randy, Aaron (her son from a prior marriage), and Randy's two children in a six-bedroom rented home.

Stacy testified Bruce had problems with substance abuse. There was little corroboration of her testimony and the review of all evidence would reveal he does not. Stacy also challenged the condition of Bruce's home. She admitted into evidence photographs of Bruce's trailer home allegedly illustrating it was not kept clean. Stacy testified she called the Department of Human Services after seeing Bruce's home. The Department made several unannounced visits to the home and found it adequate for the family's needs.

Bruce testified the trailer home is on his mother's farmstead and at times he has lived with the children in his mother's home and not the trailer home. He testified he and the children were not living in the trailer home when Stacy took the photographs. He believes Stacy staged some of the photographs.

A Department of Human Services worker testified the Department received a call alleging Bruce's home was a health hazard. The worker said she made two visits in the fall of 1994 and concluded the home was not a health hazard. She said the trailer home appeared clean and neat.

Three of the girls' teachers testified. They stated Samantha and Amanda were well-behaved and "A" and "B" students. They have good school attendance.

At the time of the hearing, Samantha was ten years old and Amanda was twelve. They have not spent much time in their mother's home. They testified they wanted to try living with Stacy. They were not certain, however, they wanted to do it on a full-time basis.

The court denied Stacy's request for primary physical care. It found there had not been shown such a substantial change in circumstances since the entry of the decree to justify modification. The court concluded Bruce had not been charged with any criminal offenses since August 1991, he had been employed on a full-time basis, and he attended to the girls' educational, extracurricular, and religious needs. The court also concluded the girls' mental and physical health was good.

We review a district court's modification of a dissolution decree de novo. Iowa R. App. P. 4; *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992); *Myers v. Myers*, 195 N.W.2d 113, 114 (Iowa 1972). We give weight to the trial court's findings of fact but they do not bind us. *In re Marriage of Sjulin*, 431 N.W.2d 773, 776 (Iowa 1988). Even though we engage in a de novo review, we will not disturb the trial court's conclusions unless there has been a failure to do equity. *In re Marriage of Wahlert*, 400 N.W.2d 557, 560 (Iowa 1987).

This is not an original custody determination. The question, therefore, is not which home is better, but the question is whether Stacy has demonstrated she can offer the children superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa App. 1994); *see also In re Marriage of Morton*, 244 N.W.2d 819, 921 (Iowa 1976). Stacy must show an ability to minister to the child's needs superior to Bruce's. *See In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa App. 1985). If both parents are found to be equally competent to minister to the children, custody should not be changed. *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App. 1992). The burden for a party petitioning for a change in a dissolution is heavy, *see In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App. 1988), because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. Custody, once fixed, should be disturbed only for the most cogent reasons. *See id.*

Stacy has the burden to show by the preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award custody to her. *See In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App. 1985).

Bruce is employed on a full-time basis. The children are healthy, well-adjusted, and performing extremely well at school. Bruce is attentive to their needs and school activities. He has had the children since 1990 when Stacy left them in his primary care. His parents live nearby and provide child care. Stacy has assumed little responsibility for the children. From 1991 until the hearing on modification, Stacy paid a mere $20 a month child support. The support was increased to $353 a month at this hearing. The children have not spent substantial time in their mother's home. She has engaged in attempts to alienate the children from their father which, if continued, could result in a modification of her visitation.

Stacy contends the trial court did not properly consider the children's testimony. We note there is considerable evidence Stacy exerted influence to convince the children they should ask to live with her.

A child's preference is entitled to some weight in a modification proceeding, but it may be given less weight than in the original dissolution proceeding. *In re Marriage of Zabecki*, 389 N.W.2d 396, 399-400 (Iowa 1986); *In re Marriage of Kurth*, 438 N.W.2d 852, 854 (Iowa App. 1989). The trial court considered the children's testimony finding they felt if they did not enjoy living with their mother

they could go back to their father. The trial court listened to three and one-half days of testimony and concluded that would not happen without another modification hearing. The trial court gave proper weight to the children's testimony.

We affirm the trial court.

Bruce has requested attorney fees on appeal. We award him $2000.

AFFIRMED.