FILED
JUL 30 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-257 / 91-1788

IN RE THE MARRIAGE OF WILLIAM L. TACK AND BARBARA A. TACK

Upon the Petition of

WILLIAM L. TACK,

Appellee,

And Concerning

BARBARA A. TACK,

Appellant.

Appeal from the Iowa District Court for Clinton County, C. H. Pelton, Judge.

Appellant appeals from a modification of a dissolution proceeding awarding primary physical custody of the children to appellee, her former husband and the children's father. **AFFIRMED.**

Realff H. Ottesen of Ottesen, Hoffman & Priester, Davenport, and Bert M. Watson, Clinton, for appellant.

Gary J. Rolfes of Mayer, Mayer, Lonergan & Rolfes, Clinton, for appellee.

Heard by Sackett, P.J., and Habhab, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J.

FACTS

On July 10, 1985, the marriage of Barbara Fedderson (formerly Barbara Tack) and William Tack was dissolved. The decree provided for joint legal custody of their four minor children with primary physical care to be shared by the parties.

On May 12, 1988, the district court entered a stipulated order of modification which retained the joint legal custody and shared physical care provisions of the dissolution decree, but made certain changes in the times the children spent with each parent.

On August 22, 1989, the district court entered a second stipulation which further modified the dissolution decree. Again, the parties retained joint legal custody and shared physical care. The modification made additional changes to the times when the children resided with each parent.

On July 16, 1990, the dissolution decree was further modified by a stipulated order to reflect the fact Barbara no longer worked outside of the home. Also, certain changes were made in the financial arrangements with regard to the children.

On May 24, 1991, Barbara filed an application for modification requesting the district court continue joint legal custody, but award physical care to her. William filed an answer to the application for modification and a counterclaim for physical custody of the children.

A hearing was held on the application to modify the dissolution decree. At the onset of trial, the district court asked the parties if they could pare down the number of witnesses they intended to call in order to eliminate cumulative evidence. The case was set for a two-day hearing with ten witnesses for each side. A short recess was held and the parties agreed to eight witnesses for each side. Neither side objected to the court's request. The hearing then proceeded.

On August 30, 1991, the district court filed its decision modifying the dissolution decree. The district court found William to be more stable than Barbara. At the time of the dissolution, Barbara abandoned the family for six or eight months for a boyfriend. The court also found she had a tendency to limit the children's relationships with others. It further found Barbara and her current spouse to be overly physical in disciplining the children, promoting complaints of child abuse which were founded.

The court found William to be mild mannered, calm, and collected. It determined he placed less stress on the children. It also found William participated with the children in social events and had a better interpersonal relationship with the children than Barbara. The court ultimately concluded the children's long-range best interests would be served by placing the children in the physical care of their father. The court ordered the father to make the children's educational decisions.

On September 6, 1991, Barbara filed a combined motion for a new trial and a rule 179(b) motion. Barbara argued in the motion for new trial the court acted unreasonably in requesting the parties pare down the number of witnesses and in questioning a witness regarding the children's interests. William filed a resistance.

On October 18, 1991, the district court ruled on Barbara's posttrial motions. The district court denied Barbara's motion for a new trial. The district court granted Barbara's motion to modify as it related to awarding tax exemptions of the children. The district court denied Barbara's rule 179(b) motion requesting the court allow her to make an offer of proof concerning the testimony of four witnesses. The district court reviewed the affidavits submitted and found them cumulative.

Barbara filed this appeal. We affirm.

SCOPE OF REVIEW

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial 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).

ANALYSIS

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "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 principles enumerated in Vetternack and applied in Kern are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been in the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

Both parties requested the district court modify the section of the dissolution decree providing for shared physical care of the four minor children. The district court agreed shared physical care was not in the best interest of the children. We agree with the trial court's conclusion that the decree should be modified.

On appeal, Barbara argues she should be awarded primary physical care of the four children. Barbara maintains the district court abused its discretion in limiting the number of witnesses each party could call. She further argues the district court did not consider all of the evidence and improperly based its final decision on the testimony of one particular witness, Sheila Busch, who the court independently examined and requested an opinion from as to which parent could best minister to the children's needs.

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), in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). 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 attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

After hearing all of the evidence and assessing the credibility of the witnesses, the district court determined

it was in the children's best interest to be placed in the parties' joint custody and in the father's physical care. In making its decision, the district court considered the factors set forth in Winter, 223 N.W.2d at 166-67. We agree with the findings of the district court and hold it is in the best interest of the children for the parties to have joint custody and for William to have primary physical care of the children.

As it relates to the remaining issue, we note that no objections were lodged when the trial court asked the parties if they could limit the number of witnesses so as to avoid cumulative evidence. From the record before us, it appears each party voluntarily agreed to limit his or her witnesses to a designated number. Accordingly, error on this issue was not preserved.

Costs of this appeal are taxed to the appellant.

AFFIRMED.