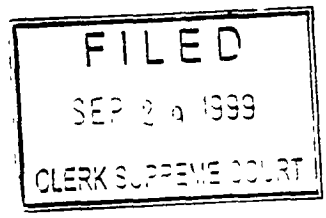
IN THE COURT OF APPEALS OF IOWA

No. 1999-157 (9-373) / 98-2286
Filed September 29, 1999

IN RE THE MARRIAGE OF TIMOTHY LEE WOLF and JOAN LYNN WOLF,



Upon the Petition of
TIMOTHY LEE WOLF,
Petitioner-Appellant,

And Concerning
JOAN LYNN WOLF,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Father appeals the grant of a motion to modify child custody made by the mother which gave her primary care of their child. **REVERSED.**

Arthur L. Buzzell, Davenport, for appellant.

Tracey E. Conner, Davenport, for appellee.

Murray Bell of Newport, Bell, Leon & Remirez, Davenport, guardian ad litem for minor child.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Timothy Wolf appeals the grant of a motion to modify child custody made by Joan Wolf which gave her primary care of their child. He contends the court's decision is not supported by sufficient evidence to establish there had been a material and substantial change in circumstances and that Joan was better able to ensure the child's well-being. We reverse.

Joan and Tim were married in February of 1985. They have one child together, Ashley, born on September 23, 1985. The parties separated in December of 1986 and their marriage was dissolved in April of 1990.

Ashley lived with Joan until she voluntarily sent Ashley to live with Tim in January of 1992. At that time, Joan was living in Australia, had health problems, was in the process of being discharged from the Navy, had no employment and no permanent residence.

The dissolution decree was modified in May of 1993 to place primary physical care of Ashley with Tim. At that time, Joan was living in Phoenix, Arizona and her future continued to be uncertain. However, over the next few years, Joan obtained employment, purchased her own home, and resolved her health problems. Joan has developed and maintained a close relationship with Ashley during eight-week-long summer visitations and by telephone contact two or three times per week.

Ashley has expressed a continuing desire to live with Joan in Phoenix.[1] She has a good relationship with each of her parents but has expressed discomfort about discussing issues surrounding puberty and other matters with Tim.

The district court determined there has been a material and substantial change in circumstance not within the contemplation of the court at the last modification proceeding which justifies a modification to place Ashley's primary physical care with Joan. The district court found, in part:

> . . . Joan has obtained full-time employment, purchased a permanent residence, resolved her health problems and has nurtured a closer relationship with Ashley as she grows older. This includes lengthy summer visitation and at least one-half hour phone conversations two or three times per week during the school year. Ashley has maintained her desire to live with her mother for the past three years as exemplified by the testimony of her father, her stepmother, her teachers, and her school counselor. Tim has performed admirably as a father to Ashley and should be commended for his loving and caring attitude towards his daughter. However, despite the distance and actual time spent with her mother, Ashley seems to be closer at this stage of her life to her mother than her father due to her changing needs as a young adolescent. This is not the fault of Tim, but is a natural consequence of growing older and having different needs as Ashley matures.

Joan's petition for modification was granted. A schedule for visitation between Ashley and Tim was established. Tim appeals.

I. STANDARD OF REVIEW. Our review of child custody modifications is de novo. Iowa R. App. P. 4; *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact findings, particularly when considering

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[1] The record contains evidence that Joan has taken an active part in instilling this desire in Ashley.

the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N.W.2d at 28.

II. MODIFICATION. Tim contends the district court should not have granted Joan's petition for modification. We agree.

Custody, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). To change a custodial provision of a dissolution decree, the party seeking modification must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially changed that the child's best interest makes it expedient to make the requested change. *See 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 change must be more or less permanent and relate to the welfare of the child but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998).

The burden to modify custody provisions of a dissolution decree is a heavy burden. *See In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998). The question is not which home is better, but whether the parent seeking modification can offer the child superior care. *Id.*; *Whalen*, 569 N.W.2d at 628. Joan must show an ability to minister more effectively to the Ashley's well-being. *See Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the child, custody should not be changed. *Id.*

The district court concluded there had been a material and substantial change in circumstances based on the fact Joan had obtained full-time employment; had purchased a home; had resolved health problems; and had nurtured a closer relationship with Ashley as she grew older. We find the positive changes in Joan's life were well within the contemplation of the court at the time of the 1993 modification. There is no evidence to suggest that in 1993 it appeared Joan's difficulties would be permanent. The changes in Joan's life do not constitute a material and substantial change of circumstances. Furthermore, the record shows Tim is a good father, has a close relationship with Ashley, and Ashley is doing well in his care.[2] Joan has not shown she could offer superior care or minister more effectively to Ashley's well being. Finally, the close relationship Ashley has with each parent establishes the custody arrangement wherein Tim was Ashley's primary caretaker was successfully maximizing Ashley's opportunity for continuing physical and emotional contact with both of her parents. Therefore, we conclude Joan has failed to meet her heavy burden to obtain modification of the custody provisions of the decree.[3]

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[2] The attorney for Ashley recommended against modification on the grounds that a material and substantial change in circumstances had not been proven. He concluded Ashley was currently in a very stable, supportive and loving home.

[3] We note Ashley's expressed continuing desire to live with Joan, while not controlling, is entitled to some consideration in this matter. *See In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). Deciding custody is far more complicated than asking children which parent they want to live with. *In re Marriage of Behn*, 416 N.W.2d 100, 101 (Iowa App. 1997). Ashley was thirteen years old at the time of the modification hearing. Under the facts of this case, we assess little weight to Ashley's expressed preference to live with Joan.

III. APPELLATE ATTORNEY FEES. Joan has requested appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Joan's request for appellate attorney fees is denied.

REVERSED.