

IN THE COURT OF APPEALS OF IOWA

No. 1-139 / 90-1382

FILED

APR 23 1991

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF CHERYL RENEE HOYT
AND DONALD RAY HOYT, JR.**

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Upon the Petition of

CHERYL RENEE HOYT,

Appellee,

And Concerning

DONALD RAY HOYT, JR.,

Appellant.

Appeal from the Iowa District Court for Page County,
Keith E. Burgett, Judge.

Donald Hoyt appeals the trial court's decision in this
modification of dissolution of marriage action. **AFFIRMED.**

Jon H. Johnson of Johnson & Graeser, P.C., Sidney, for
appellant.

Mark D. Swanson of Swanson & Boeye, Red Oak, for
appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

PER CURIAM

Cheryl Renee Hoyt and Donald Ray Hoyt, Jr., were divorced on July 14, 1986. The original decree granted custody of the parties' two minor children to Cheryl. Donald's child support was set at \$200 per month. On November 8, 1989, Donald filed his petition for modification in which he sought custody of the two children, ages eleven and nine. Cheryl filed a counterclaim seeking an increase in support and insurance coverage.

At trial Donald introduced evidence Cheryl had moved on several occasions since the dissolution. He also offered evidence she participated in a number of immoral parties in front of the children where alcohol and illegal drugs were involved. Donald also claimed Cheryl has had a series of live-in boyfriends, some of whom mistreat the children. The district court agreed most of Donald's claims were supported by the evidence, and Cheryl's lifestyle was not condoned by the court. Nonetheless, the court declined to modify the custody decree noting Cheryl had cleaned up her act since the modification action was filed. The court ordered an increase in child support of \$20 per month which closely conforms to the child support guidelines. The court made no changes regarding Cheryl's request for health insurance but ordered Donald to pay \$500 toward Cheryl's attorney fees.

On appeal Donald renews his arguments he and his new wife could provide a better environment for the children. He emphasizes Cheryl is raising the children in a filthy environment which exposes the children to illicit sex and drugs. He asserts Cheryl's statement of future marriage plans and remaining in a stable home environment are mere conjecture and certainly not consistent with her past behavior.

As modification actions are brought in equity, our standard of review is de novo. Iowa R. App. P. 4.

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 In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

We have reviewed the facts and the trial court's decision. The trial court found there had been no substantial change in circumstances sufficient to justify a change in custody. We agree. Neither party's behavior has been exemplary. In the future, we encourage both parents

to continue to straighten out their lives, both for their own sakes and especially for the sake of their children.

Cheryl requests attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. In re Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We award Cheryl \$500 to apply upon her appellate attorney fees. Costs of appeal are assessed to Donald.

We affirm the trial court on all issues.

AFFIRMED.