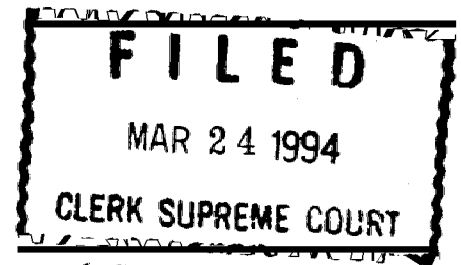


IN THE COURT OF APPEALS OF IOWA

No. 4-061 / 93-617



IN RE THE MARRIAGE OF KIMBERLY A. SWINTON AND
CURTIS C. SWINTON

Upon the Petition of

KIMBERLY A. SWINTON,

Appellee,

And Concerning

CURTIS C. SWINTON,

Appellant.

Appeal from the Iowa District Court for Chickasaw
County, John Bauercamper, Judge.

The husband appeals an order denying his petition for
modification of the child custody provisions of the
parties' dissolution decree. **AFFIRMED.**

David H. Skilton of Crown, Skilton & Skilton, Nashua,
for appellant.

Frances L. Gohlke of Carney & Gohlke, Waverly, for
appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

DONIELSON, C.J.

The marriage of Kimberly and Curtis Swinton was dissolved in December 1991. The parties have two minor children: Matthew, born November 1984, and Michael, born February 1987. By agreement between the parties, the decree awarded Kimberly primary physical custody of the children. Kimberly agreed to give Curtis a thirty-day notice if she intended to move out of the Nashua school district. Once given notice of her intent to move, Curtis had thirty days in which to petition the court for a modification of child custody.

Kimberly purchased a home in Waverly and notified Curtis of her intent to move. Curtis then filed a petition for modification of child custody to keep the children in the Nashua school district.

At the hearing, Curtis requested the parties' eight-year-old son, Matthew, be allowed to testify. Curtis claimed Matthew wished to remain in Nashua with him. The court denied the request stating it had sufficient evidence before it to decide the custody issue. It also stated it would find on the record Matthew wished to stay in Nashua.

The court denied the petition to modify the dissolution decree. It awarded Kimberly \$1,000 in attorney fees stating this was appropriate because she was forced to incur the expense of maintaining two residences during the proceedings. Curtis appeals.

I. Attorney Fee Award.

Curtis first asserts the district court erred in awarding Kimberly \$1,000 in attorney fees. Iowa Code section 598.36 grants the district court broad discretion in awarding attorney fees it deems reasonable to the prevailing party. See In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award, the complaining party must show the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977).

Kimberly was required to keep the children in the Nashua school district until the placement issues were resolved. She reasonably prepared for a move to Waverly by obtaining housing there. She was the prevailing party. Curtis petitioned the court for modification of child custody; the court denied his petition. A simple reading of the trial transcript disposes of the argument this proceeding was "more advisory than adversarial in nature." Nor can we agree with Curtis the award of attorney fees constituted a modification of the property settlement from the dissolution. The district court did not abuse its broad discretion by awarding Kimberly attorney fees of \$1,000.

II. Not Allowing Matthew to Testify.

Curtis sought, without success, to have the district court allow eight-year-old Matthew to testify he wanted to remain in Nashua. The district court has discretion in allowing young children to testify. In re Marriage of Abkes, 460 N.W.2d 184, 186 (Iowa App. 1990). A child's stated preference is a factor the court considers, but is not controlling. Iowa Code § 598.41(3)(f) (1991); In re Marriage of Udelhoffen, 444 N.W.2d 473, 476 (Iowa 1989). Such preference is given less weight in a modification action than in the original custody determination. In re Marriage of Behn, 416 N.W.2d 100, 102 (Iowa App. 1987). In this case the court determined allowing Matthew to testify "would unduly expose him to emotional harm which is not necessary." Yet the court did not refuse to consider his preference. The court specifically found on the record "Matthew has been upset at the prospect of moving to Waverly and leaving his familiar surroundings, school, family, and friends. As a result, he has expressed a preference to remain in Nashua." We conclude the district court did not abuse its discretion when it considered Matthew's preference, yet protected him from emotional harm by not allowing him to testify.

III. Bias of the District Court Judge.

Curtis alleges the judge interjected himself into the proceedings and showed bias toward Kimberly. We disagree.

Our review of actions for modification of dissolution decrees is de novo. Iowa R. App. P. 4. We have reviewed the transcript of the hearing with particular attention to the interactions cited by Curtis. We find the judge did not improperly interject himself or display bias toward Kimberly. Rather, the conduct of the judge was courteous and even-handed. The judge, since the proceeding was in equity, allowed both parties more flexibility in presenting evidence, but did encourage both parties to be more organized. We find no impropriety or bias.

IV. Appellate Attorney Fees.

Kimberly requests an award of 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We determine, after considering these factors, the parties shall be responsible for their own attorney fees on appeal. Costs of this appeal are taxed to Curtis.

AFFIRMED.