IN THE COURT OF APPEALS OF IOWA

No. 7-431 / 97-0076

000273

IN RE THE MARRIAGE OF AMIRA F. SALAMA AND FOUAD A. SALAMA

Upon the Petition of
AMIRA F. SALAMA,

Petitioner-Appellee,

And Concerning
FOUAD A. SALAMA,

Respondent-Appellant.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II, Judge.

Fouad appeals the district court's denial of his motion to modify the parties' dissolution of marriage decree. **AFFIRMED.**

Tom Hyland of Hyland, Laden & Pearson, Des Moines, for appellant.

Jill Southworth Rolek, West Des Moines, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

SACKETT, P.J.

Fouad A. Salama appeals the district court's refusal to modify the decree of dissolution of his marriage to petitioner-appellee Amira F. Salama to grant him physical care of the parties' minor child, Sara. Amira requests appellate attorney fees. We affirm.

Amira and Fouad were divorced in April 1993. The decree awarded the parties joint custody of Sara, born August 5, 1989. Amira was awarded primary physical care. In April 1996, Fouad asked for modification of the decree requesting a reduction in the amount of child support he was required to pay. Amira denied his claim for reduction and asked the court to increase child support and modify the visitation provisions of the decree because she intended to move to Florida. In May 1996, Fouad amended his modification action to request he be awarded primary physical care of Sara.

The district court denied Fouad's request for modification in its entirety finding the burden was on the party resisting the removal of the child to another state to demonstrate the move will detrimentally affect the child's best interests and the trauma of the move was not a sufficient reason to justify shifting physical care to the non-moving custodian.

The court denied Amira's motion to increase child support but granted her motion for modification of visitation.

Fouad contends the district court should not have denied his request to modify the custody provisions of the decree. Fouad maintains he showed a substantial and material change in circumstances warranting the modification. He advances Amira has interfered with or denied his visitation with Sara on many occasions and has failed to consult him when making major decisions involving Sara. Fouad further contends moving to Florida is not in Sara's best interests because Amira's job there is not stable and is no more lucrative than her employment opportunities in Iowa. He points out Sara has many relatives in Iowa.

The Iowa legislature, apparently concerned about the distance between parents sharing physical care, made a statutory change that effects the burden of proof in a modification such as this where the distance the parent moves exceeds one hundred fifty miles. The amendment to Iowa Code section 598.21 provides:

> 8(A). If a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation a substantial change in circumstances. . . .

H.F. 612, at 117. The amendment was not in place when the district court heard this case. Because of our finding, we need not determine whether we apply it, although we do find Amira's move with the child a change in circumstances.

Amira and Fouad are both well-educated adults. Amira is educated among other things as a paralegal. Fouad, born in 1938, is a medical doctor who no longer practices. Amira and Fouad unfortunately have been unable to put aside hostilities

they feel for each other and work jointly toward providing their daughter stability. The record clearly supports a finding that they both have exhibited immature behavior in their roles as Sara's parents. The record is equally clear that Sara suffers because of their conduct. Sara has taken upon herself the responsibility to try and make both parents happy. She is not consistent in vocalizing her wishes and appears to be strongly influenced by both her father and her mother.[1]

Sara accused her half-brother, Fouad's child, of sexually abusing her but later recanted the statements. She at times gave no reason for allegedly fabricating the story and at other times implicated her mother in having made it up. Her mother continues to feel the allegations are true, although they have been found otherwise by the district court here and by the juvenile court in dismissing a petition filed on Sara's behalf.

Sara has been involved with a number of therapists who give different opinions as to her best placement and her relationship with each parent. As one therapist vocalized, the file is four inches thick.

Fouad's and Amira's rendition of facts concerning their disagreements are seriously conflicting, causing us concern for the credibility of both parties.

This is not an original custody determination. The question, therefore, is not which home is better, but whether Fouad has demonstrated he can offer Sara superior

---

[1] Sheila Pottebaum, a licensed psychologist, gave the opinion, "Sara is so confused by the many perceptions given to her by adults that she is virtually incapable of recognizing the truth about a great many situations."

care. *See In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). Fouad must show an ability to minister to the child's needs superior to Amira'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 Rosenfeld*, 524 N.W.2d 212, 213 (Iowa App. 1994); *In re Marriage of Gravatt*, 371 N.W.2d.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).

We review de novo. Iowa R. App. P. 4; *In re Marriage of Feustel*, 467 N W 2d 261, 263 (Iowa 1991). The burden for a party petitioning for a change in a dissolution is heavy. *In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App. 1988). 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. *Id.* at 693. Fouad 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 Sara's interests make it expedient to award custody to him. *See In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App. 1985).

Neither Fouad nor Amira appear willing to put aside hostilities toward the other and act in Sara's interest. We hold it against both of them in our review. The Iowa courts have addressed similar complaints under other circumstances. *See In re*

Marriage of Udelhofen, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Leyda*, 355 N.W.2d 862, 865-67 (Iowa 1984); *Rosenfeld*, 524 N.W.2d at 215; *In re Marriage of Wedemeyer*, 475 N.W 2d 657, 659-60 (Iowa App. 1991); *In re Marriage of Gratias*, 406 N.W.2d.2d 815, 817-18 (Iowa App. 1987).

We are critical of Amira's decision to move with Sara to Florida without involving Fouad, Sara's other physical custodian, in the decision. Dr. John Tedesco, appointed by the court to do a custody evaluation, testified he felt the separation which he generally did not approve might, in this situation, be positive and less stressful for Sara because it would allow her unencumbered time separately with each parent.

Amira, as a custodian, has been attentive to her daughter's needs. Fouad has failed to carry the burden of showing, as he is required in a modification, that he can provide superior care. We find no valid reason to disagree with the trial court's assessment. We give weight to the fact findings of the trial court, particularly as to credibility of witnesses, and affirm. *See In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

Amira requests appellate attorney fees. The trial court disapproved of her parenting and her attitude toward Fouad. Amira planned the move to Florida without Fouad's input. She has been less than cooperative in affording visitation. We have considered these facts and believe Amira should pay her own attorney fees.

AFFIRMED.