

IN THE COURT OF APPEALS OF IOWA

No. 3-254 / 92-1232

IN RE THE MARRIAGE OF WILLA M. GOODFELLOW AND
JACOB E. KRCH

Upon the Petition of
WILLA M. GOODFELLOW,
Petitioner-Appellee,

And Concerning
JACOB E. KRCH,
Respondent-Appellant.

FILED

JUN 29 1993

CLERK SUPREME COURT

000089

Appeal from the Iowa District Court for Scott County,
Margaret Stevenson Briles, Judge.

Krch appeals from the district court order denying
modification of the dissolution decree. He argues the
court erred in not giving him physical care of the parties'
minor child. **AFFIRMED.**

Dennis D. Jasper of Stafne, Lewis, Jasper, Alexander &
Preacher, Bettendorf, for appellant.

Patrick W. Driscoll of Stanley, Lande & Hunter,
Davenport, for appellee.

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

*Senior judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

PER CURIAM

000090

Respondent-appellant Jacob E. Krch appeals following the trial court's denial of his application to modify the custody provision in his dissolution decree giving him physical care of his eight-year-old son. Jacob's marriage to petitioner-appellee Willa M. Goodfellow had been dissolved in September 1989 and physical care awarded to Willa. Jacob filed this application in May 1991 seeking to modify the decree claiming he was the superior custodian and physical care should be changed. Following a hearing his application was denied in May 1992. We affirm.

We review de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Modification of provisions of a dissolution decree is justified only if there has been some material and substantial change in the circumstances of the parties, making it equitable that other terms be imposed. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden rests on Jacob who is seeking the modification to establish such a change of circumstances by a preponderance of the evidence. Mears v. Mears, 213 N.W.2d 511, 513 (Iowa 1973); Thayer, 286 N.W.2d at 223. Circumstances that have

000091

changed, to justify modification, must be those that were not within contemplation of the trial court when the original decree was entered. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983).

The knowledge of the trial court at the time the award is made is the basis for determining whether there has been a change of circumstances. Full, 255 N.W.2d at 159; Leo v. Leo, 213 N.W.2d 495, 496 (Iowa 1973). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. Mears, 213 N.W.2d at 514. This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

To change the custodial provision of a dissolution decree, Jacob must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the child's best interests make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). Jacob must prove an ability to minister more effectively to the child's well-being. Id.; see also In re Marriage of Gravatt, 371 N.W.2d 836, 838-40 (Iowa App. 1985).

000092

Both parents are loving and caring. They both have the ability to supply the child with all necessary material needs, nurturing, and supervision. The child will have above average care in either home. We have very carefully examined the record made at the dissolution hearing. It would serve no useful purpose to recite the evidence introduced at trial. While Jacob has shown he meets all the requirements to be a very adequate physical custodian, the record also shows Willa is currently a very adequate physical custodian. Jacob has not met his burden of showing by a preponderance of the evidence that conditions have changed since the decree was entered that have substantially changed the child's best interest and made it expedient to make the requested change. Frederici, 338 N.W.2d at 158. To obtain the change he is asking, Jacob bears the heavy burden of showing the ability to minister to the child's care more effectively than Willa. See id. We affirm on this issue.

Jacob also challenged the trial court's decision to award attorney fees to Willa. The trial court ordered him to pay \$6475 toward her fees. Iowa trial courts have considerable discretion in awarding attorney fees. 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. In re Marriage of Cooper, 451 N.W.2d 507, 510 (Iowa App. 1989). Awards of attorney fees must be for fair and reasonable amounts, In

000093

re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We affirm on this issue.

Willa has requested attorney fees on appeal. We order Jacob pay \$1000 toward the fees of her appellate attorney.

AFFIRMED.

Sackett, P.J., and Keefe, S.J., concur; Habhab, J., dissents.

000094

HABEAB, J. (dissenting)

I respectfully dissent. I would reverse the trial court and award custody of eight-year-old Jacob to his father.

From the record before me, I find that conditions since the entry of the decree have so materially and substantially changed that the child's best interests make it expedient to make the requested change. I believe Willa's open conduct displays a complete insensitivity to the best interest of her child. I would reverse.