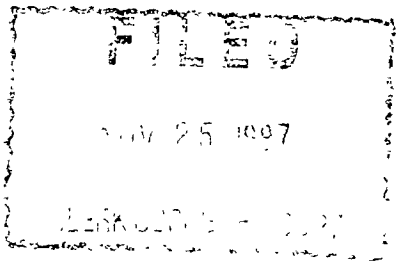
IN THE COURT OF APPEALS OF IOWA 000203

No. 7-536 / 96-1219



IN RE THE MARRIAGE OF BRIAN K. LEICHTY AND ROLEEN K. LEICHTY

Upon the Petition of
BRIAN K. LEICHTY,
Appellee,

And Concerning
ROLEEN K. LEICHTY, n/k/a ROLEEN K. CONGDON,
Appellant.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

Respondent appeals from the modification of the dissolution decree awarding petitioner primary physical care of the parties' minor child. **AFFIRMED.**

L. G. Klein, Oxford, until withdrawal, and then Roleen K. Congdon, Maquoketa, pro se.

Patricia C. Kamath, Iowa City, for appellee.

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

HUITINK, J.

I. Background Facts and Proceedings.

Roleen and Brian were divorced in 1987. The decree dissolving their marriage provided for joint custody of their daughter, Kristi. Roleen was awarded physical care subject to Brian's visitation rights.

Brian filed this action in February 1995. He cited Roleen's residential, marital, and employment instability as substantial change in circumstances necessitating modification of Kristi's physical care. Kristi was placed in Brian's physical care after Roleen was defaulted for failing to appear at a pretrial conference. Although the default was set aside, the district court left Kristi with Brian pending final resolution of his custodial claims.

The district court modified the decree by awarding Kristi's physical care to Brian. In reaching this conclusion, the court determined Roleen's declining marital stability, frequent change of residence, and failure to communicate with Brian on matters of material parental concerns necessitated modification.

On appeal Roleen contends Kristi's long-term interests are better served if Kristi remains in her physical care. Roleen cites her long history as Kristi's primary caretaker. She also argues the significance of her personal situation has been overstated and Brian failed to prove Kristi has been adversely affected thereby. The district court's denial of Roleen's motion to continue the trial and refusal to interview Kristi in camera are cited as additional errors.

II. Standard of Review.

We review this equitable action de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings of fact, but we do give them deference because of the district court's trial perspective. *Id.; In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Continuance.

Throughout these proceedings, Roleen's relationship with her attorneys was problematical. Counsel originally retained by Roleen withdrew because Roleen failed to keep counsel informed of her residence and was unavailable for consultations. Roleen sought to continue the trial because she was unable to retain new counsel until ten days before trial.

The disposition of a motion to continue implicates the sound discretion of the district court. We will not interfere absent an abuse of discretion. *In re Marriage of Clifford*, 515 N.W.2d 559 (Iowa App. 1994). Our review of the record indicates Roleen was offered ample opportunity to engage counsel and prepare for trial. Her neglect or indifference to the consequences of these proceedings provided insufficient justification for a continuance. We find no abuse of discretion and affirm on this issue.

IV. Exclusion of Kristi's Testimony.

At trial Roleen's lawyer asked to interview Kristi in camera. This request was denied. This determination implicates the broad discretion of the district court to

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control the mode and interrogation of witnesses. See Iowa R. Evid. 611. We will not interfere absent an abuse of discretion. *In re Marriage of Abkes*, 460 N.W.2d 184, 186 (Iowa App. 1990).

The purpose of Roleen's request for an in camera interview was to inform the court of Kristi's preference to remain with her. This fact, however, was not the subject of serious dispute. Both parties acknowledged the close relationship Kristi enjoyed with Roleen and Kristi's concern for Roleen's welfare. The district court was also informed by Kristi's school guidance counselor that interviewing Kristi for this purpose would be traumatic for Kristi.

Under these circumstances, the district court's refusal to permit counsel to examine Kristi in camera fell well within the scope of its discretion. We accordingly affirm on this issue.

V. The Merits.

To change a custodial provision of a dissolution decree, the applicant must establish that conditions since the decree was entered have so substantially changed that the child's best interests necessitate the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and must be more or less permanent not temporary. They must relate to the welfare of the child. The parent seeking to take physical care 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 physical care stems from the principal 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); *In re Marriage of Behn;* 416 N.W.2d 100, 101 (Iowa App. 1987).

Roleen's greater experience as Kristi's primary care provider is not disputed. This fact is entitled to considerable weight in resolving a custody dispute. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa App. 1995). We also note Kristi's acknowledged preference to remain with Roleen cannot be ignored. *In re Marriage of Hunt,* 476 N.W.2d 99, 101-102 (Iowa App. 1991). These considerations, however, are outweighed in this case by compelling evidence of Roleen's declining ability to provide a stable and secure environment for Kristi.

The record indicates that Roleen and Kristi have lived at least thirteen different places since the dissolution was entered in October 1987. As a result of these changes, Kristi has been required to change schools multiple times. Kristi has a history of high absenteeism and it is a fair inference that Kristi's special educational needs have been compromised by Roleen's residential instability.

Roleen has also married twice since the parties' dissolution. Her relationship with her current husband, John Congdon, is of particular concern. There is evidence of John's criminal history and violent propensities. These characteristics were the source of concerns for Roleen's safety expressed by her family and friends. Roleen, primarily at John's insistence, has failed to inform Brian of changes in her residence, leaving Brian no access to Roleen or Kristi. Additionally, there is evidence that John

has assumed a dominant role in Roleen's joint custodial relationship with Brian. As a result, there has been increased tension and limited communication on matters of mutual parental concern.

The record also contains favorable evidence concerning Brian's ability to minister effectively to Kristi's needs. Brian has remarried and his wife is supportive of Brian's custodial aspirations. Brian also enjoys stable employment. Moreover, Kristi's school performance has improved while in Brian's care. He offers Kristi a stable and secure environment that Roleen no longer provides. We accordingly find that Brian has met his heavy burden of proof and that the physical care provisions of the original decree should be modified as provided by the district court.

The judgment of the district court is affirmed. Each party shall pay their own attorney fees and costs are taxed to Roleen.

AFFIRMED.