

IN THE COURT OF APPEALS OF IOWA

No. 6-420 / 95-2047

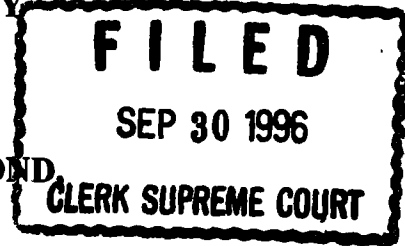
**IN RE THE MARRIAGE OF LINDA KAY SHIRLEY
AND TIMOTHY HENRY SHIRLEY**

**Upon the Petition of
LINDA KAY SHIRLEY n/k/a LINDA KAY REDMOND**

Petitioner-Appellee,

**And Concerning
TIMOTHY HENRY SHIRLEY,**

Respondent-Appellant.



Appeal from the Iowa District Court for Fremont County, Timothy O'Grady,
Judge.

Timothy Shirley appeals the district court's dismissal of his application to
modify custody provisions of the parties' dissolution of marriage decree.

AFFIRMED.

Joseph J. Hrvol, Council Bluffs, for appellant.

Drew H. Kouris, Council Bluffs, for appellee.

Heard by Habhab, P.J., and Cady and Vogel, JJ.

HABHAB, P.J.

Timothy Shirley appeals the district court's denial of his petition to modify custody. At issue are custody, the district court's decision not to hear testimony from the parties' minor children, and the award of \$750 in trial attorney fees to Linda. We affirm.

Linda and Timothy Shirley's marriage was dissolved on October 1, 1992. Their dissolution decree awarded them joint custody of their two minor children, Timothy (Timmy), born March 15, 1988, and Jamie, born March 18, 1989. Linda was granted primary physical care of both children and Timothy was awarded visitation. Linda married James Redmond and they have another child. Timothy has not remarried.

In December 1994, Linda filed an application for rule to show cause alleging Timothy failed to comply with the original dissolution decree's provisions regarding maintaining health insurance for the children and assuming one-half the costs of the uninsured medical expenses. Linda also made application to modify the decree for more specific visitation provisions. Timothy answered and filed an application to modify the custody provisions of the dissolution decree requesting the primary physical care of the children be transferred to him.

Following a hearing, the court dismissed Timothy's application to modify the custody provisions of the original decree finding Timothy failed to show that a

material and substantial change in circumstances had occurred. The court further ordered Timothy to pay \$750 towards Linda's attorney fees.

Timothy appeals. He argues: (1) the court erred in failing to modify the custody provisions of the parties' dissolution decree; (2) the court abused its discretion in refusing to allow Timmy and Jamie to testify; and (3) the court erred in awarding Linda attorney fees because no evidence was presented regarding the parties' financial situations.

Linda alleges Timothy has not preserved error on the issues of whether the children should have been allowed to testify and attorney fees. In addition, Linda seeks appellate attorney fees.

I. Modification of Custody. The legal principles governing our review of a modification action are well established.

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 Anderson, 530 N.W.2d 741, 741-42 (Iowa App. 1995).

In an appeal from an action to modify custody, our review is de novo. *Anderson*, 530 N.W.2d at 741; Iowa R. App. P. 4. We give weight to the findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value and we must base our decision primarily on the particular circumstances of the parties before us. *Anderson*, 530 N.W.2d at 741. We are cognizant of the superior vantage point of the trial court and its ability to consider the demeanor and appearance of the parties. *See In re Marriage of Urban*, 358 N.W.2d 429, 423 (Iowa 1984).

In our de novo review of the record, we find that Timothy has failed to establish there has been a substantial change in circumstance warranting modification of the custody provisions within the original decree. Timothy failed to provide evidence the children have suffered physical or sexual abuse while in Linda's care. In fact, the three child abuse investigations completed, two of which were conducted based on allegations made by Timothy, establish the allegations of abuse are unfounded.

Testimony at trial was provided by several social workers and psychologists who have worked with the family. Betty Parks of Lutheran Social Services was assigned by the Iowa Department of Human Services to conduct in-home counseling with Linda and the children in 1994. Ms. Parks testified that Timmy and Jamie were very guarded in what they would say to her. The children informed her Timothy told

them her job was to prevent them from seeing him and they should not talk to her. Although Ms. Parks testified that the Redmond family did have some problems with communication and problem solving, she added that these issues were resolvable and there was nothing abnormal concerning Linda's relationship with the children. Ms. Parks further testified she did not believe it was necessary to transfer the custody of Jamie and Timmy to Timothy.

Randy Henderson of the Iowa Department of Human Services testified he set up in-home counseling with the Redmond family after the most recent abuse referral was unfounded. This counseling was voluntary and was to assist the children with dealing with the divorce. Mr. Henderson testified he did not feel the children were at risk in Linda's care.

Paul Feilmann testified on Timothy's behalf. Mr. Feilmann is a clinical social worker and testified that he visited with Timothy, Linda, and the children from the spring of 1993 until the early part of 1994. He testified Timmy and Jamie were showing signs of mild depression and anxiety resulting from the divorce. He further established Timothy was experiencing problems adjusting to the divorce and that Timothy felt he was still emotionally married to Linda. Mr. Feilmann was of the opinion that Timothy was on a mission to obtain custody of the children and the children were under pressure from Timothy as to what to say to Mr. Feilmann.

Dr. John H. Wineman, a clinical psychologist, was ordered by the court to perform a psychological evaluation of Jamie and Timmy to establish the mental status

of each child. Dr. Wineman does not make recommendations regarding custody. His evaluation reports assess the mental status of each child and he makes recommendations for treatment. Each evaluation expressly states:

[T]he evaluation would not focus directly on parent issues or adequacies and is not designed in a manner that would allow the examiner to address specific child custody issues, particularly as it related to which parent may be best for the children at this time.

As such, we do not consider this report in considering the parenting skills of Timothy and Linda. We do note, however, Dr. Wineman recommended psychotherapy for both children to focus on anxiety reduction. He also recommended education of both parents to better understand how their behavior effects the children and what each of them can do to reduce anxiety in the children. Dr. Wineman further noted the children's therapy should focus on strengthening the relationship between each child and Linda.

Each party also produced several lay witnesses to support their claim for custody.

In our de novo review, we find that no substantial change of circumstance warranting modification of the original decree has occurred. Testimony at trial established that Timmy and Jamie are suffering from anxiety as a result of the continued conflict between the parties. Timothy has not shown the best interests of the children are such that transfer of primary physical care to him is warranted, nor has he shown he is a more effective minister to the well-being of the children.

II. Testimony of Children. During the trial, Timothy requested the district court conduct an in-camera examination of the children. Linda asserts Timothy never called the children as witnesses and therefore had not preserved error on this issue. We find Timothy's request in this regard was sufficient to preserve error.

Timmy and Jamie were ages seven and six, respectively, at the time of trial. The district court denied Timothy's request to hear from the children on the recommendation of Mr. Randy Henderson. Mr. Henderson conducted family-centered services for the family from January 1995 through July 1995. He also observed the children the morning of trial and reviewed their psychological evaluations. At trial, Mr. Henderson testified the children did not have the maturity to testify and that it would not be in their best interest to do so.

Timothy asserts on appeal that the trial court abused its discretion in not allowing the children to testify and further that the court should have at least examined the children to determine their competency. After careful review of the record, we disagree. The district court had information regarding the children's preferences through the testimony of the parties and witnesses presented at trial. It is within the inherent power of the trial court to protect the children in this situation and not allow them to testify. *In re Marriage of Abkes*, 460 N.W.2d 184 (Iowa App. 1990).

Here we are particularly influenced by the findings of the trial court. In issuing its decision, the district court noted that Timmy and Jamie have been at the focal point of the ongoing struggles between Timothy and Linda. We find that as the children have suffered from the continual conflict between the parties, the trial court's refusal to examine or hear testimony from them was proper.

III. Trial Attorney Fees. Timothy argues the trial court abused its discretion in awarding Linda \$750 in attorney fees as no new evidence regarding the financial circumstances of the parties was submitted to the district court. We find that error on this issue has been properly preserved.

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 that the trial court abused its discretion. *Id.* 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). At trial, Timothy testified that his employment had not changed since the issuance of the original dissolution decree. Linda's petition specifically requests that Timothy be ordered to pay attorney fees and costs of the action. Timothy did not provide any evidence below to establish his financial situation is such that he should not be required to pay the attorney fees assessed against him by the district court. We

find that the trial court did not abuse its discretion in making an award of attorney fees to Linda in the amount of \$750.

IV. Appellate Attorney Fees. Linda requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 679, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* This is the second occasion since entry of the original decree Linda has had to defend the district court's order regarding custody on appeal. Given the financial circumstances of the parties in this action and the fact that Linda was again required to defend the district court's order regarding custody, we find equity warrants an award of appellate attorney fees to Linda in the amount of \$1000.

AFFIRMED.