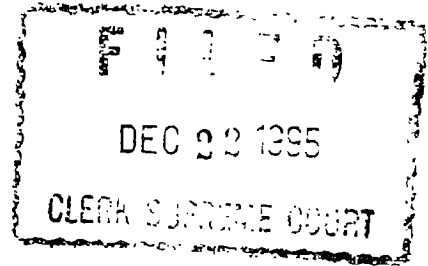


IN THE COURT OF APPEALS OF IOWA

No. 5-620 / 95-343



IN RE THE MARRIAGE OF ROSS E. HAVENS
AND ROBIN HAVENS

Upon the Petition of
ROSS E. HAVENS,

Appellee,

And Concerning
ROBIN HAVENS,

Appellant.

Appeal from the Iowa District Court for Cass County, Glen M. McGee, Judge.

Respondent appeals a district court order granting petitioner's application for modification of custody of the parties' two minor children. **AFFIRMED AS MODIFIED.**

John M. Trewet of Kluever, Van Ginkel & Trewet, Atlantic, for appellant.

James W. Mailander, Anita, and Rana A. Scarlett, Shenandoah, for appellee.

Heard by Habhab, P.J., Cady, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

CADY, J.

This appeal stems from an order entered by the district court modifying the custodial terms of a decree for dissolution of marriage. On our de novo review, we find insufficient evidence to support modification. Accordingly, we modify the district court order to restore the original custody provisions.

Ross and Robin Havens were divorced on September 3, 1993. The district court awarded them joint custody of their two boys, Kyle and Kody, with physical care to Robin. Kyle was born January 30, 1990, and Kody was born December 24, 1991.

At the time of the divorce, Robin lived in a home in Atlantic, Iowa, and Ross lived outside Wiota, Iowa. Robin later met Scott Lukehart and moved with the children into his house in Atlantic in February 1994. Their relationship initially flourished then soon soured, yet not before Robin became pregnant. Lukehart had Robin evicted from his house in May. Robin moved to her mother's house in Omaha for a couple of days, then returned to Atlantic and resided in a family crisis center for a few weeks. The crisis center contacted Robin after Lukehart reported to police she threatened suicide. The crisis center determined she was not suicidal. Robin never acted on any threats of suicide.

Robin and the children moved into a house in Atlantic in May 1994 and later moved back into the home they lived in at the time of the divorce. Ross moved into

a home next to his parent's home in Wiota following the divorce. Robin gave birth to another boy, Kray, on December 22, 1994.

Robin did not work outside the home during the marriage, but made several unsuccessful efforts to work outside the home following the divorce. She eventually decided to remain in the home and care for the boys. Ross changed jobs in November 1994.

Ross filed an application to modify custody on May 4, 1994. He alleged Robin's life had become unstable and he feared for the safety of the children due to her mental condition and suicidal tendencies. The district court held the modification hearing on February 10, 1995.

The trial court modified the decree to grant Ross custody of the children and awarded Robin \$1000 in attorney fees. The court found Ross had experienced increased stability since the divorce, while Robin had experienced instability evidenced by her unstable relationships with men, unstable and erratic employment, and frequent moves in residences. The court also relied on separate reports from a clinical psychologist and a psychiatrist. The psychologist felt Robin suffered from a borderline personality disorder, which was refuted by the psychiatrist.

Robin appealed. She argues the evidence does not support a finding of a substantial change of circumstances. She also claims she should have been awarded the full amount of her attorney fees of \$4000.

I. Standard of Review.

Our review is de novo. Iowa R. App. 4. We give weight to the 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). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

II. Modification of Custody.

Before the custodial provisions of a dissolution decree may be altered, the applying party must demonstrate by a preponderance of evidence conditions since the entry of the decree have so materially and substantially changed that the children's best interests make the requested change expedient. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The changed circumstances must not have been contemplated by the court at the time the decree was entered, and must be more or less permanent, not temporary in nature. *Id.* They must also relate to the welfare of the children. *Id.* Moreover, the parent seeking custody must prove an ability to minister more effectively to the children's well being. *Id.* The heavy burden placed upon the party seeking the modification stems from the venerable principle that once custody of children is established it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

Although the record reveals several changes since the dissolution, we believe it is important to first consider the period of time within which these changes have occurred. The modification application followed the decree by less than eight months, and the final hearing on the application was held approximately nine months later. Thus, the critical evidence to support a material and substantial change of circumstances is compacted into seventeen months.

Considering the nature of the changes within the time span involved, we are unable to conclude the changes in this case are more or less permanent. We are also unable to find they were beyond the contemplation of the original trial court.

Robin has moved several times since the divorce, but remained in Atlantic and has now returned to the home where she was residing at the time of the divorce. The various moves were essentially the result of an ill-fated relationship with another man. There is no reason to believe Robin will continue to move the children or that she will continue to experience problems in her relationships with men. Robin enjoyed a long-term involvement with Ross prior to the divorce, indicating her ability to maintain steady relationships with men.

We recognize Ross maintains stable employment, but he is also a college graduate and, as a noncustodial parent, has been able to devote much of his time to his work. He also had stable employment at the time of the original decree. To the contrary, Robin only has a high school education and did not work outside the home during most of the marriage. Her efforts to work outside the home following the

divorce and her subsequent decision to remain at home with the children do not support modification.

We also reject the notion the psychological profiles and reports justify modification of custody. Although a psychologist reported Robin appeared to have a borderline personality disorder, a psychiatrist who also examined Robin found no psychiatric diagnosis and concluded she was emotionally capable of parenting her children. We further observe the clinical psychologist who evaluated the parties prior to the dissolution of marriage did not find Robin to be suffering from any personality disorders. No doctors testified at the modification hearing and we are not influenced by any credibility findings of the trial court.

We are slow, for good reason, to change custody once the issue has been settled. We are also reluctant to separate half-siblings. *See In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). A change in custody would separate the children from their half-brother.

We conclude Ross has failed to demonstrate a material and substantial change in circumstance since entry of the decree. Some instability and adjustment is not uncommon following a divorce and we are not convinced the changes in Robin's life during the period of time since the divorce justify the dramatic step of changing custody of the children. Ample evidence exists showing Robin has adequately cared for the children. Ross, on the other hand, is also actively involved in his work and has missed scheduled visitations with the children.

III. Attorney Fees.

An award of attorney fees is not a right, but rests within the trial court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We have reviewed the record and are unable to conclude the award of \$1000 was an abuse of discretion. We award Robin \$1200 in appellate attorney fees.

IV. Conclusion.

We modify the trial court's order to restore custody of the children with Robin. The child support and visitation provisions of the original decree are also reinstated. Robin is awarded \$1200 in appellate attorney fees. Costs are assessed to Ross.

AFFIRMED AS MODIFIED.