FILED
MAY 25 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-189 / 92-1282

IN RE THE MARRIAGE OF JANET M. ARP AND ROY A. ARP

Upon the Petition of

JANET M. ARP n/k/a **JANET M. BOGE,**

Appellee,

And Concerning

ROY A. ARP,

Appellant.

Appeal from the Iowa District Court for Bremer County, Jon Stuart Scoles, Judge.

Roy appeals from the district court's dismissal of his petition for modification of the parties' dissolution decree. **AFFIRMED.**

Roger L. Sutton of Sutton Law Office, Charles City, for appellant.

Gary J. Boveia of Boveia Law Office, Waverly, for appellee.

Heard by Oxberger, C.J., and Donielson, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, J.

Roy and Janet dissolved their marriage in 1982. Janet received primary custody of the two minor children, Jesse, born in 1978; and Katie, born in 1979.

Janet has been employed as a teacher with the Charles City school district since 1981. In February 1990, Janet married Gordon Boge. At the time of the modification hearing, Roy was employed by Midwest Omni and Penn Mutual. In July 1990, Roy filed a petition for modification of placement. In January 1991, Janet filed a petition of modification of Roy's child support obligation. Both matters were consolidated for trial.

A hearing was held in May 1992. Roy conceded both children had been doing well academically. However, he argued both children desired to live with him. He claimed the children were unhappy with Janet and their stepfather, Gordon. He specifically contended Janet was too "rigid" and had subjected the children to verbal abuse. He also alleged the children had been physically abused by Gordon. Following the hearing, the district court concluded both Roy and Janet had failed to prove a material and substantial change in circumstances to justify any modifications of the decree.

Roy now appeals. He contends the district court erred in finding there had been no change of circumstances which warranted a modification of primary physical custody. Roy also contends the district court abused its discretion in

ordering Roy to pay Janet's attorney fees. Roy and Janet both request appellate attorney fees.

I. Modification of Primary Physical Custody. Roy first contends the district court erred in refusing to modify the decree and award him primary physical custody of the children.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. 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).

> 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.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. Id. 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).

We are not convinced the children have been subjected to physical and mental abuse as Roy has alleged. Janet has developed a stricter approach to parenting than perhaps Roy believes is necessary. However, the fact she is a "rigid" disciplinarian in no way warrants a modification of custody. The only specific instance of physical abuse referred to in Roy's brief deals with an allegation which is outside the record and in no way will be considered by this court.

We find the most persuasive evidence to be the evidence Janet has presented of how well the children have flourished under her care since she was first awarded primary physical custody in 1982. In the Iowa Test of Basic Skills, Jesse scored in the ninety-eighth percentile and Katie scored in the ninety-second percentile. At trial, Jesse was described by teachers as a well-adjusted, bright, active and good student. Katie was described as more introverted, but nevertheless to be emotionally, socially, and academically well-adjusted.

Roy has presented no credible evidence that he has the superior ability to care for the physical, emotional, mental, and financial needs of the children. Following the dissolution, Roy had moved to Davenport. He remained in that area until returning to Charles City in 1988. However, since that time, Roy has made few friends and

business contacts in the Charles City area. Since the time of his filing the petition for modification, Roy has experienced both emotional and financial difficulties. In 1991, Roy filed for bankruptcy and he continues to be financially unstable.

This court gives only minimal weight to the stated of preferences of Jesse and Katie. Both children have stated they wish to live with Roy. Iowa Code section 598.41(3)(f) (1991) requires the court, in making a custody determination, to consider the preference of the children. However, the preference of a child is not controlling. In re Marriage of Blume, 473 N.W.2d 629, 630 (Iowa App. 1991) (citation omitted). "In determining the weight to give a child's preference we consider, among other things, the child's age, educational level, maturity, relationship with family members and reasons given for his or her decision." Blume, 473 N.W.2d at 630 (emphasis added). A child's preference is entitled to less weight in a modification proceeding than it would be given in an original custody determination. In re Marriage of Behn, 416 N.W.2d 100, 102 (Iowa App. 1987).

Neither of the children were able to articulate specific reasons why they preferred to live with Roy, other than the fact they were unhappy their mother had married Gordon. The evidence supports a finding that Roy has encouraged the children's dissatisfaction with their mother and Gordon. He criticizes Janet for being too "rigid" and

promises to be more "open" with the children. It is not surprising the children have expressed a preference to live with Roy.

On our review, we find Roy has failed to establish, by a preponderance of the evidence, there has been a material and substantial change of circumstances which was not contemplated at the time of the decree. We further find Roy has failed to prove he is better able to minister to the children's well-being. We affirm the district court on this issue.

II. **Attorney Fees.** Roy contends the district court abused its discretion in ordering Roy to pay Janet's attorney 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 that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In 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).

Initially, we note the district court did not order Roy to pay Janet's attorney fees. Rather, the court ordered Roy to pay the attorney fees incurred for the guardian ad litem which had been appointed to represent the children at

Roy's request. The district court did not abuse its discretion in this regard.

Roy and Janet both request appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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). We award Janet $1500 appellate attorney fees.

The costs of this appeal are taxed to Roy.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED.