

IN THE COURT OF APPEALS OF IOWA

No. 1999-29 (9-139) / 98-1453

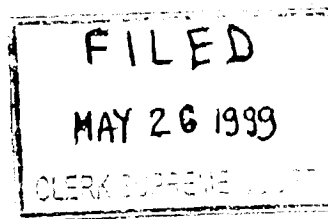
**IN RE THE MARRIAGE OF JANICE MARIE UHLENHAKE
AND ARTHUR LEONARD KENNETH UHLENHAKE**

Upon the Petition of
JANICE MARIE UHLENHAKE,

Appellee,

And Concerning
ARTHUR LEONARD KENNETH UHLENHAKE,

Appellant.



Appeal from the Iowa District Court for Winneshiek County, Margaret
Lingreen, Judge.

Appellant appeals from the district court's refusal to modify the custody
provisions of the parties' decree of dissolution. **AFFIRMED.**

Stephen J. Belay of Anderson, Wilmarth, Van Der Maaten & Belay, Decorah,
for appellant.

Russell Schroeder, Jr., of Schroeder Law Office, Charles City, for appellee.

Considered by Huitink, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.,

Arthur Uhlenhake appeals from a district court order refusing to modify the decree dissolving his marriage to Janice Uhlenhake. He contends the district court erred in refusing to transfer primary physical care of his daughter to him despite her clearly-stated preference to live with him. We affirm. Janice seeks an award of appellate attorney fees.

Background: Arthur and Janice married in 1977. Their two children are Chad, born in 1979, and Stephanie, born in 1983. Throughout their marriage, the parties lived in Ossian, in northeast Iowa. The marriage was dissolved in 1994 and the court granted joint legal custody with primary physical care of the children to Janice. In 1996 Janice remarried and relocated with her husband near Algona. Chad expressed a desire to finish high school in Ossian, where he was very involved in sports. In September 1996 Arthur petitioned to modify physical care of both children to him. In May 1997 the court approved the parties' stipulation Arthur would have primary physical care of Chad with the understanding Arthur and Chad would continue to live with Arthur's parents.

In December 1997 Janice relocated with her husband to Albert Lea, Minnesota. Stephanie told her father she wanted to return to Ossian and complete her schooling there. In January 1998 Arthur petitioned for modification of primary physical care. At trial in July 1998, Stephanie testified concerning her desire to live with her father in Ossian. The court dismissed Arthur's petition, concluding Arthur had "not shown

a superior ability to minister to Stephanie's well being" and Janice could "best minister to [Stephanie's] long-range best interest."

Appellate claims: Arthur claims the court erred in disregarding Stephanie's stated preference to live with him, given her age, intelligence, and maturity. *See* Iowa Code § 598.41(3)(f) (1997).¹

Discussion: In order to prevail in his petition to change primary physical care, Arthur must prove conditions since the dissolution decree have so materially and substantially changed that the children's best interests make it expedient to change their custody to him. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). The changed circumstances must not have been contemplated by the trial court when the decree was entered. *Id.* A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. *In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa App. 1994). 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 Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). A child's preference

¹ Section 598.41(3) reads, in pertinent part:

3. In considering what custody arrangement . . . is in the best interest of the minor child, the court shall consider the following factors:

* * *

f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.

is entitled to less weight in a modification proceeding than in the original dissolution. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa App. 1993); *In re Marriage of Kurth*, 438 N.W.2d 852, 854 (Iowa App. 1989).

Arthur cites language from *In re Marriage of Burham* that a child's preferences, while not controlling, are relevant and cannot be ignored. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979). In contrast to the case at bar, *Burham* was an original custody determination and the parties did not agree to joint custody. Arthur also cites *In re Marriage of Pundt* concerning the weight to be given to a child's preferences. *In re Marriage of Pundt*, 547 N.W.2d 243, (Iowa App. 1996). *Pundt*, like *Burham*, was a custody determination in a dissolution, not a modification. The issue in *Pundt* was whether or not to split up siblings, based on the preference of one sibling. Next Arthur cites *In re Marriage of Ellerbroek* in support of his claim much weight should be given to Stephanie's preference at age fifteen, as it was in *Ellerbroek*. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-60 (Iowa App. 1985). Neither *Burham*, *Ellerbroek*, nor *Pundt* supports Arthur's claim concerning the weight the court should give to Stephanie's preference. All three cases are original dissolution appeals, not modifications.

The trial court's findings indicate the court carefully considered and gave weight to Stephanie's preferences. The court concluded other factors such as the improvement in her grades, Janice's relationship with the children, and her efforts to promote their relationship with Arthur outweighed Stephanie's preference. From our

de novo review of the record, we agree with the district court Arthur's application should be denied.

Janice seeks an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). 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 Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). We order Arthur to pay \$500 of Janice's appellate attorney fees.

AFFIRMED.

No. 98-1453. [1999-29 (9-139)] IN RE MARRIAGE OF UHLENHAKE

Appeal from the Iowa District Court for Winneshiek County, Margaret Lingreen, Judge. **AFFIRMED.** Considered by Huitink, P.J., and Vogel, and Zimmer, JJ. Opinion by Zimmer, J. (5 pages \$2.00)

Arthur Uhlenhake appeals a district court order refusing to modify the custody provisions of the 1994 decree dissolving his marriage to Janice Uhlenhake. He contends the district court erred in refusing to transfer primary physical care of his daughter to him despite her preference to live with him. In 1996 Janice remarried and relocated with her husband near Algona. In December 1997 Janice relocated with her husband to Albert Lea, Minnesota. Stephanie told her father she wanted to return to Ossian and complete her schooling there. Arthur claims the court erred in disregarding Stephanie's stated preference to live with him, given her age, intelligence, and maturity. *See* Iowa Code § 598.41(3)(f) (1997). **OPINION HOLDS:** A child's preference is entitled to less weight in a modification proceeding than in the original dissolution. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa App. 1993). The trial court's findings indicate the court carefully considered and gave weight to Stephanie's preferences. The court concluded other factors such as the improvement in her grades, Janice's relationship with the children, and her efforts to promote their relationship with Arthur outweighed Stephanie's preference. From our de novo review of the record, we agree with the district court.