IN THE COURT OF APPEALS OF IOWA

No. 1-026 / 00-0540
Filed February 28, 2001

IN RE THE MARRIAGE OF MARCUS LOWELL HEYER AND VICKIE JO HEYER

Upon the Petition of
MARCUS LOWELL HEYER,
Petitioner-Appellee/Cross-Appellant,

FILED
FEB 2 3
CLERK SUPREME

And Concerning
VICKIE JO HEYER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Hancock County, Paul W. Riffel, Judge.

The petitioner appeals, and respondent cross-appeals, from the district court order granting respondent's petition to modify the child custody provisions of the parties' dissolution decree. **AFFIRMED ON BOTH APPEALS.**

Richard A. Bartolomei of Bartolomei & Lange, P.C., Des Moines, for appellant.

James M. Stanton of Stanton & Sorensen, Clear Lake, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

The petitioner appeals, and respondent cross-appeals, from the district court order granting respondent's petition to modify the child custody provisions of the parties' dissolution decree. Petitioner contends the district court erred in finding there was a material and substantial change in circumstances justifying a transfer of their children's physical care to respondent. On cross-appeal, respondent contends the district court erred in failing to award her trial attorney fees. Respondent also requests an award of appellate attorney fees. We affirm on both appeals.

The court issued its findings of fact, conclusions of law, and decree of dissolution, dissolving the marriage of Marcus and Vickie Heyer, in February 1997. The court granted the parties joint legal custody, and awarded Marcus physical care of the parties' two children, Andrew, born in May 1987, and Faith, born in February 1991. The court granted liberal visitation rights to Vickie and ordered her to pay monthly child support of $423.

Vickie filed a petition to modify the decree in April 1999, alleging a material and substantial change in circumstances justifying a transfer of the children's physical care to her. Specifically, Vickie claimed under Marcus's care, Andrew's school performance plummeted, and Marcus failed to properly address Andrew's affliction with attention deficit disorder (ADD). Vickie asserted Faith's personal hygiene had deteriorated under Marcus's care. She claimed Marcus's work and school schedule resulted in the children spending most of their time at school or

with a babysitter. In addition, Vickie stated she had not had a drink since November 1, 1996.

After hearings on the matter, the district court modified the decree, awarding physical care and placement of the children with Vickie. The district court concluded:

> The Court concludes Vickie has met her burden of proof and has shown an ability to minister more effectively to the children's well-being. A preponderance of the evidence supports her claim that she has completely abstained from alcohol since November 1, 1996. Her fiancé, Paul Wilson, also quit drinking in October of 1997. They appear to have a stable relationship and are better able to give the children the time and attention which is so necessary for children of tender years. The Court does not doubt that Marcus sincerely loves his children but his self-centered, job-oriented tendencies noted by the trial court in the dissolution of marriage proceeding have had a negative impact upon the children. Andrew's performance in school has gone from bad to worse. Faith's health and personal hygiene have suffered. Marcus has simply not been spending enough time with his children nor giving them the care and attention they require and deserve. His priorities appear to be elsewhere, particularly with his job. Dr. Peltan's concern as to the long-term effects of Marcus's detachment and self-involvement has been verified. Circumstances have significantly changed since entry of the decree in that Vickie is presently the most effective parent to both children.

Marcus appeals and Vickie cross-appeals.

Standard of Review. Our review of child custody modifications is de novo. Iowa R. App. P. 4; *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997).

Modification. Marcus contends the circumstances cited by Vickie do not constitute evidence that conditions since entry of the original decree have so

materially and substantially changed that the children's best interest would be served by the modification. We disagree.

Custody, once fixed, should be disturbed only for the most cogent reasons. *Whalen*, 569 N.W.2d at 628. To change a custodial provision of a dissolution decree, the party seeking modification must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially changed that the child's best interest make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change must be more or less permanent and relate to the welfare of the children, but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

The burden to modify custody provisions of a dissolution decree is a heavy burden. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). The question is not which home is better, but whether the parent seeking modification can offer the children superior care. *Id.*; *Whalen*, 569 N.W.2d at 628. Vickie must show an ability to minister more effectively to the children's needs. *Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the children, custody should not be changed. *Id.*

At the time of the decree, Marcus was employed with Armour Foods in Britt. His employment with Armour Foods terminated, and he secured full-time employment with Winnebago Industries in Forest City, where he has worked since October 1997. He typically works Monday through Friday from 6 a.m. until

either 3:30 or 4:30 p.m. For two years, Marcus was enrolled in a Microsoft Network Engineer course at Hamilton College in Mason City. The course met three evenings per week from 5:45 p.m. until 8:45 or 9:45 p.m. After Marcus completed his course at Hamilton College in October 1999, he began working longer hours at Winnebago Industries.

Marcus's work and school schedule required him to drop the children off at the babysitter by approximately 5:15 a.m. When he began working longer hours, Marcus would get the children up at 3:45 a.m. in order to drop them off at the babysitter by approximately 4:30 a.m. The babysitter is not up when Marcus drops off the children. They come in with blankets and sleep on the couch until she gives the children breakfast and takes them to school. After school, the children return to the babysitter's home until approximately 4:30 p.m. On the evenings Marcus had class, a second babysitter picked the children up, fed them dinner, and cared for them at her home until Marcus picked them up after class. The children would generally return home between 9:30 and 10 p.m. When Marcus began working longer hours, he would pick up Faith between 5:30 and 6:30 p.m. Andrew began riding the bus home after school and spent the afternoon at home alone until Marcus returned from work. On one occasion, Vickie stopped by Marcus's home and found both children home alone. Marcus was at school at the time.

Andrew's performance at school has deteriorated since the decree. He went from receiving Cs and Ds, to consistently receiving Ds or Fs on his grade reports. In the fall of 1998, school officials requested Marcus have Andrew

evaluated for ADD. The evaluation did not take place until June 1999. Andrew now takes medication for his condition.

Faith's personal hygiene has been problematic since the decree. During a weekend visitation at Vickie's, Faith complained of itching. Vickie took Faith to the doctor, who diagnosed her with a parasitic infestation (worms). Vickie obtained the necessary medication and administered it to Faith. On another occasion, Faith arrived at Vickie's with an ear infection and could hardly talk. Marcus denied knowledge of either condition. Faith has arrived at Vickie's wearing underwear so dirty it must be thrown away or wearing her brother's clothes. Her teeth are not brushed and her hair is not combed. Marcus confirmed Faith bathes only twice a week. Faith's babysitter testified the children were often not clean and well-groomed when they arrived at her home.

Vickie lives with her fiancé, Paul Wilson, in Emmetsburg. The couple planned to marry in July 2000. Vickie has worked full-time at Skyjack Manufacturing in Emmetsburg since October 1995. She works Monday through Friday from 7 a.m. until 3:30 p.m. Paul works Monday through Friday from 7:10 a.m. until 3:10 p.m. at SNC Manufacturing in Emmetsburg. Although the decretal court expressed concern with Vickie's history of drinking, the record supports Vickie's assertion she has not had a drink since November 1, 1996. Paul stopped drinking in October 1997.

Paul's thirteen-year-old daughter lives with the couple, and gets along well with Andrew and Faith. She watches the children during the summer while Vickie and Paul are at work during the day. Andrew and Faith have spent a

considerable amount of time at Vickie's since the decree was entered. The children spent alternate weekends and holidays, and virtually all of their summer vacation period at Vickie's from 1997 to 1999.

Based on our de novo review of the record, we conclude the evidence of Marcus's changed conduct since the decree is not of the type that would have automatically been considered and anticipated by the court in the original dissolution trial. When we consider whether a change in circumstance was within the contemplation of the court at the time of the decree, we focus upon "what the decretal court actually knew, not on what the parties knew, should have known, or should have produced at the earlier trial." *Warren v. Warren*, 191 N.W.2d 659, 661 (Iowa 1971). While the dissolution court noted Marcus's self-centered and job-oriented characteristics, it could not have contemplated the degree to which those characteristics have been displayed since the dissolution. We conclude Vickie has met her burden of proof and has shown an ability to minister more effectively to the children's needs.

Cross-Appeal: Attorney Fees. Vickie appeals, claiming the district court erred by not awarding her trial attorney fees. In addition, she requests an award of appellate attorney fees.

Ordinarily, an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). An award of attorney fees depends upon the ability of the respective parties to pay, depending upon the financial circumstances and earnings of each. *Id.* We

conclude the district court properly considered this issue and we find no abuse of discretion.

Similarly, an award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). A successful party does not have a vested right to appellate attorney fees. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). 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. *Wood*, 567 N.W.2d at 684; *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We deny Vickie's request for appellate attorney fees.

AFFIRMED.