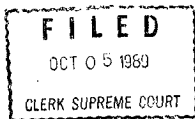


IN THE COURT OF APPEALS OF IOWA

9-375 / 89-77



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IN RE THE MARRIAGE OF KEITH G. MAIDEN AND MARY L. MAIDEN

Upon the Petition of

KEITH G. MAIDEN,

Petitioner-Appellee,

And Concerning

MARY L. MAIDEN,

Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County,
Joseph C. Keefe, Judge.

Respondent appeals the decision of the district court which denied her application for modification of the physical care of the parties' minor children and granted petitioner's application for modification of the visitation schedule. **AFFIRMED AS MODIFIED.**

Russel A. Neuwoehner of Kaufman, Lange, Hodge & Neuwoehner, Dubuque, for appellant.

Arnold J. Van Etten and Charles A. Kintzinger of Kintzinger, Van Etten, Setter & Scott, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden,
JJ.

SCHLEGEL, J.

Respondent, Mary, appeals the decision of the district court which denied her application for modification of the physical care of the parties' minor children and granted petitioner's application for modification of the visitation schedule in view of petitioner's proposed move to Texas. We affirm the trial court as modified.

Mary contends that the court erred in granting Keith's request to modify visitation so as to allow him to move to Texas with the children. Mary also asserts that the court should not have reduced her summer visitation time from six to five weeks. Finally, Mary argues that the court erred in not granting her a new trial and in failing to clarify the visitation provisions of the modification order. Petitioner asks for attorney fees for this appeal.

A decree of dissolution was entered for Keith Maiden and Mary Maiden on April 2, 1987. This decree was affirmed by the court of appeals on June 29, 1988. The parties have two children: Ty J. Maiden, born November 20, 1977; and Tara J. Maiden, born April 23, 1985. The parties were awarded joint legal custody of the children with primary physical care given to Keith. Mary was given liberal visitation rights, including six weeks in the summer. The court noted that Keith would have the assistance of his mother, grandmother, and mother-in-law in taking care of the children.

At the time of the decree Mary was a computer operator working full time for \$8.75 per hour. Keith was an assembly line worker at FDL Foods earning \$9.30 per hour. Since the time of the decree, Keith developed carpal tunnel syndrome. He sought a different line of work and secured a job as a maintenance worker for the Arlington School District in Arlington, Texas. His starting salary will be \$7.50 per hour. Mary now lives in East Dubuque with her boyfriend and has the same job.

Keith filed an application to modify the visitation provisions of the decree due to his proposed move to Texas. Mary also filed an application for modification asking that physical care of the children be placed with her and that Keith be prohibited from removing the children from Iowa. The district court granted Keith's application and denied Mary's. Mary then filed a motion for new trial and for clarification of the visitation provisions. The court denied this motion. Mary now appeals.

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). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984).

Mary contends the trial court should have denied Keith's request to modify visitation. This modification will allow him to move to Texas with the children. To justify a modification of visitation rights there must be a demonstrated change of circumstances since the dissolution decree, but such a change may be much less extensive than would be necessary to obtain custody. In re Marriage of Glass, 213 N.W.2d 668, 670 (Iowa 1973). A change in residence of the custodial parent will justify a revision of visitation rights. Id. Mary argues that this change in residence is not in the best interests of the children. There is nothing to indicate that the best interests of the children will not be served by this proposed move. The father will be taking a cut in pay but, as he points out, there is more opportunity for advancement at his new job. There was testimony from the children's teachers that this move would have no adverse affect on them. The failure of Keith to take another job available in Dubuque was reasonable considering the hours that those jobs would require. The record shows that Keith's actions are in the best interests of the children and therefore a revision of the visitation is required under these circumstances.

The visitation provisions of the order do need clarification. The summer visitation of five weeks is sufficient. However, Mary should have visitation not less than one-half of the time the children are in Dubuque on a visit and should also have one-half of the children's spring break.

Mary also contends that the court should have modified the previous custody award and place the children in her physical care. The moving party in a modification action carries a heavy burden when seeking a change in custodial provisions of a dissolution decree. 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). To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the 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). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id. See also In re Marriage of Gravatt, 371 N.W.2d 836 (Iowa App. 1985).

There is no evidence that Mary would minister more effectively to the children's well being. While Mary would doubtless do a good job as custodial parent, we are up against the rule that custody should be soon fixed and not changed except for the most cogent reasons. The reasons set forth here are not the most cogent and the trial court was correct in denying the request to change custody.

Keith's request for attorney fees on appeal is denied. 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). Mary's financial position is not so superior to Keith's as to require her to pay attorney fees, however, costs will be assessed against her for this appeal.

AFFIRMED AS MODIFIED.