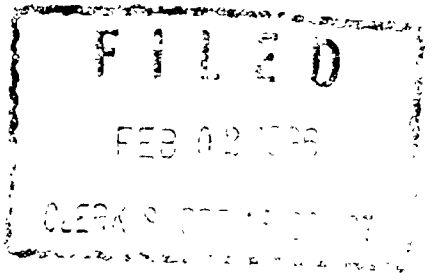
IN THE COURT OF APPEALS OF IOWA



No. 5-605 / 95-0176

IN RE THE MARRIAGE OF MICHAEL RALPH SCEARCY AND DEBRA LEANN SCEARCY

Upon the Petition of
MICHAEL RALPH SCEARCY,

Appellee,

And Concerning
DEBRA LEANN SCEARCY,

Appellant.

Appeal from the Iowa District Court for Van Buren County, Harlan W. Bainter, Judge.

Debra Scearcy appeals the district court's order refusing to modify the parties' dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Steven Gardner of Kiple, Kiple, Denefe, Beaver & Gardner, Ottumwa, for appellant.

Tim Dille, Keosauqua, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ. Hayden, J., takes no part.

HUITINK, J.

Michael and Debra Sceary were divorced in 1989. The dissolution decree provided the parties would have joint legal custody of their child. Amber, was seven years old at the time the decree was entered and is now thirteen. The decree granted primary physical care to Michael.

In about 1991, Michael began working the night shift at Rockwell International in Fairfield. Debra agreed to care for Amber while he was at work. On Mondays, Wednesdays, and Fridays, Debra took care of Amber from 10:30 p.m. until 7:30 a.m. On Tuesdays and Thursdays, Amber came to Debra's home at about 3 p.m., when she got out of school, and remained until 7:30 a.m. Debra also had visitation with Amber on alternating weekends. The parties maintained this schedule for about three years.

On April 29, 1994, Michael married Barbara Hopwood, now known as Barbara Sceary. Barbara had two children, Melanie and Shelby, from a previous marriage. Melanie has psychological problems and is residing in a group home. In August 1994 Michael and Barbara moved to a house in Eldon. Also living in the home are Amber, Shelby, and Christopher, Michael's son from a previous marriage. Amber testified she does not get along with Barbara and Shelby. Amber has expressed a preference to live with Debra.

On August 25, 1994, Debra filed an application for modification of the dissolution decree. She pointed out Amber was spending much of the time at her

house. She also claimed Michael's remarriage and Amber's preference to live with her constituted a substantial change in circumstances. Michael filed a counterclaim seeking to increase Debra's child support obligation.

Debra obtained a temporary injunction prohibiting Michael from changing their accustomed visitation hours. In August or September 1994, Michael changed to the day shift, and thus no longer needed Debra to care for Amber on nights he was working. The temporary injunction was quashed on September 23, 1994. Once the temporary injunction was lifted, Michael unilaterally reduced Debra's visitation to those times set forth in the dissolution decree.

The modification hearing was held on December 13, 1994. At the modification hearing, Debra presented testimony of two of Amber's teachers. The teachers testified Amber's grades had been going down and she often did not complete her home work assignments. Amber had expressed to her teachers a concern about her father's remarriage. In chambers, Amber, who was then twelve years old, testified she would prefer to live with Debra. She stated her relationship with Barbara and Shelby was not very good. She also stated she would have preferred to stay in her old school district, instead of changing school districts when her father moved to Eldon.

Debra argued Barbara had not provided a proper home for Melanie and this showed she would not be a good care giver for Amber. Michael presented a report from the executive director of Melanie's group home which stated Barbara was a very

involved and concerned parent. The director also stated Melanie's problems were not the result of Barbara's parenting.

The district court denied the application for modification. The court found the fact Debra accommodated Michael's work schedule by taking care of Amber on nights he worked was not a substantial change in circumstances. It determined parents should not be discouraged from making arrangements to accommodate their work schedules. In addition, the court found no evidence to show Barbara would be an inadequate care giver for Amber. The court considered Amber's stated preference, but concluded it should not change physical care based solely on her personal choice. The court ordered Debra to pay child support of $61.52 per week. Debra appealed the denial of her application for modification.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

Debra asks us to modify the dissolution decree by transferring primary physical care of Amber to her. She claims Amber does not get along with Barbara or Shelby. She states Barbara is not able to deal with Melanie, and points out there is a possibility Melanie may move back home in the future. Debra also claims Amber's school work

has deteriorated since Michael's remarriage Debra believes the district court should have given greater consideration to Amber's preference

In child custody cases, the governing consideration is the best interest of the child. *In re Marriage of Moore*, 526 N.W 2d 335, 337 (Iowa App 1994) To change custody set by a dissolution decree, the party seeking modification must establish by a preponderance of the evidence conditions have so materially and substantially changed since the decree the child's best interests make the requested change expedient. *In re Marriage of Jahnel*, 506 N W 2d 473, 474 (Iowa App. 1993). The parent seeking to change custody must prove an ability to minister more effectively to the child's well-being. *Moore*, 526 N.W.2d at 337. This heavy burden comes from the principle once custody had been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213-214 (Iowa App. 1994).

We first note we agree with the district court that Debra's accommodation of Michael's work schedule should not constitute a substantial change in circumstances. Parents should not be discouraged from making arrangements to accommodate their work schedules. However, we do find there has been a substantial change of circumstances in this case. Michael's remarriage, and subsequent move to a new town are a substantial change in circumstances. Amber has been confronted with a new town, new home, new family members, and a new school district.

We also consider Amber's stated preference to live with Debra. Our review of Amber's testimony shows her to be quite mature. Her reasoning as to why she prefers to live with her mother appears to be well thought out. We recognize Amber's stated preference as her one opportunity to affect her own circumstances in the dissolution process.

Both parents have been good caretakers for Amber, and Amber has expressed strong feelings for both of her parents. However, Amber's concerns about her father's remarriage and the move to a new town appear to be causing her problems in school. Because Debra has been taking care of Amber most evenings, we find Debra's home presents more stability to Amber. For this reason, Debra has an ability to minister more effectively to Amber's well-being. We conclude Debra should be granted physical care of Amber.

We remand to the district court for a determination of Michael's child support obligation for Amber. We do not retain jurisdiction.

We modify the dissolution decree to change physical care of Amber to Debra. Costs of this appeal are assessed to Michael.

AFFIRMED AS MODIFIED AND REMANDED.