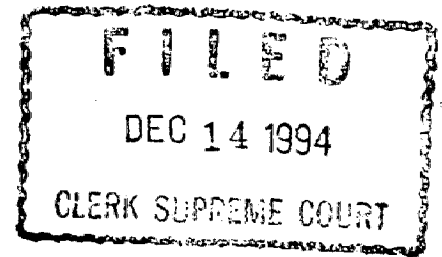


IN THE COURT OF APPEALS OF IOWA

No. 4-364 / 94-97



IN RE THE MARRIAGE OF PETER E. J. HILL AND
THERESA M. HILL

Upon the Petition of
PETER E. J. HILL,

Appellant,

And Concerning
THERESA M. HILL,

Appellee.

Appeal from the Iowa District Court for Lyon County,
Tom Hamilton, Judge.

Peter appeals the modification of the dissolution
decree. **AFFIRMED.**

Randy L. Waagmeester of De Waay & Waagmeester, Rock
Rapids, for appellant.

Robert W. Green, Sioux City, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

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HAYDEN, P.J.

The marriage of Theresa and Peter Hill was dissolved in September 1988. The decree approved the parties' stipulation which gave Theresa primary physical care of their two children, Molly, born December 10, 1983, and Erin, born May 28, 1986. Peter was to pay \$277 per month in child support.

Peter applied for a modification of the decree in May 1993, seeking to have physical care of the children placed with him. Theresa sought to retain physical care and requested Peter's child support obligation be recalculated.

Peter operates his own painting and decorating business. The trial court found his net income is \$1517 per month. The court noted Peter always remained current in his support payments, voluntarily increased his support payments at times, and did not seek credit for past overpayments if the court determined an increase was warranted.

The trial court found Theresa's "employment skills [were] modest at best" and while she had on occasion worked at fast food restaurants, she was currently unemployed and receiving AFDC.

Peter argued modification of the children's placement was warranted because (1) the children desired to be placed with him; (2) the children were tardy at school when living with Theresa; (3) Theresa could not control the children at times; and (4) the man Theresa was living with had created

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a drunken disturbance one night. Peter moved to have an attorney appointed to represent the children in the modification. After a hearing, the trial court denied the motion.

The children testified at trial. The court found although Theresa did not deny most of Peter's allegations, the case for modification of placement was not clear. The court found Peter had been on a continuing campaign not only to influence the children to express the desire to live with him, but to be disruptive while living with Theresa. The court found the problem which arose from Theresa's boyfriend's drinking was an isolated incident. The court declined to modify placement and changed Peter's support obligation to \$546 per month pursuant to the child support guidelines.

Peter appeals. He contends the trial court erred in failing to appoint a guardian ad litem for the modification proceeding, and in failing to transfer primary physical care of the children to him. Peter seeks attorney fees on appeal. We will discuss each issue in turn.

I. Guardian Ad Litem.

Peter contends the trial court erred in refusing to appoint an attorney to represent the children. We review for an abuse of discretion. In re Marriage of Teepe, 271 N.W.2d 740, 744 (Iowa 1978).

The Iowa Code provides "[t]he court may appoint an attorney to represent the interests of the minor child or

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children of the parties." Iowa Code § 598.12 (1993). It is obvious "the provisions of section 598.12 of the Code are directory only and not mandatory." Boyes v. Boyes, 247 N.W.2d 265, 267 (Iowa 1976). The trial court acted within the latitude of permissible discretion in refusing to appoint an attorney to represent the children. The trial court is affirmed on this issue.

II. Custody of the Children.

Peter argues the trial court erred in failing to transfer primary physical care of the children to him. Our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

"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

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well-being. Id. This burden stems from the principle once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. Mikelson, 299 N.W.2d at 671.

The main point Peter makes is the girls want to live with him. Both girls so testified. Peter also complains the children are occasionally tardy for school, Theresa's boyfriend on occasion became quarrelsome after drinking too much in the past, and at least once Theresa admitted she couldn't handle the girls. However, as the trial court judge stated, "the case for modification is not as clear as it would seem." It is apparent Peter has waged a continuing campaign to influence his daughters to live with him. More significantly, Peter has influenced the girls to make life as miserable for their mother as possible until she accedes to the change. Peter did not admit to this but the girls did. They were very candid about their efforts to upset their mother and the encouragement their father has given them to do so.

On cross-examination, Molly Hill testified as follows:

Q. You think your mom loves you? A. Yes.

Q. Do you think your mom does the best she can to care for you? A. Yes.

Q. Do you sometimes do things that make your mom mad? A. Yes.

Q. And when you are doing the things do you know it is making your mom mad when you are doing them? A. Yes.

Q. Now, you have been talking to your dad about coming up here for quite a while, haven't you? A. Yes.

Q. I mean, more than a couple of years you have been talking about it? A. (No response.)

Q. Probably three years you have been talking about it? A. Uh-huh.

Q. Hasn't your dad told you that if you just keep working on your mom that she will give in an-- A. Yes.

Q. That is kind of what you have been doing, isn't it, the working on your mom? A. Yes.

Q. Trying to make life difficult for her and making her given in? A. Yes.

Q. That is not easy on you mom, is it? A. No.

The fact the children want to live with their father is given some weight. The children's wishes in this respect are to be given less weight in a modification action than they are in an original custody action. In re Marriage of Junkins, 240 N.W.2d 667, 668-69 (Iowa 1976). There is also some question as to whether the children have reached the age to exercise discretion in choosing a custodian. See Herron v. Herron, 258 Iowa 1052, 1059, 141 N.W.2d 562, 566 (Iowa 1966) ("The wishes of a seven or eight-year old or even a ten-year-old should be given little if any weight since they are not of any age to exercise discretion in choosing a custodian.") However, the most obvious problem in considering a change in physical caretakers is Peter's attempt to turn the children against their mother. He has been successful and now asks to be rewarded. This we cannot do.

Peter also complains about the children's tardiness to school. It is admitted tardiness did occur. However, there is no evidence it has adversely affected the children. If the children's grades have not been up to par

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of late, it may be because they are unhappy living with their mother due to Peter's efforts.

There was some testimony regarding Theresa's boyfriend and his possible drinking problem. However, it appears the problems were isolated and are not ongoing. The testimony did not rise to the level of moral misconduct.

Peter also takes stock in the fact Theresa has, in the past, asked him to take the girls because she could not handle them. Peter makes no allowance for the difficulties of a single parent, compounded here by the negative influence of the noncustodial parent. Again, Peter seeks to use a circumstance created and fostered by him to his own advantage.

Plainly spoken, Peter has not carried his burden of proving material and substantial change in circumstances, nor has Peter proven he can better administer the children's needs. Again, 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). The children indicate a preference to live with Peter. However, the trial court was correct in stating the way the preference came about should defeat any chance Peter has to rely on it. The trial court is affirmed on this issue.

III. Attorney Fees.

Lastly, Peter seeks attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within

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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 deny Peter's request for appellate attorney fees.

Judgment of the trial court affirmed. Costs are to be taxed to Peter.

AFFIRMED.

Habhab, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

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I dissent. I would modify and award Peter custody.

I find both Peter and Theresa are making their best efforts to do what is right for their children.

Theresa should be commended for voluntarily placing the children with Peter where they wanted to be. The tragedy is when Peter petitioned for physical care, Theresa removed the children despite the fact they had adjusted well and the older child was registered in a summer school class that would have provided needed skills reinforcement.

I do not share the majority's conclusion Peter has made a blatant effort to turn the children against their mother. The children want to be with their father. They thrive in his care. The children benefit from Peter's close extended family. The children frequently are late for school while in Theresa's care. Theresa has done nothing to help correct the older child's academic problem. I have concern about Theresa's live-in companion.