

IN THE COURT OF APPEALS OF IOWA

No. 6-493 / 96-0338

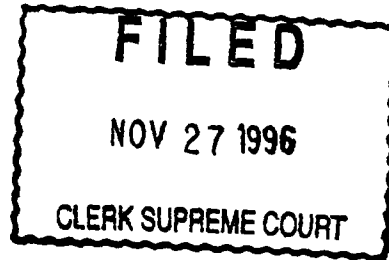
**IN RE THE MARRIAGE OF JUDY McGLAUGHLIN
AND DAVID McGLAUGHLIN**

**Upon the Petition of
JUDY McGLAUGHLIN,**

Petitioner-Appellee,

**And Concerning
DAVID McGLAUGHLIN,**

Respondent-Appellant.



Appeal from the Iowa District Court for Buchanan County, William J. Klotzbach, Judge.

David McGlaughlin appeals from a district court order denying his petition to modify the decree dissolving his marriage to Judy McGlaughlin. **AFFIRMED.**

James S. Pieters of Pieters, Pieters & Corzine, Waterloo, for appellant.

Steven K. Ristvedt of Ristvedt Law Offices, P.C., Independence, for appellee.

Heard by Cady, P.J., and Huitink and Streit, JJ.

STREIT, J.

David McGlaughlin appeals from a district court order denying his petition to modify the decree dissolving his marriage to Judy McGlaughlin. David contends the district court erred in ruling he failed to show a substantial change of circumstances justifying a transfer of primary physical care of the parties' children to him.

David and Judy McGlaughlin were married on May 12, 1984. They had two children together, Sherry Alexis, born June 12, 1984, and Michael David, born August 18, 1987. David and Judy's marriage was dissolved by a decree entered on October 28, 1988. The court awarded joint legal custody and gave primary physical care of the children to Judy. The child support provisions of the decree were modified by stipulation of the parties on July 13, 1989.

On July 31, 1995, David filed a petition for modification seeking a transfer of primary physical care of the children to him. At the time of the hearing, Judy was working full-time as a corrections officer in Anamosa. She had a one-and-one-half-year-old son, Dylan, from another man. David had remarried and had a four-month-old child.

Since the decree had been entered, Judy and the children had lived in twelve different locations. Sherry had attended school in four different districts and Michael had been in two districts. The court shared David's concerns that Judy would occasionally stay out late at night and leave the children with a baby-sitter, that Judy

would sometimes let Sherry watch Michael and Dylan, and that Judy would smoke near Michael, who has asthma. The court found Judy kept the house clean and the children were clean and well-fed. Both children were also doing well in school. Following the hearing, the district court entered its ruling concluding David failed to show a substantial change of circumstances and denied the petition for modification. David appeals.

In an appeal from an action to modify custody, our review is de novo. *In re Anderson*, 530 N.W.2d 741, 741 (Iowa App. 1995). We give weight to the fact findings of the trial court but are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties before us. *Anderson*, 530 N.W.2d at 741.

In reviewing a modification action, the governing legal principles are well established.

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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. 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 for only the most cogent reasons.

Anderson, 530 N.W.2d at 741-42.

Even though we exercise de novo review, we are cognizant of the superior vantage point of the trial court and its ability to consider the demeanor and appearance of the parties. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). The district court found “[t]he children are getting along just fine where they are on the basis of the evidence introduced, and there is no reason that the placement which has been fixed should now be disturbed.”

Judy has had “something of a nomadic existence” since the decree. *See Anderson*, 530 N.W.2d at 743. Her employment and living circumstances have been unstable for the last seven years, but she is now secure in her new job in Anamosa and the children are doing exceptionally well in school. We do not support Judy’s smoking around the children, especially Michael who has developed asthma. The court is not persuaded by Judy’s remarks that she does not usually smoke in the car and that when she smokes in the house it is by a window. However, Michael’s health condition is not so severe that it is a substantial and material change in circumstance to modify custody. We find there has not been a material and substantial change in circumstances since entry of the decree.

AFFIRMED.