FILED
MAR 24 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-080 / 93-994

IN RE THE MARRIAGE OF PEGGY A. MELETIO AND CARL M. MELETIO

Upon the Petition of

PEGGY A. MELETIO,

Appellant,

And Concerning

CARL M. MELETIO,

Appellee.

Appeal from the Iowa District Court for Buchanan County, Robert E. Mahan, Judge.

Peggy appeals from a district court ruling modifying the child custody provision of the dissolution decree and placing the child with Carl. **AFFIRMED.**

Larry L. Anfinson of Randall, Anfinson & Luce, Waterloo, for appellant.

Donna Lesyshen of Tyler & Lesyshen, Waterloo, for appellee.

Heard by Donielson, P.J., Sackett, J., and Peterson, S.J.*

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

Peggy and Carl Meletio were married in 1985. They have one child, Abby, born October 9, 1990. The parties separated in September 1991 after Carl became romantically involved with Peggy's sister, Diane. On June 5, 1992, the marriage was dissolved.

The dissolution decree was based on the parties' stipulation and awarded the parties joint custody of Abby with Peggy assuming primary placement.

In February 1993 Carl filed for a modification. After a hearing, the district court found Carl had been "judicially prevented from pursuing his claim for placement of the minor child in the original dissolution action." The court found Carl's attorney had told him custody of young children in general was awarded to the mother and the particular judge assigned to the case had a strong bias in favor of mothers when cases involved small children.

The court also found Carl had shown he was better able to care for Abby. The court noted the person Peggy was living with, Floyd Maxwell, had a history of alcohol and domestic abuse problems. The court expressed concern about parties Peggy attended at her parents' river home.

The court noted Abby expressed a strong preference for placement with her father's family which was unusual for a child her age. The court also expressed disfavor with the courtroom behavior of many of Peggy's witnesses, which affected the court's assessment of their credibility.

The court granted the modification requested and gave Carl physical care of Abby.

Peggy appeals.

Our review in cases such as this 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). Our review of a modification of the custody provisions of a dissolution decree differs from our review of the original decree:

> 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 only for the most cogent reasons.

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)).

Under the facts of this case we find Carl has carried his burden to show substantial changes in circumstances warranting a modification of child custody. Evidence shows Carl has changed for the better since the dissolution, stopping his use of drugs. He has evidenced great concern for Abby's care and welfare, in contrast to his actions during the marriage. In addition, testimony reveals Abby shows an obvious preference for staying with her father and strongly protests when she is to be returned to her mother's care, beyond what would be normal separation trauma. Carl also appears to be able to minister more effectively to Abby's long-term needs. He is established in a job and has maintained a stable "family" relationship since the dissolution. He also appears better able to provide financially for Abby's needs in the future.

Peggy also asks for attorney fees for the modification proceeding and for this appeal. Iowa Code section 598.36 (1993) provides the district court may award attorney fees to the prevailing party in a modification proceeding. Since Peggy was not the prevailing party, the district court properly did not award her attorney fees. Since we are affirming the district court's modification, no reconsideration of fees is necessary.

An award of appellate attorney fees is not a matter of right, but rests within this 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). Peggy has not shown a need for an award of attorney fees, nor was she forced to incur fees on appeal to defend the decision of the district court. We determine both parties are responsible for their own attorney fees on appeal. Costs of this action are taxed to Peggy.

AFFIRMED.