IN THE COURT OF APPEALS OF IOWA

No. 5-117 / 94-1296

IN RE THE MARRIAGE OF LISA I. PRESCOTT AND TODD A. PRESCOTT

Upon the Petition of
LISA I. PRESCOTT,

Petitioner-Appellee,

And Concerning
TODD A. PRESCOTT,

Respondent-Appellant.

FILED
APR 28 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Carroll County, Joel E. Swanson, Judge.

Respondent husband appeals from a district court judgment denying his petition for modification of child custody. **AFFIRMED.**

Gerald W. Crawford and J.D. Hartung of the Crawford Law Firm, West Des Moines, for appellant.

Kay E. Dull, Sioux City, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

Todd and Lisa Prescott were married on November 7, 1980, in Carroll, Iowa. Two children were born of this marriage: Stephanie, born April 30, 1981, and Troy, born February 25, 1984. Lisa filed a petition for dissolution on September 17, 1993. On March 11, 1994, the district court entered its dissolution decree. By stipulated agreement, the parties were awarded joint custody with physical care awarded to Lisa. Pursuant to the decree, Lisa was required to provide written notice to Todd of her intent to move the children more than fifty miles from Coon Rapids. On April 26, 1994, Lisa gave Todd written notice that she was moving with the children to Kearney, Nebraska, to live with her fiance.

On May 7, 1994, Todd filed his petition for modification of custody. Lisa moved to Kearney on June 2, 1994. At the hearing on the petition, the children testified they preferred living in Coon Rapids because all of their friends were there and they could participate in their favorite activities. Troy stated he was concerned with rumors that his new neighborhood in Kearney was inhabited by "bad people" who used drugs. Todd attempted to show Lisa was having an affair with her fiance before the petition for dissolution was filed, and that she planned all along to move the children to Kearney once the divorce was final. Lisa testified she refused to sign an agreement with Todd to limit her mobility in the state for nine years. She stated she did become engaged to her new fiance, but that it was a total surprise.

The district court denied Todd's petition for modification. The court opined that the parties were aware of the possibility Lisa might move with the children at the time of the dissolution proceedings. The court noted that not one witness had come forward to suggest Lisa had not been a good parent or living in Kearney, Nebraska, would be detrimental to the children's safety and general welfare. The court further noted that even Todd's mother stated that Lisa was a good parent who tried to

maintain good relations after the divorce. The district court concluded Todd had failed to show a substantial change in circumstances. Todd appeals.

In this equity action, 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).

The sole issue on appeal is whether there should be a modification in the primary physical care provision of the original dissolution decree. Todd contends the district court erred in not modifying the dissolution decree.

Todd admits Lisa is not an unfit parent. However, he contends her extramarital affair and her decision to uproot the children from an environment they love should be taken into consideration when assessing her ability to minister to their needs. Todd claims Lisa intended to move to Kearney all along, but misled him into believing she would stay in Coon Rapids for quite awhile. He claims since Lisa was allowed to be less than truthful about her intentions, he should not be held to the high standards required to obtain a modification.

Todd's bears a heavy burden in attempting to obtain a modification of primary physical care. This is due to the principle that once primary physical care is fixed, it should only be disturbed for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

> 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.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

In a discussion regarding the modification of custody provisions of a dissolution decree, our supreme court, in dicta, stated:

> The threshold question is always whether conditions since the dissolution decree was entered have so materially and substantially changed that the best interests of the children compel a change in custody. The object of the examination is not to relitigate matters settled at the divorce but to decide whether circumstances have materially changed since that time. To answer the question, the court must assess the current situation and project into the future.

In re Marriage of Cervetti, 497 N.W.2d 897, 901 (Iowa 1993) (citation omitted). In other words, our focus should not be on the alleged motives of the parties during the original dissolution, but rather on an assessment of the current situation and a projection into the future.

Very little time has passed since the original dissolution decree was entered. The only change of condition, raised by the parties, is Lisa moving to Nebraska with the children upon the marriage to her second husband. Lisa, pursuant to the provisions of the dissolution decree, gave Todd proper notice of the move prior to her relocation.

Stability is an important element in the upbringing of children. Stability can be nurtured as much by leaving them with the same custodial parent as by requiring them to live in the same neighborhood or town. *In re Marriage of Weidner*, 338 N.W.2d 351, 360 (Iowa 1983). While we are concerned about the children's ability to adapt to the new environment in Nebraska, the children have not been in Nebraska long enough to determine if they have been adversely effected by the move. At this time, we do not view moving the children to Nebraska as sufficient to meet Todd's heavy burden of proof. While this element alone does not satisfy his burden at this

particular time, it may in the future if the children do not adapt well to their new environment.

Lisa requests appellate attorney fees for this appeal. 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 Gilliam,* 525 N.W.2d 436, 439 (Iowa App. 1994). We allow Lisa $750 to apply to her appellate attorney fees.

We affirm the decision of the district court to deny the modification of the dissolution decree. Costs assessed to appellant.

AFFIRMED.