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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LARRY G. TALBOT AND KAREN K. TALBOT SHONDEL

Upon the Petition of)
LARRY G. TALBOT,)
Petitioner-Appellant,) Filed June 30, 1981
And Concerning)
KAREN K. TALBOT SHONDEL,) 1-90
Respondent-Appellee.) 3-65613

Appeal from Appanoose District Court - James D. Jenkins, Judge.

Petitioner husband appeals from trial court ruling on respondent wife's application to modify the parties' dissolution decree. AFFIRMED IN PART; REVERSED IN PART.

C. K. Pettit, Bloomfield, for petitioner-appellant.

Sidney E. Drake of Drake Law Office, Centerville, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Petitioner husband appeals from trial court ruling on respondent wife's application to modify the parties' dissolution decree. Petitioner contends that custody of the couple's two children should have been transferred to him, that the trial court erred in increasing the child support award from $125 per month to $100 per week, and that the provision allowing petitioner to claim the children as dependents for income tax purposes should not have been eliminated from the decree. We affirm in part and reverse in part.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

I.

The eleven-year marriage of Larry Talbot and Karen Talbot (Shondel) was dissolved by a decree entered on June 25, 1973. Custody of the two children (a boy born in 1966 and a girl born in 1968) was given to the respondent wife, while the petitioner husband was required to pay $125 per month in child support. He was also allowed the income tax deductions for the children. At that time, his annual income was $10,400 and respondent's was approximately $4000. Both parties have remarried since the dissolution; petitioner now earns $15,000 per year and respondent $12,000.

In November of 1979, the respondent filed a petition to modify the decree, requesting, among other things, that the child support award be increased to $100 per week and that federal and state income tax law determine which parent is allowed to claim the children as dependents. The petitioner answered and counterclaimed, requesting that custody be transferred to him. The two children testified at the modification hearing that they would rather live with their father because they have more fun at his house and because they do not get along with their stepfather. In a modification decree entered on August 11, 1980, the trial court declined to change

custody; however, it increased child support to $100 per week (to cease when the youngest child reaches age 18 or graduates from high school, whichever occurs later) and modified the decree to provide that allowance of dependency deductions be determined by federal and state income tax laws. Petitioner then appealed from modification of the decree.

II.

We agree with the trial court that the decree should not be modified to grant custody to the petitioner.

In cases involving custody, our first and governing consideration is the best interests of the child. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977); Iowa R. App. P. 14(f)(15). In order to justify modification of the custody provisions of a decree, it must be shown that there has been since the date of the decree a substantial and material change in circumstances relating to the child's welfare and that such change in circumstances was not within the contemplation of the parties and the court at the time the decree was entered. In re Marriage of Wagner, 272 N.W.2d 418, 421 (Iowa 1978). Not every change in circumstances is a sufficient basis for modification, however; the change must be such that the modification requested has become expedient or necessary. Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976); In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976). Additionally, the change in circumstances must be more or less permanent or continuous; it cannot be merely transitory, variable, or temporary. Melton, 256 N.W.2d at 205. The burden is on the party seeking modification to prove the change in circumstances by a preponderance of the evidence. Id. That party must also show that he or she is able to minister more effectively than the custodial parent to the well-being of the child. Davis, 237 N.W.2d at 457; Brown, 247 N.W.2d at 4.

We conclude that the petitioner has failed to satisfy his burden of proof and that custody should therefore remain with the respondent. Remarriage of the parties is not in and of itself a change in circumstances sufficient to warrant modification of custody. McCrery v. McCrery, 258 Iowa 354, 357, 138 N.W.2d 876, 878 (1965). It must be accompanied by a showing that there has been an adverse effect on the child such that the child's welfare demands a change in custody. Id. (quoting Scheffers v. Scheffers, 242 Iowa 563, 569, 47 N.W.2d 157, 160 (1951)). No such showing has been made here. Remarriage of the mother has not resulted in an adverse effect on the physical or

mental health of these children; the record indicates that they receive adequate care and are loved. Respondent's present husband, the children's stepfather, appeared to the trial court to be a kind and loving person; we give weight to the findings of the trial court, particularly when they involve judgments as to the general demeanor of witnesses. Iowa R. App. P. 14(f)(7). Although both of the children expressed a desire to live with their natural father, and although such preferences, while not controlling, are relevant to the custody issue and cannot be ignored, In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979), they are entitled to less weight in a proceeding to change custody than in an original hearing. In re Marriage of Junkins, 240 N.W.2d 667, 668-69 (Iowa 1976); In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). Moreover, the trial court suspected, as we do, that the preferences of these particular children may have been influenced by the fact that the natural father and his new wife, who have the children on weekends, have provided the children with lavish gifts, exciting trips, and constant attention. For all these reasons, we decline to modify custody in favor of the petitioner.

III.

To justify modification of the child support provisions of a decree, it must be shown that there was a material and substantial change in the circumstances of the parties such that it would be inequitable to enforce the original award of support. In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977); Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973). Modification should be based on a change in circumstances that is permanent, In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973), and that was not within the contemplation of the trial court and the parties at the time of the decree. See Jensen, 251 N.W.2d at 254. We consider the parties' circumstances as of the date of the modification hearing. In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979).

The trial court modified the child support award from $125 per month to $100 per week; we think this modification was overly generous. In so modifying the amount of child support to be paid by the petitioner, the trial court apparently relied on the fact that the combined annual income of the petitioner and his second wife is approximately $35,000. While the second wife's income may be properly considered in fixing the amount of the petitioner's child support obligation, Page v. Page, 219 N.W.2d 556, 558 (1974), the trial court seems to have ignored the fact that the respondent and her

present husband also earn approximately $35,000 per year. Moreover, the children's stepfather contributes to their support and plans to continue to do so in the future. Additionally, the petitioner father has the children from Friday night until Sunday night, sometimes until Monday noon, approximately 25% of the custodial time. While this would not consist of 25% of support costs, it would nonetheless be considerable, not warranting an increase from $125 per month to $100 per week. The decree provides this support to continue at the same level even after a child becomes of age. We think that the respondent has shown a change in circumstances that would justify an increase in child support but we reduce and modify the trial court's award. In light of increased costs, the children's needs and their ages, the petitioner is ordered to pay one-half of the children's orthodontal expenses not covered by respondent's insurance and set his child support payments at $300 per month until the oldest child is 18 or graduates from high school, whichever is later, and $175 per month thereafter until the youngest child reaches 18 or graduates from high school, if later. Similarly, because the parties and their present spouses enjoy essentially the same combined annual income, we find no change in circumstances to justify modification of the provision granting dependency deductions for the children to the petitioner. See In re Marriage of Habben, 260 N.W.2d 401, 403-04 (Iowa 1977). We therefore reinstate the provision of the original decree that grants these tax deductions to the petitioner and affirm all other matters.

AFFIRMED IN PART; REVERSED IN PART.