

IN THE COURT OF APPEALS OF IOWA

No. 3-311 / 92-1451

FILED

AUG 06 1993

CLERK SUPREME COURT

IN RE THE MARRIAGE OF SHARI L. NYLEN AND JON C. NYLEN

000411

Upon the Petition of
SHARI L. NYLEN,

Appellee,

And Concerning
JON C. NYLEN,

Appellant.

Appeal from the Iowa District Court for Woodbury
County, Charles L. Smith III, Judge.

The former husband appeals an order of the district
court denying his application to modify the parties'
dissolution decree to provide him with physical custody of
the parties' children. **AFFIRMED.**

Stanley E. Munger of Munger & Reinschmidt, Sioux City,
for appellant.

Alice S. Horneber, Sioux City, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab,
JJ.

HAYDEN, J. 000442

The district court dissolved the marriage of Jon and Shari Nylen on August 31, 1988. Pursuant to the decree, Shari received physical custody of the parties' minor children, Kim and Jeff, then ages eight and four. In addition, the parties stipulated either party could seek a modification, without a further showing of substantial change in circumstances, in the event one of them moved from the State of Iowa. This stipulation was made part of the decree.

In March 1992 Shari filed an application for modification of visitation. As a basis for the request, Shari indicated she intended to remarry in August 1992 and planned to move to Lenexa, Kansas. In April 1992 Jon filed an application for modification seeking physical custody of the children.

The district court consolidated the two applications and held a hearing on the matter. Kim and Jeff testified they had no objections to their mother's remarriage or their new home in Lenexa. Both stated, however, they did not want to leave their school, friends, dog, and family. Kim and Jeff were twelve years old and eight years old respectively at the time of the modification hearing.

On August 24, 1992, the district court filed its order granting Shari's application for modification of visitation and denying Jon's application for modification of custody. The district court took into consideration the children's

desire to remain in Sioux City, but found they would adjust to their new environment. The court noted the children stated no preference to reside with Jon. The district court concluded Jon failed to prove he had superior ability to minister to Kim and Jeff's needs.

Jon filed a motion for a new trial and asked the court to allow Kim to testify further. The district court overruled the motion. Jon appeals.

Shari filed notice of a cross appeal. Shari seeks trial and appellate attorney fees and costs. Shari filed a motion to strike references in Jon's reply brief to events occurring after the case was submitted to the district court. The supreme court overruled the motion to strike, but directed those portions of the parties' brief which referred to events occurring subsequent to the date of the decree would not be considered in this appeal.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992) (citing Iowa R. App. P. 14(f)(7)).

I. Custody. Jon contends the district court's denial of his application for modification of custody is not in the long-term best interests of the children. Our primary consideration in deciding child custody issues is the best

interests of the child. In re Marriage of Weidner, 338 N.W.2d 351, 359 (Iowa 1983).

The applicant bears the burden of establishing by a preponderance of the evidence that circumstances since the entry of the decree have so materially and substantially changed so as to justify modification. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The changed circumstances must not have been contemplated by the court when the decree was entered. Id. They must be more or less permanent, not temporary, and they must relate to the welfare of the children. Id. The parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id.

The parties' attempt to exempt themselves from showing a substantial change in circumstances in a modification proceeding is not binding on this court. In re Marriage of Witzenburg, 489 N.W.2d 34, 36 (Iowa App. 1992). In seeking a modification in custody, Jon must show a substantial change in circumstances. Id.; Frederici, 338 N.W.2d at 158. A permanent move from the State of Iowa was contemplated by the district court when the decree was entered. The move by Shari to Lenexa, Kansas, alone, does not constitute a material and substantial change in circumstances. Weidner, 338 N.W.2d at 360-61 (citing In re Marriage of Day, 314 N.W.2d 416, 420 (Iowa 1982); In re Marriage of Lower, 269 N.W.2d 822, 826-27 (Iowa 1978)) (court holding removal of children from state provides no

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justification in itself for custodial change). Jon must also show a change in circumstances would serve the best interests of the children. A parent seeking to take custody from the other parent must prove an ability to minister more effectively to the children's well being. Frederici, 338 N.W.2d at 158. This heavy burden arises from the principle custody should be disturbed only for the most cogent reasons after the courts have fixed it. Id. (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)). Shari continues to provide excellent primary care for Kim and Jeff. The children are socially active and well adjusted. Evidence shows Shari encourages the children's relationship with their father and stepmother. Jon, however, expressed criticism of Shari. The record shows Jon has an inconsistent and unstable employment history. No credible evidence was presented at trial to show Shari was not doing all things proper and necessary for the well being of the children. We also considered the testimony and report of Dr. Bill Arbes, a psychologist and expert witness for Jon. Dr. Arbes's testimony and report were stricken by the district court because they were not revealed to Shari in a timely manner. Even after considering this testimony and report, we find they fail to provide evidence of a substantial change warranting a modification. We have disregarded the parties' references to events and occurrences after submission to the district court.

We find Jon has failed to show by a preponderance of the evidence a substantial change in circumstances relating to Kim and Jeff's welfare. Jon has not shown he has a superior ability to minister the children's needs more effectively than Shari. The long-term best interests are served by Kim and Jeff's continued physical placement with their mother. We affirm the district court on this issue.

II. New Trial. In ruling upon motions for new trial, the district court has broad discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). The district court's decision will be reversed only upon a finding of abuse of discretion. There was substantial evidence to support the conclusions made by the district court. No new evidence is presented which could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial. The district court did not abuse its discretion. We affirm the district court's denial of the motion for new trial.

III. Attorney Fees at Trial. The district court denied requests by Jon and Shari for attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991) (citing In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983)). The district court did not abuse its discretion in denying attorney fees at trial. We do not disturb the district court's decision regarding attorney fees and costs at trial. We affirm on this issue.

IV. Attorney Fees on Appeal. Jon also seeks attorney fees on appeal. Shari cross-appeals for attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties financial positions. Giles, 338 N.W.2d at 546. 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 Jon's request for appellate attorney fees. Jon is ordered to pay \$750 of Shari's appellate attorney fees.

Costs of this appeal are assessed to Jon.

AFFIRMED.