FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LINDA SUSAN ROBINSON
AND RICHARD LYNN ROBINSON

Upon the Petition of)
LINDA SUSAN ROBINSON,)
Petitioner-Appellant,)
And Concerning)
RICHARD LYNN ROBINSON,)
Respondent-Appellee.)

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8-589
88-808

Appeal from the Iowa District Court for Page County (No. 1132), James M. Richardson, Judge.

Petitioner appeals from the district court decision modifying the physical care order for the parties' two minor children. **AFFIRMED.**

Verd R. Bailey of the Bailey Law Office, P.C., Clarinda, for petitioner-appellant.

Patrick A. Sondag of Turner, Jones, Bitting & O'Meara, Clarinda, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Petitioner appeals from the decision of the district court which granted respondent's petition for modification and switched the physical care of the parties' two minor children to respondent. Petitioner claims the district court erred in: 1) finding that a material and substantial change in circumstances had occurred which justified changing the custody of the children from petitioner to respondent; 2) not increasing respondent's child support obligation; and 3) not awarding her attorney fees. Petitioner and respondent ask for attorney fees on appeal.

Linda Robinson and Richard Robinson were married on September 3, 1977. Linda had a son, Eric, born February 18, 1974, who was adopted by Richard. The parties had one other child, Nicole Renee, born September 18, 1978. A decree of dissolution was entered for the parties on December 21, 1982. Linda was given sole custody of the children and Richard was given visitation rights and ordered to pay $125 per child per month in child support. The parties had separated earlier in 1982 and Linda had moved first to California and then Virginia, where she married John Nicole in 1983. Later they moved to Florida. Visitation became a problem, and Richard did not see the children until December 1986.

There was evidence that John had a bad temper and was particularly abusive to Eric. Linda left John in January

1987 and took the children to California. There Linda had mental health problems and was hospitalized at a psychiatric facility for two weeks. In August 1987, Linda sent the children to Shenandoah to live with Richard on a temporary basis. Later Linda came to Iowa. The children were enrolled in school at Shenandoah and have attended there ever since. Eric has had problems in school, getting in fights and working below his grade level. Eric has learning disabilities; however, he has shown some improvement lately.

Upon Richard's petition for modification, the district court found there had been a substantial change in circumstances. The court granted the parties joint legal custody and gave Richard primary physical care of the children. Linda was given visitation rights and ordered to pay $50 per month per child in support.

Our scope of review in this matter 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 the witnesses. Iowa R. App. P. 14(f)(7). When conflicting testimony exists, this court relies heavily on the trial court's findings, In re Marriage of Vrban, 359 N.W.2d 420, 423-23 (Iowa 1984), because it had the opportunity to observe and listen to the parties. Matter of Guardianship of Stewart, 369 N.W.2d 820, 824 (Iowa 1985). The trial court has reasonable discretion in determining whether

modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983).

I. The standard applicable to this case was stated in the case of In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

> 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 interest 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 administer 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 its findings of fact, the trial court listed four circumstances which show by a preponderance of the evidence that a material and substantial change in conditions has occurred. The changes found are:

> 1. The personal trauma to the children and Linda due to the failed second marriage;
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> 2. Linda's emotional and psychological problems experienced since the decree;
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> 3. Linda's voluntary and informal transfer of custody of the children to Richard; and
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> 4. Richard's changed life-style which allows sufficient time to meet the children's needs.

Relying heavily on the trial court's finding of facts, we agree that cogent reasons exist for granting the parties joint custody of the children with Richard primarily responsible for their physical care. Joint custody shall be granted unless it is unreasonable and not in the best interests of the children. Iowa Code § 598.41(2). Recently both parents have demonstrated an ability to share in the parental responsibilities. Cooperation between the parents is in the children's best interests and should be encouraged here.

The children's best interests also demand that Richard have primary responsibility for their physical care. Our review of the facts reveals that the changes listed above are material and substantial. They were not contemplated by the court issuing the original decree. The changes are not of a temporary nature and do relate to the welfare of the children. Finally, Richard has demonstrated his ability to administer more effectively to the children's well being.

The original divorce decree found that the mother, Linda, had been primarily responsible for the care of the children and had done a good job maintaining them in a healthful and clean environment. Richard, on the other hand, spent much time earning a livelihood and working in his garden. The court also found that Linda contemplated remarriage and expected to be able to devote her full

attention to the children. Richard was expected to continue working and would have to rely on the help of others to care for the children.

Six years later, the conditions are not as the original trial court predicted. Linda took the children to live in California and Virginia. The distance made visits with Richard difficult. He maintained contact via the telephone and through the mails as best he could. There is evidence that Linda frustrated his attempts, which is a factor we consider. In re Marriage of Gonzales, 373 N.W.2d 152, 154 (Iowa App. 1985).

The conditions the children endured with Linda did not provide the stable environment contemplated by the trial court. Besides the stress of another failing marriage, the children, especially Eric, were subjected to abuse by the stepfather. Eric became involved in disruptive behavior, including fighting and vandalism. Both of the children's school work suffered during this time. The conditions affected Linda, and she began seeing a psychiatrist in 1986. In January of 1987, Linda was hospitalized for two weeks for her emotional problems. She underwent outpatient treatment for at least one month after that.

Linda made arrangements with Richard for the children to live with him in the summer of 1987. This was yet another disruption in the children's lives. They have adjusted well to this change now and should not be required

to readjust once again. Richard has demonstrated his ability to care for the children and ensure that their needs are being met. He has adjusted his life so that he can spend time helping with their school work and promoting their interests. Richard has provided the children with a stable nurturing environment which is in the long-range best interests of the children.

We find the trial court reached an equitable result. Therefore, the modification order is affirmed. Having upheld the modification order, it is unnecessary to consider Linda's request for additional child support payments.

II. Linda claims she should have been awarded attorney fees for the modification action. The trial court ordered Richard to pay all costs of the action, but the parties were responsible for their own attorney fees. We agree with this result.

Attorney fees are not recoverable as a matter of right, but rest within the court's discretion and depend upon one spouse's ability to satisfy them. In re Marriage of Phipps, 379 N.W.2d 26, 29 (Iowa App. 1985). The court's discretion in fixing fees is considerable. In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). In reviewing an award of fees, we will also consider whether one party was successful in resisting the other's application for increased support and if the party was

successful in the application for custody modification. Phipps, 379 N.W.2d at 30. We find no reason to disrupt the trial court's order regarding fees and costs.

The parties have also requested attorney fees on appeal. An award of attorney fees on appeal may be granted based on the parties' respective abilities to pay. In re Marriage of Stanley, 411 N.W.2d 698, 703 (Iowa App. 1987). We have reviewed the attorneys' statements and the record to determine the parties' respective abilities to pay these fees. Relevant considerations include ability to earn a salary, possibilities of second jobs, child support, day care, and general expenses. Id. We find that each party should be responsible for his or her own attorney fees and should split the costs of this appeal.

AFFIRMED.