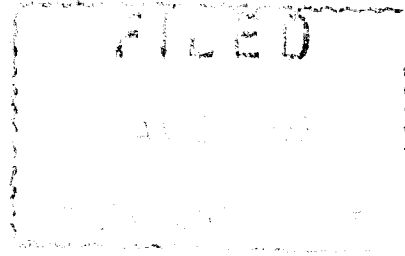


IN THE COURT OF APPEALS OF IOWA

No. 8-733 / 98-0705
Filed January 27, 1999

**IN RE THE MARRIAGE OF KRISTINE KAE
HOWELL AND STEVEN ROBERT HOWELL**

Upon the Petition of
KRISTINE KAE HOWELL,
Appellant,



And Concerning
STEVEN ROBERT HOWELL,
Appellee.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson,
Judge.

Kristine Howell appeals a district court ruling granting Steven Howell's
petition for a modification of custody of the parties' two minor children.

AFFIRMED.

Rod Powell of Powell Law Firm, P.C., Norwalk, for appellant.

Greg S. Noble of Murray, Jankins & Noble, Des Moines, for appellee.

Nancy Lynn Robertson of Iowa Coalition Against Domestic Violence, Des
Moines, amicus curiae.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ. Streit, J., takes no part.

HUITINK, P.J.***I. Background Facts and Proceedings.***

Steven and Kristine Howell's marriage was dissolved on October 5, 1995. They were awarded joint custody of their children, Jessica, age eight, and Sarah, age five. Kristine was awarded physical care subject to Steven's visitation rights.

Steven initiated these proceedings in June 1997. He cited Kristine's abusive relationship with Scott McClurg, alcohol abuse, and financial instability as justification for modification of the 1995 decree.

Kristine denied Steven's allegations and claimed, even if true, they were insufficient to support modification of the decree. Kristine also claimed the children were thriving in her care and her relationship with McClurg was of no consequence to their welfare.

After considering the conflicting evidence on these issues, the district court reached the following conclusions:

18. Parental stability, responsibility, and maturity are important anchors for children. Not only has Kristine not demonstrated these qualities, Kristine has chosen to place her current romantic relationship ahead of the interests of the minor children Jessica and Sarah. The Court finds that she is still involved in an abusive relationship with her boyfriend Scott McClurg and the Court has concern for the physical and mental well being of the children while this relationship continues.

19. The Court finds that as a parent Steve is more stable, more responsible and more mature. The Court finds the children have a good relationship with their step-brothers Lonnie and Nick and with their step-mother Elizabeth Howell. There has been a substantial material change in circumstances since the Decree of Dissolution of Marriage. The Court finds

that Steve Howell should have physical custody of both minor children, Elizabeth and Sarah, effective immediately. The change in custody is based upon the facts set forth above and upon the present best interest of the children.

On appeal Kristine contends Steven has failed to establish the substantial change of circumstances necessary to warrant modification of the decree. The Iowa Coalition Against Domestic Violence, in its amicus curiae brief, contends the district court ignored evidence of Steven's history of domestic abuse necessitating a remand for specific findings of fact on this issue. The Coalition alternatively argues Steven is presumptively unsuited to physical care because he abused Kristine during their marriage.

II. Standard of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). 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). 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).

III. The Merits.

Courts can modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App.1996). The change must be more or less permanent and relate to the welfare of the children. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). 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 Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987)(citing *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983)).

The question is not which home is better, but whether Steven has demonstrated he can offer the children superior care. *See In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Steven must show an ability to minister to the children's needs superior to Kristine. *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the children, custody should not be changed. *Id.*; *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App.1992).

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. *In re Marriage of Smiley*, 518

N.W.2d 376, 378-79 (Iowa 1994)(citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Our review of the record confirms the district court's assessment of Kristine's relationship with McClurg and its implications for the children. Kristine has substantially understated the significance of McClurg's presence in her home and the extent to which he has physically abused her. Despite her initial denials, Kristine conceded McClurg was at her home "quite a bit" and she required medical treatment as the result of his abuse. There is also evidence Steven and his wife allowed Kristine and the children to stay at their home because Kristine was afraid of McClurg. McClurg was also arrested for assaulting Steven when Steven returned the children following visitation in June 1997.

Kristine is in no way deserving of or at fault for McClurg's abusive behavior. She is, however, responsible for the welfare of the children while entrusted with their physical care. Kristine's misrepresentation of her relationship with McClurg and the dimensions of violence in her home raise serious concerns about her parental judgment. Kristine is either unable or unwilling to appreciate the degree to which children's immediate and long-term welfare is jeopardized by her continued abusive relationship with McClurg. We, like the district court, conclude these circumstances justify modification of the 1995 decree.

In reaching this conclusion, we have not ignored evidence of Kristine's declining financial and personal stability. We have also favorably considered

evidence indicating the children are happily and comfortably situated in Kristine's physical care. It is sufficient to note that these circumstances, alone or in combination, are not sufficient to alter the outcome of this case.

The Coalition's interest in this case is premised on their belief Steven has a history of domestic abuse. At trial, Kristine testified:

Q. We've heard some testimony about battering earlier today. Has Mr. Howell ever battered you?

A. Yes. There was an occasion.

Q. When was that?

A. January of 1995. No, no, no, 1993.
January 1993.

Q. Did he create bruises on you?

A. Yes, he did.

Q. Did you do anything about it?

A. No, I did not.

Q. You didn't file any domestic assault charges or anything?

A. No, I did not.

As noted earlier, the Coalition argues this evidence, if properly considered, disqualifies Steven as a custodial parent.¹ See Iowa Code § 598.41(1)(b)(if court finds a history of domestic abuse exists a rebuttal presumption against awarding joint custody exists). We disagree.

We reject the notion that the absence of specific findings by the district court means it failed to properly weigh this evidence. See *In re Marriage of Ford*, 563 N.W.2d 629, 632 (Iowa App. 1997). Any prejudice resulting from failure to consider this evidence can be adequately remediated by an appropriate post-trial motion or de

¹ We pass on Steven's error preservation claim because consideration of the merits results in the same outcome.

novo appellate review. In any event, we find evidence of a single and remote incident of domestic abuse insufficient to presumptively deny Steven physical care of the children in this case. *Id.* at 633. The record discloses no other evidence of domestic violence in this or Steven's current marriage. There is no evidence indicating Steven's prior behavior poses an immediate or long-term risk to the children.

Steven has remarried. His wife and her children enjoy good relationships with Jessica and Sarah. Steven offers a stable and secure custodial environment that Kristine is no longer able to provide.

The judgment of the district court is accordingly affirmed.

AFFIRMED.