FILED
MAR 0 9 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF BRIAN F. NAUMAN AND SHARI ANN NAUMAN

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Upon the Petition of)

BRIAN F. NAUMAN,)

Petitioner-Appellee,) Filed March 9, 1988

And Concerning)

SHARI ANN NAUMAN,) 7-573
87-782

Respondent-Appellant.)

Appeal from the Iowa District Court for Scott County (No. 34570), James E. Kelley, Judge.

Respondent former wife appeals from the trial court's ruling on petitioner-former husband's petition for modification of a dissolution decree. **AFFIRMED.**

Bobbi M. Alpers, Davenport, for respondent-appellant.

Michael J. McCarthy of McCarthy & Lammers, Davenport, for petitioner-appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

This appeal concerns the custody of Andrea Lynn Nauman, born August 22, 1982. The trial court after a modification hearing placed Andrea's custody with her father, the petitioner-appellee. The respondent-mother appeals that result. We affirm.

Andrea is the child of Brian and Shari Nauman, whose marriage was dissolved on February 3, 1984. By that dissolution decree Andrea's custody was placed with her mother, Shari. Shari has since remarried to Mike McCune, and they have two children. Brian likewise has remarried and he has no children by this second marriage.

In the summer of 1985, Shari left Andrea with Brian. She gave Brian no particular reason for doing so other than she could no longer "handle it." At trial Shari testified it was ". . . around the time that we were doing drugs and I felt that would be best for Andrea because at the time I was confused."

Brian and his present wife had Andrea for three months—from June until Labor Day of 1985. On that day, Shari came to Brian's home and told him she had a present for Andrea in the truck. This was a mere ploy, for despite the screams of Andrea that she wanted her "daddy," Shari forced Andrea into the truck and drove away.

Later in 1985, Brian learned that Shari and Mike had been using heroin, Darvon, and other "mind medications." He learned that Shari spent twenty-one days during the summer of 1985 in an inpatient drug program.

The treatment program undertaken by Shari was prompted by a number of burglary and theft charges brought against her and Mike. As a result of these charges, a plea bargain agreement was reached and Mike was convicted of burglary and served eight months of an indeterminate ten-year sentence at the

men's reformatory in Anamosa. Shari was convicted of theft and she was sentenced to confinement for a term of no more than two years.

After she was sentenced, Shari appealed to the Iowa Supreme Court. She remained free on bond. Mike was released from prison in August of 1986, and in October of the same year, Shari's appeal was dismissed. She was sent to the women's reformatory in Mitchellville, where she served two and one-half months of her sentence. She and Mike were both on parole at the time of the modification hearing.

Shari did not tell Brian that she was going to prison. Instead she made arrangements with her sister to care for Andrea. Brian learned of Shari's incarceration in October of 1986 and at that time he began this modification action and asked for and received temporary custody of Andrea. Andrea has been with Brian and his present wife since that date.

The trial court modified the decree by changing the custody of Andrea from Shari to Brian. Shari appeals, alleging (1) that the trial court erred in finding that circumstances had substantially and materially changed since the time of the parties' dissolution to warrant modifying the decree and the child custody, and (2) that the trial court erred in finding that Andrea's best interest could be provided for more capably by the petitioner.

Our scope of review 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 witnesses, but we 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 in the case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

The moving party in a modification action carries a heavy burden when seeking a change in the custodial provisions of a dissolution decree. This burden

stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

As the Iowa Supreme Court, in In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983), stated:

> 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. The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being.

Our de novo review of the evidence leads us to conclude that the modification decree should not be disturbed. The trial court saw and heard the witnesses and was able to observe their conduct and demeanor on the witness stand. It determined that Brian, as the non-custodial parent, was more capable of providing for the best interests of Andrea than Shari. It also observed:

> Shari in her testimony claims that she is not addicted to any controlled substances. However, her emotional control is somewhat suspect, given the observations of her in the courtroom. Her credibility is not as great as Brian's.

No one seriously challenges that when Shari was in the inpatient drug program that it was in Andrea's best interests that she be with Brian. It is equally clear to us that when Shari was incarcerated at Mitchellville, Andrea's best interests were served by again placing her with her father.

Shari's environment and living conditions had an adverse impact on Andrea. The chaos and confusion of people coming and going were difficult on her emotionally. Shari's statement that Brian was not her "real father" only added to Andrea's already confused state of mind.

Since Andrea has resided with Brian and his present wife, her emotional condition has improved. She has entered preschool and is receiving professional counseling. Her counselor testified:

> Q. Do you believe that she has been in that environment long enough to come to a conclusion as to whether it is a permanent situation and in the long run would be a stabilizing influence on her life? A. I would highly recommend, very highly recommend that she stay where she is for her own good—for her own good.
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> Q. If she goes back to her natural mother, what problems do you foresee? A. A reoccurrence of much of the other behavior. Another move, which this would represent, would tear everything apart. Another readjustment. Another move would be very difficult and the benefits she has had the last four months would be gone. Materially, emotionally, psychologically, spiritually. On every level. She is a very intelligent child, very intelligent. She has been given the resources through preschool—preschool, resources and toys to progress.
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> Q. How would you describe her behavior since her mother has been released? A. As I said, it was very chaotic and confusing and traumatized the first week. I saw her after that first visit. Partly because of some inappropriate and confusing things that were said and it has taken a month to stabilize her behavior. I really feel that she does adjust because of the type of child she is and presently she does very well in the very structured and set up environment she is in. She functions very well.

The trial court was correct in finding that there had been a material and substantial change in conditions since the entry of the decree and that Andrea's best interest makes it expedient to change her custody from Shari to Brian.

We reject appellant's argument that Shari's chemical dependency problems may have been contemplated by the court when the decree was entered. The facts do not support this assertion. In either event, although excessive use of drugs (and criminal activity) is material in custody disputes, it is not the sole determining factor. The real test is the effect that circumstance has on Andrea. In this instance it has had a substantial adverse effect.

The evidence is clear to us that it is in Andrea's best interests that the decree be modified, for Brian has displayed a superior ability to minister more effectively to Andrea's needs.

The judgment of the district court is affirmed.

AFFIRMED.