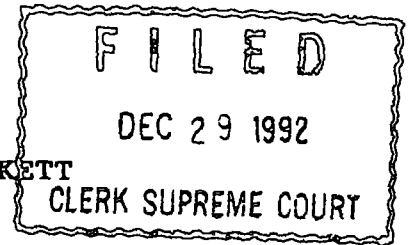


IN THE COURT OF APPEALS OF IOWA

No. 2-576 / 92-823

IN RE THE MARRIAGE OF JULIE RENEE HESKETT
AND KELVIN DEAN HESKETT



Upon the Petition of

JULIE RENEE HESKETT,

Appellee,

And Concerning

KELVIN DEAN HESKETT,

Appellant.

Appeal from the Iowa District Court for Johnson County,
Kristin L. Hibbs, Judge.

Kelvin appeals from the district court's ruling which
failed to modify the custody provisions of the parties'
dissolution decree. **AFFIRMED.**

Adrian T. Knuth, Anamosa, for appellant.

Margaret T. Lainson of Mearden, Sueppel, Downer &
Hayes, Iowa City, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden,
JJ. Schlegel and Sackett, JJ., take no part.

OXBERGER, C.J.

In June 1983, the district court dissolved the marriage of Kelvin (Kelly) and Julie Heskett. The court awarded sole custody of the parties' children, Billy (born February 7, 1977) and Brandon (born January 9, 1979) to Julie. Kelly received reasonable visitation and was ordered to pay \$100 per month per child in support.

In July 1985, following Kelly's application and a trial, the district court modified the original decree and placed the boys in the joint legal custody of both parents. Their primary physical care remained with Julie during the school year and with Kelly during the summer.

Julie and the boys live with Dale Flecksing in rural Solon, Iowa. Despite instances of domestic abuse, Julie has remained with Dale. They have two daughters. Kelly remarried and lives in Anamosa, Iowa.

On May 23, 1992, Kelly again filed an application for modification of the decree. He requested physical care of the children. After a trial, the district court denied Kelly's request, increased his child support obligation to \$467.60 per month, and ordered him to pay \$1,500 towards Julie's attorney fees. Kelly appeals.

I. Scope of Review

Our 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).

II. Modification Petition

Kelly contends the district court erred in finding he failed to carry his burden of proof in a modification petition. He contends the instability of Julie's domestic situation, his own stability and maturation, and the children's preference constitute the requisite change in circumstances.

In order to modify a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence a material and substantial change in circumstances not within the contemplation of the court at the time the decree was issued. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). 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 heavy burden placed on the parent seeking modification stems from the principle that once custody has been determined, it should be disturbed only for the most cogent reasons. Id.

Kelly obviously loves his children and is able to provide a suitable home environment for them. However, we agree with the district court and do not find a substantial change in circumstances not within the contemplation of the court which previously modified the decree. While Kelly is now married to Glenice, he was cohabiting with her at the time of the previous modification. In addition, we find it

within the court's contemplation that as a person ages, he or she may become more stable and consistent with employment. Obviously, we are concerned about Julie's cohabitant Dale's two previous convictions for domestic abuse. However, Dale is currently in counseling and has not committed additional offenses within the past year. Thus, we do not find that conduct a permanent condition impacting the children.

In addition, Kelly fails to show he has a superior ability to minister to the children. Julie is an active, involved, and conscientious parent. She has been persistent in obtaining remedial opportunities for Brandon's special educational needs. School personnel testified Julie maintained regular contact with Brandon's teacher and was supportive of his educational program. On the contrary, Kelly has had no contact with the children's school officials.

Further, we support the district court's encouragement to both parents to communicate openly with one another regarding the children and to support one another's role as parents.

III. Admissibility of Children's Testimony

Kelly next contends the district court abused its discretion in refusing to allow the parties' children to testify at the modification hearing.

It is within the trial court's inherent power to refuse to allow children to testify regarding matters relating to care and custody. In re Marriage of Abkes, 460 N.W.2d 184, 186 (Iowa App. 1990). The guidepost is whether the risk of harm to the children is greater than any potential benefit. Id.

The trial court acknowledged the likely preference of Billy and possible preference of Brandon to reside with their father. However, the court also found extreme pressure had been placed upon the children.

Our de novo review supports the finding of the district court. Julie testified she was concerned about the amount of pressure placed on Billy during weekend visitation. Evidence of a more permissive environment, greater material comforts, and lesser supervision at Kelly's contributed to the pressure placed on Billy and Brandon. We hold the district court did not abuse its discretion in refusing to allow the children's testimony.

IV. Abatement of Child Support

Kelly next contends the district court erred in failing to abate his child support when the children reside with him in the summer months.

Kelly did not make this request at the lower court and accordingly, we do not consider it on appeal.

V. Attorney Fees

Kelly contends the district court erred in awarding Julie a portion of her attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

Nothing in the record supports Kelly's contention that the district court abused its discretion. We affirm.

Julie requests attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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).

Julie has limited financial resources and is unemployed while Kelly is gainfully employed. Julie was required to defend this action on appeal. Accordingly, we grant Julie

the amount of attorney fees requested in her affidavit, \$1,000.00, plus the cost of printing the brief, \$64.45.

AFFIRMED.