FILED
OCT 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-257 / 93-1323

IN RE THE MARRIAGE OF DUANE A. LIDDLE AND DENISE A. LIDDLE

Upon the Petition of
DUANE A. LIDDLE,
Petitioner-Appellant/Cross-Appellee,

And Concerning
DENISE A. LIDDLE,
Respondent-Appellee/Cross-Appellant.

IN RE THE MARRIAGE OF DUANE A. LIDDLE AND DENISE A. LIDDLE

Upon the Petition of
DUANE A. LIDDLE,
Petitioner,

And Concerning
DENISE A. LIDDLE,
Respondent-Appellee,

JESSIE LIDDLE and JONNIE LIDDLE, Minor Children,
Appellants.

Appeal from the Iowa District Court for Bremer County, Jon Stuart Scoles, Judge.

Father appeals an order modifying the custody provisions of the parties' dissolution decree, and mother cross-appeals the support provisions of the modification. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Ivan J. Ackerman of Engelbrecht, Ackerman & Hassman, Waverly, for petitioner-appellant.

Bruce J. Toenjes of Nelson Law Office, Shell Rock, for appellants minor children.

Gerald B. Carney of Carney & Gohlke, Waverly, for appellee.

Heard by Donielson, C.J., Huitink, J., and Perkins, S.J.*

*Senior judge from the fifth judicial district serving on this court by order of the Iowa Supreme Court.

HUITINK, J.

Duane Liddle appeals the custody provisions, and Denise Liddle cross-appeals the support provisions of an order modifying their dissolution decree. We sustain Denise's motion to strike from the appendix all portions of the transcript from the August 16, 1993, contempt hearing. We affirm in part and reverse in part.

The parties' marriage was dissolved in June 1989 after seventeen years. They have two daughters: Jessie, born in October 1979, and Johnnie, born in June 1981. The parties split custody of the children pending dissolution of their marriage. The decree awarded Denise primary physical care of the children during the school year. Duane was awarded primary physical care during the summer vacation. Both parties were awarded liberal visitation, and Duane was ordered to pay child support in the amount of $75 per child per month, except during the summer when the amount was decreased to $25 per child per month.

In October 1990 the district court modified the decree to provide for a structured visitation schedule. This was necessitated by Duane's failure to allow Denise the liberal visitation as provided for in the original decree. The court found Duane continually "used the children as a weapon in his ongoing battle with Denise" and often denied her even the most brief contact with the children for no apparent reason.

In April 1991 the decree was again modified, but by stipulation of the parties. Duane and Denise agreed to alternate primary care from week to week on a six-month trial basis. The stipulation provided neither party was to pay child support during this period. The stipulation also provided, after the six months, either party could seek modification without the necessity of proving a substantial change in circumstances.

In June 1992 Duane filed for modification of the decree, seeking primary physical custody of the children and requesting Denise be required to pay child support. In her answer, Denise requested primary physical custody and "such other and further relief as the court may deem just and equitable."

In August 1992 Denise requested the children's previous guardian ad litem be appointed to represent them in the proceedings. The court found no reason for the children to be represented and denied her request. In April 1993 the court denied a similar request by Duane and the children in which they claimed counsel was necessary "to make their interests and preferences as to placement known to the court, as well as to protect their interests."

A modification hearing was held in May 1993. In its July 1993 order the district court awarded Denise physical care and established a structured visitation schedule. The court also reinstated the original child support order, concluding it could not modify the support order due to insufficient evidence submitted at the hearing.

Our review in equity actions is de novo. Iowa R. App. P. 4. We are not bound by the fact findings of the trial court, but we do give them deference because it 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 App. 1992). We recognize the district court "'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.'" In re Marriage of Behn, 385 N.W.2d 540, 543 (Iowa 1986) (quoting In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974)).

Duane contends the court erred in awarding primary physical care to Denise, contrary to the children's stated preference. We disagree.

In determining custody issues, our primary consideration is the best interests of the child. Iowa R. App. P. 14(f)(15). Our objective is to place the children in the environment most likely to bring them to physical, mental, and social maturity. In re Marriage of Bartlett, 427 N.W.2d 876, 877 (Iowa App. 1988). The denial by one parent of continuing contact with the other, without just cause, is a significant factor in determining custody. Id. at 878.

The record is replete with instances where Duane has portrayed a negative image of Denise to the children. He repeatedly refused to allow Denise normal visitation during summer months, thus limiting the children's access to their

mother. Duane's conduct is a serious reflection of his fitness as the custodial parent. See id. The record shows Denise has the superior ability to provide for the children's emotional support and will encourage their relationship with Duane. Denise can best provide the environment which will bring Jessie and Johnnie to healthy physical, mental, and social maturity.

As for the children's preferences, the court questioned the children in chambers, with the parties' attorneys present. Jessie testified she was more comfortable with Duane, while Johnnie testified she trusted Duane more than Denise. When the court asked for specifics, neither child was able to articulate specific reasons or examples for their views.

A child's preference is entitled to less weight in a modification action than it would be given in the original custody proceedings. In re Marriage of Behn, 416 N.W.2d 100, 102 (Iowa App. 1987). In this case there is overwhelming evidence the children's preferences were influenced by Duane. Thus, the weight of Jessie's and Johnnie's testimony is diminished in light of this parental pressure. See In re Marriage of Sires, 506 N.W.2d 813, 814 (Iowa App. 1993). We find no error by the trial court and affirm its award of physical custody of the children to Denise.

Next, Duane and the children contend the court abused its discretion by not appointing counsel to represent the children. They claim the court ignored the children's interests and court-appointed counsel would have protected those interests. We disagree.

Iowa Code section 598.12(1) (1991) provides, in part, "the court may appoint an attorney to represent the interests of minor child or children of the parties" in dissolution proceedings. This provision is directionary, not mandatory, and it is within a trial court's discretion to refuse to appoint an attorney to represent the children. See Boyes v. Boyes, 247 N.W.2d 265, 268 (Iowa 1976).

Our review of the entire record reveals the trial court, at every stage of the process, gave serious consideration to the interests of the children. All pertinent information was provided to the trial court to enable it to determine what the children's best interests required.

The court was aware of, and considered, the counselor's privilege not to testify about his conversations with the children. The counselor was aware of the privilege as well and chose not to assert it. Neither parent objected to the counselor testifying at trial.

At oral arguments, the children's attorney was asked what new and relevant information would have been provided had the children been represented. Counsel could not identify any new witnesses or additional issues that would have been raised. Counsel also could not establish any area that was not fully developed at trial due to the children's lack of representation. In addition, the court asked the children in chambers whether they had anything to add or wanted to say. Given the opportunity to speak freely, the children said nothing.

We reject Duane's claim he is entitled to a new trial due to the children's lack of representation. There is no evidence showing the result would be different if this case were remanded on this issue. All of the parties involved were afforded a full and fair hearing on the issues. For all of the above-stated reasons we determine the trial court did not abuse its discretion when it denied to appoint individual counsel for the children.

On cross-appeal, Denise contends the trial court erred in failing to require Duane to pay child support pursuant to the child support guidelines. Duane contends modification of the child support is not properly before this court.

The court has the authority to order parents to pay a reasonable and necessary amount for support of a child "upon every judgment of annulment, dissolution or separate maintenance." Iowa Code § 598.21(4) (1991). A court also

has the authority to modify support orders when there has been a substantial change in circumstances. Iowa Code § 598.21(8) (1991). A modification of the custody arrangement is a significant change which justifies the imposition of child support. In re Marriage of Green, 417 N.W.2d 252, 254 (Iowa App. 1987).

In this case the parties entered into a stipulation in April 1991 that granted either party the right to file for modification without having to prove a substantial change of circumstances. Although the issue of child support was before the court, it declined to modify support since the parties did not provide sufficient information from which the court could determine the parties' monthly incomes. Rather the court reinstated Duane's original support obligation.

There is, however, sufficient evidence showing the failure to review the support obligation will result in substantial injustice to Jessie and Johnnie. We agree with the trial court's finding that Duane has "steadfastly refused to contribute to their financial support pursuant to the original court order," placing him over $2600 in arrears.

We also agree with the trial court's finding Duane established a "corporation" (in which the children are the sole shareholders) in an effort to avoid creditors and avoid paying child support. The children, along with Duane, serve as the corporation's officers. Duane claims

the children have hired him as a subcontractor of the corporation and he earns only $100 to $500 per month. However, there was testimony the corporation earned over $1500 per month.

Lastly, the modifying court quoted from the original decree that, "Duane's own testimony established he has the capability of earning in excess of $25,000 per year but has chosen not to do so because it would interfere with his preferred life-style." We agree with this finding.

The lack of assets should not serve as a shield against a child support obligor's responsibilities. In re Marriage of Phillips, 493 N.W.2d 872, 877 (Iowa App. 1992). In addition, a party's current inability to pay a support obligation is less of a consideration than his or her long-term earning capacity. See In re Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983).

Our review of the record convinces us a remand is required for a specific determination of (1) each party's monthly income and (2) whether the support guidelines should be used in determining Duane's support obligation.

The parties are ordered to provide the following information to the district court: First, Duane shall submit copies of his state and federal tax returns filed since 1989. If he has not filed tax returns, he shall submit copies of his W-2 forms provided by the corporation. He shall also provide the court with all income and tax information from the corporation. This

information is necessary for the court to determine Duane's actual income. Denise is also ordered to submit copies of her tax returns or other information which indicates her net monthly income.

Finally, Denise 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). Duane is ordered to pay $1500 toward Denise's attorney fees for this appeal.

The decision of the district court is affirmed in part, reversed in part, and remanded. We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Costs of this appeal are assessed to Duane Liddle.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.