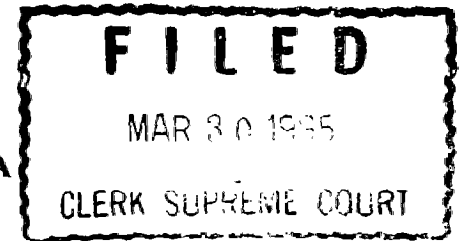


IN THE COURT OF APPEALS OF IOWA

No. 4-580 / 94-0180



**IN RE THE MARRIAGE OF SHERIE E. BRENDLINGER AND
GEORGE BRENDLINGER**

Upon the Petition of
SHERIE E. BRENDLINGER,
n/k/a **SHERIE McCAULEY,**

Petitioner-Appellant-Cross-Appellee,

And Concerning
GEORGE BRENDLINGER,

Respondent-Appellee-Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Sherie Brendlinger appeals, and George Brendlinger cross-appeals, from a district court order modifying their dissolution decree to transfer primary physical care of the minor children from Sherie to George. **AFFIRMED.**

Jeff Carter of Tom Whitney Law Offices, Des Moines, for appellant.

Artis Reis, West Des Moines, for appellee.

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

HABHAB, J.

Sherie and George Brendlinger were married on March 3, 1982. They have two children, Chad, born July 30, 1982, and Joshua, born July 1, 1984

The parties' marriage was dissolved on April 23, 1991. The district court awarded the parties' joint legal custody and gave primary physical care of the children to Sherie. The court noted its concern with Sherie's resistance to George's involvement with the children. The court awarded George liberal visitation.

George filed a petition for modification on July 15, 1992. George alleged a substantial change of circumstances had occurred due to Sherie's denial of visitations, abusive attitude towards him in front of the children, financial irresponsibility, plans to remove the children to Mahaska County, and failure to provide proper medical care.

Following the modification hearing, the court determined George had proven a substantial change of circumstances. The court found Sherie had "totally ignored George's rights as a joint custodial parent." Sherie and her new husband, Curtis McCauley, had denied George scheduled visitations and prevented him from having telephone contact with the children. The court also relied on the report and testimony of Sue Town, the court-ordered custody investigator. Town had also recommended a transfer of custody due to Sherie's refusal to facilitate George's relationship with the children. The court found Curtis' behavior towards George "appalling." The court noted Sherie had demonstrated financial irresponsibility by losing the marital home to foreclosure and filing personal bankruptcy.

The trial judge indicated George also shouldered part of the blame for Sherie's animosity. He constantly hauled Sherie into court resulting in an extreme financial burden. The court found George telephoned the children too often and engaged in "an irritating habit" of recording all communications between the parties.

On balance, however, the court believed George could provide the more stable home and that leaving the children in Sherie's care would completely undermine George's role as

the father. The court, therefore, modified the decree by transferring primary physical care of the children to George, establishing a detailed visitation schedule, requiring Sherie to pay \$90 per month child support, and requiring the parties to participate in counseling. The court ordered George to pay \$2,000 of Sherie's attorney fees and the entire cost of the custody investigation.

Sherie appeals. She claims George failed to demonstrate a substantial change in circumstances warranting a modification of primary physical care.

George cross-appeals alleging he should not have to pay any of Sherie's attorney fees and only one-half of the cost of the custody investigation.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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).

Sherie contends the district court erred in modifying the parties' dissolution decree by awarding George primary physical care of the children.

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. A parent seeking to take custody from the other must prove an ability to minister 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 re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)). We find, as the district court found, that George met this heavy burden.

Although we find George has met his burden, it is necessary to make note that George's behavior since the divorce has been less than commendable. We agree with and would like to reiterate the district court's following observations regarding George's post divorce behavior

He has essentially refused to accept Sherie's position as primary custodial parent. Since the filing of the divorce, he has kept Sherie in court constantly which is an extreme financial burden. He has attempted to control and interfere with most of Sherie's decisions related to the children. At trial George was asked whether he has done anything wrong over the years. He answered no. This underscores George's own inability to understand the significance of his conduct.

George's practice of tape recording all communications between himself and Sherie and her family is an irritating habit at best. It evidences a total lack of trust and cooperation. Further, George's conduct in insisting on the numerous telephone calls to the children has further aggravated an already deteriorating situation. George acts as if he was without blame. He is rigid and insists on everything being his way. He is reluctant to compromise.

As Joshua's teacher, Ms. Howard, stated, George needs to "lighten up." The boys are children and need to laugh, play, and enjoy life's experiences. George magnifies all problems, particularly anything involving Sherie and looks for the negative in all of her parenting.

We conclude George has shown material and substantial changes which require a modification in order meet the best interests of the children. In discussing the material and substantial changes which have occurred, we begin by noting that much of the testimony given by the parties conflicts. We also note that while no one factor alone equates to a material and substantial change, George meets his burden by showing many different factors.

Since the divorce, Sherie has had substantial financial problems. These conditions got bad enough that she had to file for bankruptcy. During her financial troubles, Sherie lost the family home in foreclosure proceedings. When George regained the home through an agreement with FmHA, he found significant damage had been done to the house and numerous major appliances were missing. George spent thousands of dollars in repairs. While Sherie has now remarried, her financial status remains uncertain.

There have also been many alleged problems with visitations and telephone calls to the children. While much of the testimony conflicts on this particular issue, we have no doubt

that some of the alleged instances occurred. Sherie makes the claim that while some visitation was missed, George was provided with make-up time for nearly all of missed visitation. While this is true, it should also be mentioned that attorneys were required for George to receive this make-up time.

There is also the issue of Sherie moving to Oskaloosa. George did not have primary physical care of the children, but he did have joint custody rights. Part of George's rights as a joint custodian include equal participation in decisions affecting the children's education. See Iowa Code § 598.41(5) (1993). We believe Sherie allowed George little, if any, participation in moving the children and changing their schools. In fact, just prior to moving the children, Sherie promised George the children would not move. Essentially, the children's move to Oskaloosa was made without the knowledge or consent of George.

Sherie has also been unable to provide a stable home for the children since the dissolution. After losing the family home in Altoona, she moved the children in with her parents on a farm outside of Oskaloosa. A few months later, she moved them into an apartment with her in Oskaloosa. Not long after that, she moved them into the home of her new boyfriend who later became her second husband.

We are also concerned with the confrontational, uncooperative attitude of Sherie's new husband. Much testimony was given regarding the unsupportive role he has taken on concerning George's rights.

In the end, we conclude there have been material and substantial changes which warrant the modification of the primary physical care provision of the dissolution decree. We find the best interests of the children require them being placed with George. It is our belief that George will be more able to provide support for Sherie's rights as the noncustodial parent than Sherie did for him. We emphasize that it is not only Sherie's nonsupport which requires the modification, but also her failure to provide the children with a secure and stable

environment, her denial of George's rights as a joint custodian of the children, and the uncooperative attitude of Sherie's new spouse which necessitate this result.

George contends the district court erred in ordering him to pay a portion of Sherie's trial attorney fees and all of the cost of the custody investigator. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Miller, 524 N.W.2d 442, 445 (Iowa App. 1994). To overturn an award, the complaining party must show the trial court abused its discretion. Id. We find the district court did not abuse its discretion. We affirm the order to pay attorney fees and the cost of the custody investigator.

Costs on appeal are assessed to Sherie

AFFIRMED.