

**IN THE DISTRICT COURT OF ROCK COUNTY, NEBRASKA**

**TIM BUSSINGER,**

Petitioner,

vs.

**TRACEY BUSSINGER,**

Respondent.

Case No. CI00-3

**ORDER DENYING  
MODIFICATION**

**DATE OF HEARING:** November 4-5, 2003.  
**DATE OF RENDITION:** November 6, 2003.  
**DATE OF ENTRY:** See court clerk's file-stamp date per § 25-1301(3).  
**APPEARANCES:**  
For petitioner: James J. Orr with petitioner.  
For respondent: W. Gerald O'Kief with respondent.  
**SUBJECT OF ORDER:** Petitioner's amended application to modify decree.  
**PROCEEDINGS:** See journal entry rendered following trial.  
**FINDINGS:** The court finds and concludes that:

1. Petitioner seeks modification of decree to change child custody from respondent to petitioner. Petitioner relies on two overall claims of a material change in circumstances. First, petitioner claims that he has improved his parenting skills and abilities. Second, he urges that respondent's moral behavior weighs against her retaining custody.

2. Ordinarily, the custody of minor children will not be changed unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the children *require* such action. *Tremain v. Tremain*, 264 Neb. 328, 646 N.W.2d 661 (2002). A "material change in circumstances" means the occurrence of something which, had it been known to the court at the time of the dissolution decree, would have persuaded the court to decree differently. *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). This does not mean that the court merely reweighs the original factors with the new evidence. Such an approach would lead to never-ending litigation over child

custody. *Hoschar v. Hoschar*, 220 Neb. 913, 374 N.W.2d 64 (1985). See also *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990).

3. As the party seeking modification, the petitioner bears the burden of establishing such a material change in circumstances. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996), *appeal after remand*, 253 Neb. 189, 569 N.W.2d 243 (1997).

4. Mere improvement of the petitioner's parenting ability does not constitute a material change in circumstances. *Scripter v. Scripter*, 190 Neb. 317, 208 N.W.2d 85 (1973).

5. Much of the petitioner's argument focused on the fact that the respondent is now residing with another man, which whom she has had a child out-of-wedlock. The evidence shows that the respondent has entered into a long-term relationship with this man, including discussion of marriage. The respondent and this man live in an adequate home near Valentine. The household consists of the respondent and the man, the respondent's children with petitioner, the man's children from his first marriage ended by the death of his wife, and the man's child from a previous nonmarital relationship. The evidence persuades this court that the parties' children are happy and healthy in that environment, and relate well to the other children in the household. The Supreme Court has stated that, while it is true that evidence concerning the moral fitness of the parents, including sexual conduct, can be considered as a factor in determining a child's best interests, absent a showing that the mother's cohabitation adversely affected her children, the court does not give this factor much weight. *Smith-Helstrom v. Yonker, supra; Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986). This court finds no persuasive evidence of any adverse effect of the respondent's cohabitation upon the parties' children.

6. Similarly, the court finds no persuasive evidence of any adverse effect upon the parties' minor children from the respondent's recreational activities relating to consumption of alcohol. The evidence persuades the court that the respondent made suitable child care arrangements and promptly and effectively dealt with any problems that arose. The petitioner's relatively frequent invocation of police and social services involvement, with no persuasive evidence that such involvement ever uncovered any problem in the respon-

dent's parenting or home environment, demonstrates the petitioner's motivation to "continue the war."

7. The petitioner also complained that the respondent refused to allow any visitation beyond that mandated by Appendix "C" standard visitation. Deliberate and continued violation of a condition of an order granting visitation justifies a change of custody. *Rollogas v. Rollogas*, 230 Neb. 46, 429 N.W.2d 727 (1988). The present case does not show any such violation. Rather, the evidence shows that the respondent has not determined it appropriate to invoke the court's reminder in paragraph 14H of the decree that the specified visitation is a minimum amount only. The petitioner's frequent involvement of police and social services authorities may be reasonably viewed by the respondent as an indication that the petitioner has failed to heed that same paragraph's admonition to him against attempting to undermine the respondent's parent-child relationships. The respondent can hardly be expected to generously assess the petitioner's requests when he seeks to carry on the child custody "war."

8. Further, the petitioner's record of failure to pay substantial amounts of child support until compelled by the coercive effect of the court's contempt power, long after the petitioner sought to invoke the court's equitable power to modify the decree on custody, demonstrates that the petitioner fails to come to this court with the "clean hands" that equity requires. While not conclusive, this failure confirms the court's conclusion that the petitioner is not entitled to the relief that he seeks.

9. This court concludes that the petitioner failed to meet his burden to establish a material change of circumstances. The decree should not be modified as to child custody.

10. The respondent did not file a counter-petition claiming a change of circumstances regarding child support. Modification of child support was listed as an issue in the pretrial order. However, the court concludes that such issue pertained only to modification of support in the context of a modification of custody. In addition, the court finds the evidence presented on the support issue to be insufficient to establish a material change of circumstances or to calculate the present support obligation under the guidelines. The

petitioner “tries” to pay himself a salary of \$1,800 per month from his closely-held corporation. That figure differs little from the information on the calculations attached to the decree. The respondent presently chooses to stay at home with her children and the children of the man with whom she resides. The evidence does not establish her earning capacity with sufficient clarity to perform the calculations.

11. This court concludes that the issue of modification of support was not effectively raised by the pleadings, as limited by the pretrial order, or by the pretrial order outside of the context of modification of custody. Even if such issue was so raised, the court concludes that the evidence fails to establish a material change of circumstances on the issue of modification of support.

12. The respondent seeks an award of attorneys’ fees as part of the costs of this proceeding. Attorneys’ fees may be awarded in a modification proceeding. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). This court must consider all the facts and circumstances presented bearing on that issue. *Schmer v. Schmer*, 211 Neb. 414, 318 N.W.2d 876 (1982). Those factors include, but are not limited to, the factors used to assess attorneys’ fees in other contexts, i.e., nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996).

13. After considering all of the facts and circumstances and the usual factors, and particularly in view of the modest disparity between the petitioner’s earnings and the respondent’s earning capacity, the court concludes that a fee of \$1,500.00 for the respondent’s attorney should be taxed to the petitioner as part of the costs of the proceeding, together with the other taxable costs.

**ORDER:**

IT IS THEREFORE ORDERED that:

1. The petitioner’s amended application for modification of decree is denied.
2. Any implied application for modification by the respondent is denied.

3. Costs of \$487.67 incurred by the respondent, together with attorneys' fees for the benefit of respondent's attorney in the amount of \$1,500.00, are taxed to the petitioner, to be paid to the clerk of this court in installments at the rate of \$100.00 per month commencing on December 1, 2003, and a like amount on the first day of each month thereafter until paid in full.

4. The judgment shall bear interest at the rate of 3.027% per annum from date of entry until paid.

5. All other requests for relief, express or implied, are denied. This is a final order.

Signed in chambers at **Ainsworth**, Nebraska, on **November 6, 2003**;  
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- If not already done, immediately transcribe trial docket entry dictated in open court.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Order Denying Modification" entered.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days ("Order denying modification entered; costs of \$487.67 and attorneys' fees of \$1,500.00 taxed to petitioner").  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Enter judgment **for costs and attorneys' fees** on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

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**William B. Cassel**  
District Judge

Mailed to: