IN THE COURT OF APPEALS OF IOWA

No. 9-178 / 98-0690

FILED

IN RE THE MARRIAGE OF BARBARA JEAN SMITH AND THOMAS WENDELL SMITH

Upon the Petition of
BARBARA JEAN SMITH,
Appellee,

And Concerning
THOMAS WENDELL SMITH,
Appellant.

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

Thomas Smith appeals from a district court order denying his application to modify the child custody provisions of the parties' dissolution decree. **AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.**

Roger J. Kuhle of the Law Officer of Roger J. Kuhle, P.C., West Des Moines, for appellant.

Deborah McKittrick, Ankeny, and Jeanne K. Johnson, Des Moines, for appellee.

Heard by Huitink, P.J., and Vogel and Zimmer, JJ.

HUITINK, P.J.

Thomas Smith appeals from a district court order denying his application to modify the child custody provisions of the parties' dissolution decree. We modify and remand for a determination of the mother's child support obligation.

I. Background Facts and Procedure.

Barbara and Thomas Smith's marriage was dissolved on October 28, 1982. The parties were awarded joint custody of their children: Amanda, now an adult; and Bradley, born June 2, 1981. Barbara was awarded physical care.

Thomas initiated these modification proceedings in June 1997. He claimed Bradley's residence with him since February 1997 was a substantial change of circumstances necessitating modification of Bradley's physical care. Thomas also sought modification of his child support obligation.

In her answer, Barbara admitted Bradley's residential change. Barbara also requested any resulting child support she would owe for Bradley be offset against Thomas' college support for Amanda and she be awarded liberal visitation with Bradley. Barbara's "Compliance With Pretrial Conference" filed in September 1997 recited that the disputed issues remaining were child support, college support, visitation, attorney fees, and court costs. Following pretrial conference, at which these issues were unresolved, Barbara amended her answer to request Bradley remain in her physical care and Thomas pay additional child support.

In its March 1998 decree, the district court declined to modify physical care citing Thomas's choice "to undercut his ex-wife's relationship with her son by allowing the teenager to move in and by not encouraging the boy to return and reconcile with his mother." Thomas' child support obligation was increased from $200 per month to $670 per month beginning April 1, 1998. Each party was required to pay their own attorney fees.

On appeal, Thomas contends Bradley's residence with him was by the parties' mutual agreement. He also argues Barbara did not contest modification until the parties were unable to resolve disputed financial matters.

II. Scope of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). 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). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. The Merits.

Courts can modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree not

contemplated by the court when the decree was entered. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987)(citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)).

The question is not which home is better, but whether Thomas has demonstrated he can offer the child superior care. *See In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Thomas must show an ability to minister to the child's needs superior to Barbara. *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the child, custody should not be changed. *Id.*; *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App.1992).

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 child's best interests make it expedient to make the requested change. *In re Marriage of Smiley*, 518 N.W.2d 376, 378-79 (Iowa 1994)(citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

The record indicates Bradley moved in with Thomas following an argument with Barbara. Amanda testified Barbara's strained relationship with Bradley was an "ongoing thing." Amanda's assessment was confirmed by Thomas's testimony that Bradley did not get along with Barbara and felt rejected and unwanted by her.

Thomas also testified Barbara called him shortly after Bradley left and offered Thomas the child's bed so she could use Bradley's room for another purpose. Barbara also returned Thomas' child support checks for Bradley after Bradley moved out of her home. Although Bradley did not testify, there is no reasonable dispute concerning his strong preference to remain with Thomas.

We believe the crucial issue is the weight that should be given to Bradley's preference. *See In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa App. 1993). The issue is more complicated than merely asking Bradley which parent he prefers to live with. *Id.* In assessing Bradley's preference, we look at his age and educational level, the strength of his preference, his relationship with family members, and the reasons he gives for his decision. *Id.; see also In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa App. 1985). We give less weight to Bradley's preference in this modification proceeding than if this were an original custody decision.

The record reflects Bradley is nearly eighteen years old. By all accounts he is an exceptional student, taking advanced classes and college credit courses in high school. He plans to attend Iowa State University this fall. Although he did not testify, his actions and testimony of other family members clearly express his preference. We

believe Bradley has demonstrated sufficient intelligence and maturity to assign considerable weight to his preference.

The record also fails to suggest that Thomas has unduly influenced Bradley's sentiments. Our interpretation of the facts does not indicate Thomas intended to "undercut" Barbara's parental authority. Thomas testified he wanted Bradley to have a continuing relationship with his mother and supported Bradley in whatever decision he made. Conversely, while Barbara now contests Thomas's physical care demands, the record shows she took no affirmative steps to secure Bradley's return, and initially acquiesced in the transfer of his physical care. We are convinced Barbara's change of heart was attributable to her failure to obtain the financial concessions she demanded rather than concern for Bradley's physical care.

Under these circumstances, we determine Bradley's physical care should be transferred to Thomas. The parties' dissolution decree is accordingly modified to accomplish this purpose.

Our decision necessitates a modification of the original decree's child support provisions. The district court's modification decree did not reach this issue because Thomas's application to modify was denied. We accordingly remand the child support issues to the district court for appropriate resolution. *See Spotts v. Spotts*, 197 NW 2d 370, 372 (Iowa 1972).

IV. Attorney Fees.

Thomas argues the district court erred in not awarding trial attorney fees. He also requests appellate attorney fees.

A. Trial Attorney Fees.

Attorney's fees are not recoverable in a dissolution as a matter of right, but rest within the court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). We find the district court did not abuse its discretion in refusing to award Thomas' trial attorney fees.

B. Appellate Attorney Fees.

In determining the appropriateness of an award of appellate attorney fees, 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 district court's decision on appeal. *In re Marriage of Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). We have considered the forgoing factors and award Thomas $500 in appellate attorney fees. Costs are taxed equally to each party.

The district court's modification decree is affirmed in part, modified in part, and remanded for determination of appropriate child support.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.

No. 98-0690. [9-178] IN RE MARRIAGE OF SMITH

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge. **AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.** Heard by Huitink, P.J., and Vogel and Zimmer, JJ. Opinion by Huitink, P.J.

(7 pages $2.80)

Barbara and Thomas Smith's marriage was dissolved on October 28, 1982. The parties were awarded joint custody of their children: Amanda, now an adult; and Bradley, born June 2, 1981. Barbara was awarded physical care. Thomas initiated these modification proceedings in June 1997. He claimed Bradley's residence with him since February 1997 was a substantial change of circumstances necessitating modification of Bradley's physical care. Thomas also sought modification of his child support obligation. Barbara's "Compliance With Pretrial Conference" filed in September 1997 recited that the disputed issues remaining were child support, college support, visitation, attorney fees, and court costs. Following pretrial conference, at which these issues were unresolved, Barbara amended her answer to request Bradley remain in her physical care and Thomas pay additional child support. The district court declined to modify physical care. Thomas' child support obligation was increased from $200 per month to $670 per month beginning April 1, 1998. On appeal, Thomas contends Bradley's residence with him was by the parties' mutual agreement. He also argues Barbara did not contest modification until the parties were unable to resolve disputed financial matters. **OPINION HOLDS:** We believe the crucial issue is the weight that should be given to Bradley's preference. The record reflects Bradley is nearly eighteen years old. By all accounts he is an exceptional student, taking advanced classes and college credit courses in high school. Although he did not testify, his actions and testimony of other family members clearly express his preference. We believe Bradley has demonstrated sufficient intelligence and maturity to assign considerable weight to his preference. The record also fails to suggest that Thomas has unduly influenced Bradley's sentiments. Conversely, while Barbara now contests Thomas's physical care demands, the record shows she took no affirmative steps to secure Bradley's return, and initially acquiesced in the transfer of his physical care. We are convinced Barbara's change of heart was attributable to her failure to obtain the financial concessions she demanded rather than concern for Bradley's physical care. Under these circumstances, we determine Bradley's physical care should be transferred to Thomas. The parties' dissolution decree is accordingly modified to accomplish this purpose.