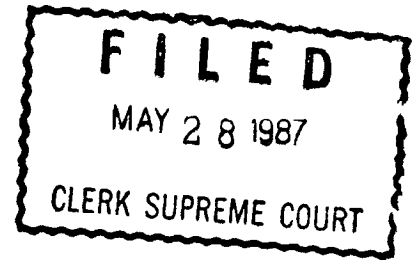


IN THE COURT OF APPEALS OF IOWA
IN RE THE MARRIAGE OF GARY L. SMITH
AND ROSE A. SMITH



Upon the Petition of)

GARY L. SMITH,)

Petitioner-Appellee)

And Concerning)

ROSE A. SMITH,)

Respondent-Appellant.)

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7-46
86-1177

Appeal from the Iowa District Court for Louisa County (No. 16456),
D. B. Hendrickson, Judge.

Respondent former wife appeals from a modification of the custody
provision of the decree dissolving the parties' marriage. **AFFIRMED.**

William L. Matthews of Hicklin & Matthews, Wapello, for appellant.

Kent Hutcheson of Fort Madison for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

This is an appeal from an order modifying the child custody provisions of a dissolution decree. The record reflects that the marriage of the parties, Rose and Gary Smith, was dissolved in June of 1981. Pursuant to the dissolution decree, Rose was granted sole custody of the parties' two minor children, Wendy and Adam, now ages sixteen and twelve respectively. In September of 1985, Gary filed the underlying petition for modification seeking the establishment of a joint custodial arrangement naming him physical custodian of the children. The trial court granted the modification and ordered that the physical care of Wendy and Adam be transferred to Gary. Rose has appealed, challenging only the latter portion of the trial court's ruling.¹ For the reasons stated below, we affirm.

Before reaching the merits, we briefly set forth the general principles governing our review. A parent seeking to modify the physical care provision of a dissolution decree carries a burden which parallels that imposed when a change of custody is sought. In re Marriage of Leyda, 355 N.W.2d 862, 864 (Iowa 1984). This burden has been characterized as "heavy" because we recognize that, "Like custody, the related status of physical care should be quickly fixed and little disturbed." In re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983); see also Leyda, 355 N.W.2d at 865. Consequently, it is well settled that those portions of a dissolution decree concerning child custody are to be altered only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 617 (Iowa 1980). In this connection, a party seeking to modify the custody arrangement must establish by a preponderance of the evidence

¹The sole issue presented is whether the trial court erred in transferring the physical care of Wendy and Adam to Gary; Rose does not challenge that portion of the court's order granting the parties joint custody of Wendy and Adam.

that conditions since the entry of the original decree have so materially and substantially changed that the child's best interests make the requested modification expedient. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). In addition, it must be shown that the changed circumstances were not contemplated by the trial court when the decree was entered, that they are permanent rather than temporary in nature, and that they relate to the welfare of the child or children in question. Id. In determining whether the requisite showing has been made, we review the record de novo. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). As with all cases involving questions of custody, the best interests of the children remain our first and foremost consideration. Leyda, 355 N.W.2d at 865.

Turning to the merits, we note that in his petition, Gary alleged a number of circumstances which he claimed comprised the requisite basis for modification. Gary's primary allegation was that Wendy and Adam had expressly stated their preference to live with him. In addition, Gary stressed that his financial circumstances had improved significantly since the date of the original decree and that he had remarried, thus allowing him to better provide for the children's needs than could Rose.² Initially, we note our concurrence with Rose's assertion that Gary's enhanced financial status does not alone comprise a proper basis for modification; our courts have previously recognized that one parent's superior

²At the time of the hearing, Gary was steadily employed and earned approximately \$11,000 annually; his wife, Judy, was also employed and earned over \$8,000 per year. In addition, Gary and Judy had recently purchased a home in Burlington. Rose had been less fortunate since the entry of the decree. Although she had remarried and two children were borne of her second marriage, her second husband contributed very little financial support to the family. At the time of the hearing, he and Rose had separated; Rose received approximately \$72 per month from his social security benefits for the support of their two children. In addition, Rose received \$460 per month from ADC, \$210 per month in food stamps, and \$50 a week from Gary for the support of Wendy and Adam.

ability to provide material accommodations is not the equivalent of a showing that such parent is more capable of ministering to the children's best interests. See Maikos v. Maikos, 260 Iowa 382, 393, 147 N.W.2d 879, 885 (1969). Similarly, in In re Marriage of Mikelson, 299 N.W.2d 670, 673 (Iowa 1980), the supreme court noted that "remarriage and [a] new home. . . are matters which were foreseeable when the decree was entered and do not establish a basis for changing custody." It is significant, however, that the trial court underscored the children's preferences in support of its decision to grant the modification and did not rely upon Gary and Rose's comparative financial capabilities. Consequently, the seminal question which we confront is whether the court placed an improper amount of weight upon Wendy and Adam's preference to reside with Gary.

In Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970), the supreme court enunciated the "almost universal rule that when a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling, may be considered by the court with other relevant factors, in determining child custody rights." See also In re Marriage of Zabecki, 389 N.W.2d 396, 399-400 (Iowa 1986) ("A child's preferences in custody determinations is given weight, although less weight may be given in modification proceedings."). Significantly, Jones also concerned a petition for modification. Unlike the present case, however, a number of additional factors present in Jones demanded that the decree be modified. For example, the court found that the custodial parent had improperly supervised the children's social and moral needs, thus indicating that their welfare would best be served by transferring custody. Id. at 392. The same cannot be said in the present case; there are no allegations that Rose's performance as a mother has been deficient. Quite to the contrary, the record discloses that Wendy and Adam

have progressed exceptionally well under her supervision — both are honor students and regularly participate in extracurricular activities. Wendy testified, however, that she would prefer living with her father because he resides in a larger community which would afford her greater variety in her high school curriculum. In addition, Wendy stated that she and her mother frequently argued and that the situation would be much less stressful if she lived with her father. In chambers, Adam also testified that he would prefer living with Gary. After hearing the testimony, the trial court concluded:

The child's age and apparent maturity are factors for the Court to weigh when considering [his or her] expressed preferences. In this case the Court, observing Wendy's demeanor, was impressed with Wendy's intelligence and maturity and her reasons for wanting to live with her father. For these reasons it is the court's conclusion that Wendy's physical custody should be placed with Gary.

Adam . . . also expressed a strong desire to live with his father. Because of his age — twelve — this expressed desire does not make a change as compelling as in Wendy's case. Nevertheless, Adam and Wendy are brother and sister and all parties agree that they should not be separated

Although this case poses a question of first impression in this state, a number of other jurisdictions have recognized that in certain circumstances, a child may be of sufficient maturity to exercise sound judgment in deciding that his or her best interests require modification of an original custodial order. See Butterick v. Butterick, 506 A.2d 335, 337-38 (N.H. 1986); Lacy v. Lacy, 553 P.2d 928, 934 (Alaska 1976); Wolff v. Wolff, 24 Or. App. 79, 81, 544 P.2d 602, 604 (1976); Strain v. Strain, 95 Idaho 904, 905-906, 523 P.2d 36, 38 (1974); Rosenberger v. Rosenberger, 21 Ill. App. 3d 550, 553, 316 N.E.2d 1, 4 (1974); Levy v. Levy, 17 Ill. 2d 194, 199, 254 N.E.2d 108, 115 (1969). The courts authoring each of the above-cited opinions concluded that in such cases, a trial court must be free to give the child's preference a substantial amount of weight in order to properly serve his or her best interests. To hold otherwise would

underplay the practical problems attendant with forcing a child to reside in a home which the child has, for credible reasons, found less appropriate; such a decision cannot be said to further the child's best interests. We think that these decisions are in full accord with the law of this state, which similarly seeks to maximize the best interests of the child. Of course, the child's preference is not in and of itself controlling, see Jones v. Jones, 175 N.W.2d at 391; rather, the court must first consider the child's age, intelligence and maturity, the intensity of his or her preference, and whether that preference was based upon undesirable or improper influences. See Butterick v. Butterick, 506 A.2d at 337-38. If, after considering each of these factors, it is apparent that the child has made a mature and well-founded decision, a sufficient basis for modification should be said to exist. Id.

Juxtaposing the aforesaid principles to the present controversy, we find no error in the trial court's decision to transfer the physical care of Wendy and Adam to Gary. The record discloses that the trial court carefully considered Wendy's age and maturity and the reasons undergirding her preference; the court then concluded that she was sufficiently mature to make a well-founded decision and to weigh the resultant consequences. We find nothing in the record indicating that the court erred in this respect.

The proper amount of weight given to Adam's preference presents a much more difficult question because of his age and the trial court's failure to make specific findings concerning his maturity. Both parties, however, expressed their desire that irrespective of how the petition was ruled upon, Wendy and Adam not be separated. It is well settled that the courts of this state endeavor to keep children of broken homes together unless their best interests demand separation. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). We find nothing in the record indicating that Wendy and Adam's

best interests require that they be separated; accordingly, we agree that they should remain together.³

Although Rose alleges that Gary "bribed" Wendy and Adam with material accommodations, this allegation is not borne out by the record; there is no evidence that Gary bought them material items or offered the same in order to secure their preferences. Cf. In re Marriage of Powers, 226 N.W.2d 810, 812 (Iowa 1975). Furthermore, we find it significant that Gary allowed his petition for modification to pend for one year before the hearing in order to observe whether Wendy or Adam would change their minds during this period; the fact that they consistently expressed their desire to live with Gary illustrates the intensity of their decisions. Cf. Powers, 226 N.W.2d at 811-12.

In addition, we adhere to the oft-stated principle that, despite our de novo review, we must afford the trial court considerable discretion in cases of this nature. Powers, 226 N.W.2d at 811. All of the parties were before the trial court and from observation, consultation, and testimony, it occupied a superior position in considering the evidence and ascertaining the children's best interests. See Lamansky v. Lamansky, 207 N.W.2d 768, 771 (Iowa 1973). Notably, the record indicates that both Gary and Rose are properly suited to have the physical custody of the children. Although we are necessarily troubled by the fact that Gary fell \$10,000 behind in his child support payments, we are unwilling to conclude that this fact, while weighing against him, indicates that he is an unsuitable parent. Our task is to determine the best interests

³We have not ignored that our decision in this matter results in the separation of Wendy and Adam from their half-siblings borne of Rose's second marriage. See In re Marriage of Orte, 389 N.W.2d 373, 374 (hesitance to separate siblings is equally applicable to half-siblings). We note, however, that neither party has raised a question regarding this separation. In addition, given the large age difference between Wendy and Adam and the two younger children, we are less reluctant to separate them.

of the children; given the strength of Wendy's sound decision, we conclude that the trial court's determination is in accord with the evidence. Hence, we affirm. In doing so, we reiterate the trial court's order that Rose be given liberal visitation rights in order to ensure the preservation of her relationships with Wendy and Adam.

Finally, Rose has requested that Gary be required to pay the attorney's fees which she incurred in connection with this appeal. In passing upon such a request, we must consider the needs of the party seeking the payment of fees and the ability of the other party to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We have evaluated Gary and Rose's relative finances and obligations and conclude that Gary should assume the \$750 in attorney's fees which Rose incurred. In addition, we order that the costs of this appeal be taxed to Gary.

AFFIRMED.