**IN THE COURT OF APPEALS OF IOWA**

No. 8-046 / 97-1013

000375

**IN RE THE MARRIAGE OF MARY E. SVEJDA AND ANDREW J. SVEJDA**

**Upon the Petition of MARY E. SVEJDA,**

Petitioner-Appellee,

**And Concerning ANDREW J. SVEJDA,**

Respondent-Appellant.

FILED
MAR 27 1998
CLERK SUPREME COURT

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Appeal from the Iowa District Court for Lee County, John G. Linn, Judge.

Respondent appeals from the district court's refusal to modify the dissolution decree to award him primary physical care of the parties' minor child. **REVERSED.**

Thomas D. Marion of Norman & Marion, Keokuk, for appellant.

M. Carl McMurray, Keokuk, for appellee.

Considered by Cady, C.J., and Sackett and Mahan, JJ.

**MAHAN, J.**

Mary and Andrew Svejda's marriage was dissolved in May 1990. They have a son, Daniel, born in 1984. As part of the stipulated agreement, Mary received primary physical care of Daniel. The district court ordered Andrew to pay $152.50 per month in child support. Mary filed a modification petition in 1996 seeking an increase in child support. Andrew filed an answer and his own petition seeking primary physical care of Daniel.

At the time of the hearing, Mary was married to Charles Thomas and Andrew lived with his girlfriend Melissa. Andrew introduced the following evidence at trial:

> 1. Daniel's expulsion from school for possession of marijuana.
> 2. Several other school disciplinary reports involving Daniel.
> 3. A signed statement by Daniel detailing drugs and drug paraphernalia he had seen in his mother's home. Specifically, Daniel testified he found marijuana and a bag of white powder along with drug paraphernalia. He also testified he had never witnessed Mary or Charles using drugs.
> 4. Evidence that Mary and Charles were frequenting a local tavern. It also included allegations by Daniel that Mary and Charles drank too much.
> 5. Daniel's preference to live with Andrew and Melissa.

The trial court believed Mary had "done basically a good job in raising Daniel." It concluded, however, there was drug use occurring in her home and, in giving Mary the benefit of the doubt, concluded Charles was using the drugs. The trial court determined if further evidence of drugs are observed, the police should be called and Andrew should again pursue a modification action. Additionally, the trial

court noted while there is not a great concern over Mary's tendency to socialize at a local tavern, there are better places for Mary and Charles to spend their time, preferredly with Daniel. The trial court also believed Daniel was not yet old enough nor mature enough to make an informed choice to "tip the scales" in Andrew's favor. The trial court concluded Mary should retain primary physical care of Daniel.

On appeal, Andrew asserts the court erred in not transferring primary physical care of Daniel to him. He argues the five reasons stated above demonstrate a substantial change in circumstances and warrant a modification in custody.

**I. PRIMARY PHYSICAL CARE.** We review a district court's modification of a dissolution decree de novo. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). We give weight to the district court's findings of fact but they do not bind us. *In re Marriage of Sjulin*, 431 N.W.2d 773, 776 (Iowa 1988). "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 criteria for determining child custody are applied in modification proceedings. *In re Marriage of Hubbard*, 315 N.W.2d 75, 80 (Iowa 1982).

Custody, once fixed, 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)). The burden for a party petitioning for a change in a dissolution decree is heavy. *See In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App.1988). Andrew, in seeking a change in primary physical care, has the burden to show by a preponderance of the evidence conditions since the dissolution decree was entered have so materially and substantially changed that Daniel's best interests make it expedient to change primary physical care to him. *See In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App.1985). The question is not which home is better, but whether Andrew has demonstrated he can offer Daniel superior care. *See In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa App.1985). If both parents are found to be equally competent to minister to the children, custody should not be changed. *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App.1992).

We have carefully reviewed all of the evidence presented in this modification action. We find Andrew's evidence against Mary is quite serious. We give weight to the trial court's finding of drug use by Charles. While the trial court found Mary is not using drugs, she has allowed drugs in the home with her son. As a result of all the evidence in this record, we find Andrew has shown a superior ability to minister to Daniel's needs. In addition, we note Daniel has specified a preference to live with

Andrew. While this preference alone is not to be considered the determining factor, it is important when combined with the other factors present in this case. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). We therefore find Andrew has demonstrated a material and substantial change in circumstances warranting a modification of the divorce decree to award Andrew the primary physical care of Daniel.

**II. CHILD SUPPORT.** Having determined Daniel's primary physical care should be changed to Andrew, we must consider child support. From the evidence in the record, we find Mary has a gross annual income of $10,400 and Andrew has a gross annual income of $21,119. After subtracting allowable deductions under the Child Support Guidelines, we find Mary has net monthly income of $775 and Andrew has net monthly income of $1446. Applying the guideline factor of 20.3 percent yields a child support obligation for Mary of $157 monthly. We therefore order Mary to pay Andrew child support in that amount. Said child support payments should commence with the date of this decision.

**REVERSED.**