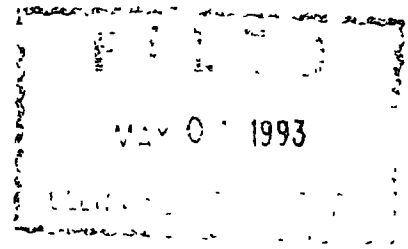
IN THE COURT OF APPEALS OF IOWA

No. 3-049 / 92-1201



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IN RE THE MARRIAGE OF LINDA JO HORNUNG AND DAVID RALPH HORNUNG

Upon the Petition of
LINDA JO HORNUNG,

Appellant,

And Concerning
DAVID RALPH HORNUNG,

Appellee.

Appeal from the Iowa District Court for Story County, Gary L. McMinimee, Judge.

The wife appeals from the district court's ruling modifying the child custody and support provisions of the dissolution decree. The husband cross-appeals seeking retroactive child support. **AFFIRMED.**

Kirk E. Goettsch of Forristal & Goettsch, Holstein, for appellant.

Thomas J. Cahill of Cahill Law Offices, Nevada, for appellee.

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

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HAYDEN, J.

The district court dissolved the twenty-seven-year marriage of Linda and David Hornung by decree on November 20, 1990. The court granted joint custody of the parties' only minor child, Ben. The court awarded primary physical care of Ben to Linda and ordered David to pay child support.

David appealed the dissolution decree. In an opinion filed November 26, 1991, this court affirmed the custody award and increased David's child support obligation. In re Marriage of Hornung, 480 N.W.2d 91 (Iowa App. 1991).

In November 1991, Ben moved in with David. In December 1991 David petitioned for modification of the dissolution decree, alleging a material change of circumstances. At the modification hearing, Ben testified his relationship with his mother deteriorated in the fall of 1991 because of the man his mother was seeing at the time. This man apparently had a drinking problem and had an altercation with Ben in January of 1992. The district court found material changes in Ben's respective relationships with the parties. On June 6, 1992, the district court modified the decree, awarding custody to David and ordering Linda to pay child support.

Linda filed an appeal from this modification on July 20, 1992. David cross-appeals seeking retroactive child support from the time Ben moved in with him.

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I. Custody. Our standard of review in modification actions regarding child custody is de novo. Iowa R. App. P. 4. Although we are not bound by the fact findings of the trial court, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). The trial court has reasonable discretion in determining whether modification is warranted. 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)).

In determining custody, various factors must be considered such as the age of the minor, the length of time the minor has lived in the home for which the preference is stated, the nature of the associations therein, the contacts with the one seeking a change of custody, the relationships and past associations, the natural and legal rights of the contending parties, and any other matters which assist in resolving the custody issue. Lursen v. Henrichs, 239 Iowa 1009, 1015, 33 N.W.2d 383, 386 (1948). The court may consider the child's wishes, taking into account the child's age and maturity. Iowa Code § 598.41(3) (1991). "[W]hen 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." Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970).

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A child's preference is not entitled to as much weight in a modification action, as is the case here, than would be given in an original custody proceeding. Smith v. Smith, 257 Iowa 584, 591, 133 N.W.2d 677, 681 (1965). However, a minor child's preference with respect to which parent he or she wishes to reside with is relevant and cannot be ignored. See In re Marriage of Ellerbroek, 377 N.W.2d 257, 258 (Iowa App. 1985).

There is evidence of material and substantial changes since the issuance of the parties' dissolution decree. Ben's relationship with his mother has deteriorated and he has stated a preference to live with David.

Ben was born on October 27, 1976, and is the youngest of the parties' four children. At the time of the original custody hearing, Ben did not express a preference to live with either parent. In November 1991, Ben moved in with his father and since then has expressed an unwaivering preference to live with David. At the modification hearing on June 6, 1992, Ben reiterated a strong preference to live with his father. Ben was fifteen years and five months old at the time of the modification hearing. Ben is a physically big, athletic, self-assured, intelligent young man.

Ben testified he wants to live with his father because his mother was continually leaving him alone at night and spending the time with her boyfriend. Ben testified he was left alone four to six nights per week. Ben stated he

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receives more attention at his father's home and gets along with his father. We believe Ben is of sufficient age and maturity to give significant weight to his preference to live with David. See In re Marriage of Bugg, 492 N.W.2d 452, 454 (Iowa App. 1992).

There is evidence Linda has difficulty disciplining Ben. Linda's relationship with her boyfriend has adversely affected her relationship with Ben. Linda's boyfriend drank a lot and did not get along with Ben. There was also testimony Linda spent less time with Ben and left him alone frequently during the course of the relationship. As a result of his strained relationship with Linda, Ben testified he moved back in with David prior to the date on which David filed a modification petition.

We find David is better able to exercise parental control and has established an ability to administer more effectively than Linda to Ben's well-being. We give less weight to Linda's relationship with her boyfriend, but we find she has demonstrated an apparent inability to conduct the relationship in a manner that preserves and fosters her relationship with Ben. In spite of his age and maturity, Ben is a minor and needs a fixed environment to complete his final years of high school. These circumstances, combined with Ben's preference to live with David, justify modifying custody. We award physical custody of Ben to David. We urge both parties to cooperate with the decree to bring stability to Ben's life. We affirm the district court.

II. Retroactive Child Support. On cross-appeal, David seeks child support from Linda for the period of time in which Ben was in his custody. We have repeatedly held that ordinarily matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time of appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974); Peb Practice Sales, Inc. v. Wright, 473 N.W.2d 624, 628 (Iowa App. 1991). The record shows this issue was not raised at the trial court level. Therefore, this issue was not preserved for appeal. We do not address this issue.

III. Attorney Fees at Trial. The trial court denied Linda's request for attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). To overturn an award, the complaining party must show the trial court abused its discretion. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). The trial court did not abuse its discretion. We hold each party shall be responsible for his or her own attorney fees. We affirm on this issue.

IV. Attorney Fees on Appeal. Linda also seeks attorney fees on appeal. In determining whether appellate attorney fees should be awarded, 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

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request was required to defend the trial court's decision on appeal. In re Marriage of Imhoff, 461 N.W.2d 342, 345-46 (Iowa App. 1990). Each party shall be responsible for his or her own attorney fees on appeal.

Costs of this appeal are assessed to Linda.

AFFIRMED.