IN THE COURT OF APPEALS OF IOWA

No. 6-339 / 95-1547

IN RE THE MARRIAGE OF AMY L. GIFFROW AND DARWIN R. GIFFROW

Upon the Petition of
AMY L. GIFFROW,

Petitioner-Appellee/Cross-Appellant,

And Concerning
DARWIN R. GIFFROW,

Respondent-Appellant/Cross-Appellee.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Appeal and cross-appeal from a district court ruling denying modification of custody and child support. **AFFIRMED.**

Bradford Kollars, Sioux City, for appellant.

Alice S. Horneber of Gildemeister, Willia & Keane, Sioux City, for appellee.

Heard by Sackett, C.J., and Habhab and Streit, JJ.

HABHAB, J.

The parties appeal and cross-appeal the denial of a petition to modify custody. At issue are custody, child support, the award of trial attorney fees, and requests for appellate attorney fees. We affirm.

The marriage of Darwin and Amy Giffrow was dissolved in July 1993. They have two children, Jim, born October 8, 1976, and Beth, born March 18, 1980. The decree awarded joint legal custody of the children but gave their primary physical care to Amy. The decree also required Darwin to pay child support of $400 per month. The decree was modified in October 1993 to increase Darwin's support obligation to $900 per month while two children were entitled to support and $675 when only one child was entitled to support.

Amy remarried in November 1994 and moved Beth and Jim from Sioux City to Vermillion, South Dakota, to be closer to her new husband's place of employment. Shortly after moving to South Dakota, Jim, then eighteen years of age; chose to return to live in Sioux City with his father. On December 12, 1994, Darwin filed a petition for modification asking that primary care of Beth be transferred to him. Darwin filed the petition because of Beth's desire to remain in Sioux City. Amy filed a resistance which included a request that Darwin be required to pay child support pursuant to the child support guidelines.

Following a five-day trial, the district court denied the petition to modify custody. The court found Beth had done well in school in Vermillion and her mother

had been supportive of her relationship with her father. The court determined Beth's desire to live with her father had been based on her wish to continue a relationship with a boyfriend in Sioux City. The court concluded Darwin had failed to show a substantial change of circumstances warranting a transfer of Beth's physical care.

The court also concluded Darwin's child support obligation did not vary more than ten percent from the child support guidelines and refused to modify the obligation. The court ordered Darwin to pay $6500 toward Beth's attorney fees.

I. Modification of Custody. In an appeal from an action to modify custody, our review is de novo. *In re Anderson*, 530 N.W.2d 741, 741 (Iowa App. 1995). We give weight to the fact findings of the trial court 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 before us. *Anderson*, 530 N.W.2d at 741.

In reviewing a modification action, the governing legal principles are well established.

> 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 children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody

> stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

Anderson, 530 N.W.2d at 741-42.

Even though we exercise de novo review, we are cognizant of the superior vantage point of the trial court and its ability to consider the demeanor and appearance of the parties. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). In this case we are particularly influenced by the findings of the trial court. In its ruling, the court indicated that at the outset it had been predisposed to defer to Beth's wishes about where she wanted to live. However, after hearing the testimony of Beth's family and her brother's friends, the court was persuaded the structure and environment of Amy's home was in Beth's best interests.

Despite extensive testimony given by Beth and Jim about their difficulties in getting along with their mother, we cannot find a reason to modify custody. As the parent with the physical care of Beth, Amy was entitled to determine where she would reside. *See In re Marriage of Frederici*, 338 N.W.2d 156, 159 (Iowa 1983) (parent with physical care has final say concerning where home of children will be). Darwin filed a petition to modify within a month of the move. Such conduct undermined efforts to allow Beth to adjust to her new home and school. It would seem much of the present hostility attested to by the children was a result of the petition to modify.

Depending upon a child's age and maturity, a child's preference may be a consideration in a custody determination. Iowa Code § 598.41(3)(f) (1995). However, a child's preference is given less weight in a modification action than when a court is making an original custody decision. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa App. 1993); *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa App. 1991). Beth exhibited maturity in some respects, but she exhibited poor judgment in getting seriously involved with a boyfriend when she was only fourteen years old. She knew her parents would not have approved or consented to her conduct, but she did so anyway. While she had broken off the relationship by the time of trial, there is no question it had been a major factor in motivating her to tell her father she wished to reside with him. Given these circumstances, we cannot find Beth's preference to live with her father warrants a change in custody.

We are aware of the presumption the custody of siblings ordinarily should not be separated. *See In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). The trial court noted Beth's brother, Jim, had a troubled history which involved stealing, drug use, truancy, failing in school, threats of suicide, lying, and Satanism. While Jim had appeared to make improvements in his life, it was not certain his presence, or that of his friends, would be a positive influence on Beth. The circumstances of this case support a separation of the siblings.

Amy had been the primary caretaker of Beth since she was three years old. It was admitted the move to South Dakota did not interfere with the continuation of

Beth's regularly scheduled visitation with her father. Beth was doing well in her new school and in the structured environment of her mother's home. Upon our de novo review of the record, we find Darwin failed to carry his heavy burden to support a modification of custody.

II. Modification of Child Support. In her resistance to the petition to modify custody, Amy stated, "Respondent should be required to pay support pursuant to the Child Support Guidelines." At the present time, Darwin is to pay $675 per month in child support for Beth. The trial court concluded application of the present guidelines would result in support of $704 per month which did not amount to a ten percent deviation. *See* Iowa Code § 598.21(9). The court did not modify the amount of support.

In her brief, Amy contends there is a ten percent deviation and Darwin should be required to pay additional support. However, she cites no authority nor does she set forth any evidence of the parties' present levels of income and the calculation of support under the guidelines. Given Amy's failure to support her argument on this issue, we defer to the trial court's conclusion that there was no deviation or other circumstance warranting modification of the support obligation.

III. Trial Attorney Fees. Darwin contends the trial court should not have ordered him to pay $6500 of Amy's trial attorney fees. He also contends he should have been awarded trial attorney fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa

1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay and the fees must be fair and reasonable. *Id.* To overturn the award, Darwin must establish the trial court abused its discretion. *Id.*

Amy was the prevailing party below and the record indicates Darwin has a superior ability to pay a portion of her trial attorney fees. Darwin was not entitled to an award of attorney fees. We find the award to Amy was equitable and not an abuse of discretion.

IV. Appellate Attorney Fees. Both parties request an award of appellate attorney fees. An award of attorney fees is not a matter of right but rests within the court's discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we consider the parties' financial positions and whether the party making the request was obligated to defend the trial court's decision on appeal. *Id.* We find equity does not warrant an award of appellate attorney fees to either party.

AFFIRMED.