IN THE COURT OF APPEALS OF IOWA

FILED
JAN 29 [illegible]
CLERK SUPREME COURT

No. 6-725 / 96-0263

**IN RE THE MARRIAGE OF GARRY LYNN WHITE AND TRACY LYNN WHITE**

**Upon the Petition of**
**GARRY LYNN WHITE,**

000345

Petitioner-Appellant,

**And Concerning**
**TRACY LYNN WHITE,**

Respondent-Appellee.

---

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Garry White appeals the district court's denial of his petition to modify the custodial provisions of the decree. **AFFIRMED.**

Thomas M. Gillespie, Cedar Rapids, for appellant.

Frank J. Nidey of Maher & Nidey Law Firm, Cedar Rapids, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

000346

**STREIT, J.**

Garry White appeals the district court's ruling in a child custody modification action that denied primary physical care of his five-year-old son to him.

Tracy and Garry White were married in January 1990. Their son, Paul Dean, was born on July 13, 1990. Their marriage was dissolved in October 1991, and the court granted Tracy primary physical care of Paul upon Garry's acquiescence. Garry was ordered to pay monthly child support of $180.

In June 1995, Tracy filed a modification petition seeking an increase in monthly child support. Garry counterclaimed, requesting primary physical care and child support.

The court denied his petition to modify the custodial provisions of the dissolution decree and ordered Garry to pay $556.68 monthly child support and $2500 in attorney fees, and modified visitation minimally. It found Garry failed to prove a substantial change in circumstances. It concluded neither party had caused Paul's behavior problems, both parties love him, and neither is unfit to have primary care. The court denied the parties' Iowa Rule of Civil Procedure 179(b) motions. Garry appeals.

***I. Standard of Review*** We review the record de novo in a proceeding to modify the custodial provisions of a decree for dissolution of marriage. *In re Marriage of Zabecki,* 389 N.W.2d 396, 398 (Iowa 1986). At the same time, we

recognize the virtues inherent in listening to and observing the parties and witnesses. *Id.* Consequently, we give weight to the findings of the trial court, although they are not binding. *Id. See also* Iowa R. App. P. 14(f)(7).

***II. Modification of Custody.*** Courts are empowered to 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, which was more or less permanent, and relates to the welfare of the child. *In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983). Additionally, the parent seeking custody must prove an ability to minister more effectively to the child's well-being. *Id.* This strict standard is premised on the principle that once custody of the child has been determined, it should be disturbed only for the most cogent reasons. *In re Marriage of Anderson,* 530 N.W.2d 741, 741-42 (Iowa App. 1995). Moreover, as in all cases involving the question of custody, our first consideration in proceedings to modify custody is the best interests of the child. *In re Marriage of Junkins,* 240 N.W.2d 667, 668 (Iowa 1976).

At the time of trial in October 1995, Tracy was twenty-five years old, Garry was thirty-one, and Paul was five. Tracy was living with her boyfriend, Brian Morris, and they were expecting their first child. Tracy was unemployed, and received some governmental assistance for food and medical expenses. Garry was residing with his

fiancé, Brenda Edwards. He was a self-employed carpet installer, and earned a gross income of approximately $40,000 in 1994.

Garry alleged at trial, among other things, Tracy was not providing adequate care, her apartment was too small, she refused to place Paul in another pre-school rather than the Head-Start program, she had several boyfriends, and she restricted his visitation. He also contended Brian was abusive and careless with Paul. He conceded, however, there had never been a founded or undetermined child abuse report against either Tracy or Brian. He believed Paul preferred to reside with him.

Tracy testified about Paul's behavior problems, and her attempts to remedy and control them by consulting a psychologist. She explained Paul's medical aliments: the ear infections, a rope burn, a broken arm, and a split lip. She discussed her plans to find a more spacious residence. Tracy also explained she limited Garry's visitation to that provided in the decree because of its affect upon Paul. She believed adherence to the decree schedule had greatly benefitted Paul and that Garry's expanded and inconsistent visits confused him.

Upon review of the record, we find the district court was correct in determining Paul should remain with Tracy. There has been no substantial change of circumstances since entry of the decree. Garry's contentions that he should have primary physical care of Paul because of Tracy's living conditions is without merit. There is no evidence which supports Garry's contention that Tracy's live-in

boyfriend, Brian, is abusive or careless with Paul, or that these living conditions have or will adversely affect Paul. Garry has failed to prove his ability to minister *more* effectively to the child's well-being.

Garry further contests the district court's order awarding Tracy 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 decision of the trial court, Garry must establish the trial court abused its discretion. *Id.* In review of Garry's income tax returns available at trial, we find there was no such abuse. The trial court's award of attorney fees is affirmed.

Finally, Tracy requests $1500 in appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our 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 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we find equity warrants an award of appellate attorney fees to Tracy in the amount of $750.

**AFFIRMED.**