FILED
FEB 23 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-641 / 92-1104

IN RE THE MARRIAGE OF CRAIG KRAUSE AND PATRICIA KRAUSE

Upon the Petition of

CRAIG KRAUSE,

Appellee,

And Concerning

PATRICIA KRAUSE, n/k/a **PATRICIA DAY,**

Appellant.

Appeal from the Iowa District Court for Webster County, Louie F. Beisser, Judge.

The wife appeals from the district court's order which denied her petition for modification of the parties' dissolution decree and required her to pay child support. **AFFIRMED.**

Mark R. Crimmins of Bennett, Crimmins & Yung, Fort Dodge, for appellant.

John R. Sandre and William W. Schwarz of Scalise, Scism, Sandre, McConville & Holiday, Des Moines, for appellee.

Heard by Donielson, P.J., and Hayden, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

DONIELSON, P.J.

In December 1988, the district court dissolved the marriage of Craig and Patricia Krause. The parties received joint legal custody of their two minor children, Christopher, born in 1983; and Kelly, born in 1986. The court designated Craig as the primary physical custodian. The court did not order Patricia to pay child support.

Craig is forty-one years of age. He is a policeman on the Fort Dodge Police Department and his net monthly income is about $1408. He has four children from two previous marriages. He presently lives with his girlfriend.

Patricia is thirty-four years of age. She has been employed as a psychiatric technician for the past twelve years. She was expected to graduate in July 1992 with a nursing degree. Prior to graduation, her net monthly income was about $1034. She married David Day in September 1990.

In August 1990, Patricia filed a petition for relief from domestic abuse after Craig slapped Christopher across the face. Finding sufficient evidence of child abuse, the district court awarded temporary protective custody of both the minor children to Patricia. Twelve days later, the court ordered the children remain in Patricia's custody until Patricia commenced modification proceedings.

Patricia then filed a petition to modify the dissolution decree seeking primary physical custody of the two children. A hearing was held in April 1992. In its

June 1992 order, the district court determined the incident between Craig and his son was insufficient to warrant a transfer of primary physical custody. Accordingly, the district court denied Patricia's petition for modification. The court also ordered Patricia to pay $310.24 per month in child support.

Patricia now appeals. She contends the district court erred in: (1) finding there had not been a substantial change in circumstances warranting a change of the primary physical custody, and (2) modifying her child support obligation.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). On our review, we affirm the district court.

I. **Child Custody**. Patricia first contends the district court erred in finding there was not a substantial change of circumstances which warranted a change of the primary physical custody.

"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." 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 party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. Id. See also In re Marriage of Gravatt,. 371 N.W.2d 836 (Iowa App. 1985). This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

The majority of Patricia's arguments focus on the events and circumstances which followed the abuse complaint filed in August 1990. Patricia points to several threats Craig lodged against her husband, David, including one which led to a conviction for criminal harassment. She also contends Craig was "abnormally preoccupied" with the children. She specifically points to Craig's reaction after Craig discovered several bruises which appeared on Kelly's buttocks and suspected David had sexually abused Kelly. In addition to taking Kelly to the emergency room, Craig had taken Kelly to Omaha for a more thorough examination and also pursued an investigation with the police. The evidence suggested Kelly had injured herself while playing with a friend. Following this incident,

there was a four-month period where Patricia denied Craig his visitation rights.

The record is replete with other complaints of abuse. Following the August 1990 complaint, there was a founded report of child abuse after Kelly's preschool reported Kelly had suffered bruising above her eye. Apparently David had swatted Kelly and she fell into a coffee table. Another child abuse complaint was lodged against David when an unidentified person alleged David had abused Christopher and Kelly after observing them at a laundromat. That report was later unfounded.

While we will not condone Craig's behavior towards Christopher, we are unwilling to modify primary physical custody based upon Patricia's allegations. Patricia's denial of visitation and the complaints regarding David's abuse of the children (two having been made by persons other than Craig) also surfaced during the same period. We will not point to either Patricia or Craig as the primary culprit of these problems. The question before us is not who is the better parent. Rather, we must examine whether there has been a substantial change in circumstances to warrant a modification of the primary physical custodian. We find find Patricia has not met her burden.

Since the August 1990 incident, Craig has sought the professional services of a psychiatrist. He acknowledges the inappropriateness of his action in slapping Christopher, and admits he simply lost control on that

occasion. We note Craig continues to be employed by the police department, and has remained financially stable.

Furthermore, we give only limited weight to the stated preferences of Christopher and Kelly. Both children have stated they wish to remain with Patricia. Iowa Code section 598.41(3)(f) (1991) requires the court, in determining the best interests of the children, to consider the preference of the children. However, the preference of the child is not controlling. In re Marriage of Blume, 473 N.W.2d 629, 630 (Iowa App. 1991) (citation omitted). "In determining the weight to give a child's preference we consider, among other things, the child's age, educational level, maturity, relationship with family members and reasons given for his or her decision." Id.

Christopher and Kelly are respectively nine years old and seven years old. It is hardly surprising the children have expressed the preference to live with Patricia as over two years have passed since the custody of the children was first temporarily transferred to Patricia. They are comfortable in Patricia's home and do not want to leave. We adopt the findings of the district court on this issue:

> One can hardly say that these children have reached an educational level that provides them with a great deal of understanding about the more important matters of life. They are of tender years. They have not reached the maturity to make the ultimate decisions dealing with their relationships and with the family [with whom] they should reside.

We also do not find Patricia necessarily has the ability to more effectively minister to the children's well-being. Following the August 1990 complaint, Patricia on numerous occasions denied Craig visitation with the children. We agree with the district court's observation that "[t]his certainly doesn't indicate fostering a good relationship between the children and their father."

There has not been a substantial change of circumstances since the time of the decree to warrant a modification of primary physical custody. We affirm the district court on this issue.

II. **Child Support**. Patricia also contends the district court erred in modifying her child support obligation. Specifically, she contends the court erred in modifying the obligation sua sponte and there was no substantial change in circumstances which warranted the modification in the decree.

The district 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 Stanley, 411 N.W.2d 698, 700 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)). Here, Patricia filed the petition to modify the decree and transfer primary physical custody of the children to her. While she did not request child support in her petition, it is reasonable to assume she would have requested support if

she had prevailed (as Craig was ordered to pay child support while Patricia had temporary custody of the children). Also, both parties included sufficient financial information in the record for the district court to make its finding. We find it was well within the district court's discretion to modify her child support obligation.

In making the determination of whether there has been a substantial change of circumstances sufficient to modify the decree, the court shall consider changes in employment and earning capacity of a party. Iowa Code § 598.21(8)(a) (1991). At the time of the decree, Patricia was assessed absolutely no child support obligation because of her low income. She is now employed as a psychiatric technician and has a net income of about $1034. She has remarried, and had anticipated graduating with her nursing degree in July 1992.

Both parents have a legal obligation to support their children, not necessarily equally, but in accordance with his or her ability to pay. Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable, 474 N.W.2d 581, 583 (Iowa App. 1991). We find there was a substantial change of circumstances since the time of the decree to warrant modification of Patricia's child support obligation. The district court did not err in ordering Patricia to pay child support in accordance with the guidelines.

For the reasons stated, we affirm the decision of the district court.

The costs of this appeal are taxed to Patricia.

AFFIRMED.