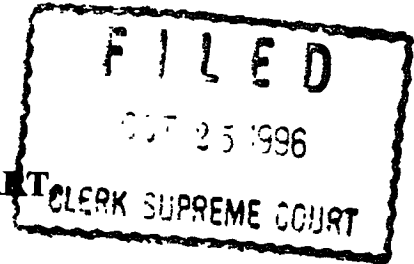


IN THE COURT OF APPEALS OF IOWA

No. 6-388 / 95-1137

**IN RE THE MARRIAGE OF TAMMY LYNN SHIVERS
AND LARRY R. SHIVERS**



Upon the Petition of
TAMMY LYNN SHIVERS, n/k/a/ TAMMY LYNN TAGGART

Appellant,

And Concerning
LARRY R. SHIVERS,

Appellee.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Tammy Shivers appeals the district court's denial of her petition to modify the parties' dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

Joseph A. Nugent, West Des Moines, for appellant.

John P. Roehrick of Roehrick, Hulting, Blumberg & Kirlin, P.C., Des Moines,
for appellee.

Heard by Habhab, P.J., Cady, and Vogel, JJ.

CADY, J.

Tammy Lynn Taggart, appeals the district court's denial of her petition to modify child support. On our review, we modify the decree.

Tammy and Larry Shivers' eight-year marriage was dissolved on November 29, 1989. They had two children. Paige was born December 12, 1982. Travis was born September 18, 1984. The dissolution decree granted Tammy primary physical care of the children, and ordered Larry to pay child support of \$130.00 per month per child. Larry stipulated to the amount of child support.

In November of 1994, Tammy filed a petition to modify the decree alleging a substantial change in circumstances. She requested child support be set according to the child support guidelines.

The district court held a hearing on Tammy's petition to modify in March of 1995. At the hearing, the court sustained numerous objections to questions propounded by Tammy's attorney. The questions dealt with the value of services performed by Larry, the income earned by Larry's present wife Chris, the alleged restructuring of income by Larry in order to avoid an increase in child support payments, and acts by Larry which increased Tammy's court costs. Tammy did not make an offer of proof after the court sustained the objections.

Larry worked as a farmer throughout his marriage to Tammy and continued to work as a farmer at the time of the modification hearing. Shortly before the hearing, however, Larry changed the nature of his farming operation by becoming a salaried

farmhand for his wife Chris. Under a written contract with Chris, Larry was paid net monthly wages of \$700.¹ Larry also drove a school bus and received net monthly wages of \$363.65. Additionally, Larry and his family resided on a farmstead owned by Larry's cousin, Ron. Chris and Ron entered into a written contract permitting Larry and Chris to live on the farmstead rent-free in exchange for performing the farm work. Larry performed most of the work pursuant to his contract with Chris. The monthly rental value for the house was \$700. It was \$400 for the surrounding farm buildings.

The district court denied Tammy's petition to modify. The court found there was insufficient evidence to determine Larry's current net monthly income or his income at the time of the decree.

Tammy appeals. She argues the court erred in: (1) refusing to allow certain evidence; (2) refusing to calculate child support based on all of Larry's income; (3) failing to find a substantial and material change in circumstances justifying a modification; and (4) failing to award her attorney fees.

Larry argues Tammy failed to preserve error by making an offer of proof when the trial court sustained objections to evidence. He also argues Tammy failed to show

¹ Larry testified the net income figure of \$8400 from custom labor listed on his financial affidavit was a typographical error, and the figure actually showed what he would be paid by his wife.

a substantial change in circumstances. Additionally, Larry asserts Tammy failed to preserve error on the issue of attorney fees.

I. Evidentiary Rulings

Tammy challenges the rulings by the trial court which excluded evidence. She seeks remand to submit the excluded evidence.

Our standard of review in modification actions is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record, but only the record, and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). *See Iowa Dept. Of Transportation v. Nebraska-Iowa Supply Co.*, 272 N.W.2d 6 (Iowa 1978). We give weight to the fact findings the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

Tammy argues the case should be remanded because the trial court improperly ruled on the objections to the admission of evidence interposed by Larry. She asserts the trial court should have admitted the evidence subject to Larry's objections because modifications are tried in equity. Tammy's description of the procedure which should have been utilized by the trial court is correct. Nevertheless, Tammy failed to preserve error on the evidentiary rulings.

When an objection is made to the admissibility of evidence in an equity action, the trial court generally should refrain from ruling on the objections and allow the evidence in the record. *In re Marriage of Anderson*, 509 N.W.2d 138, 142 (Iowa App. 1993). If a trial court erroneously sustains an objection, the appellate court is

denied the ability utilize the evidence on its de novo review. *Conkling v. Conkling*, 185 N.W.2d 777, 782 (Iowa 1971). Rather than requiring the interrogating party to make an offer of proof each time an objection is interposed, the trial court should usually simply note the objection and permit the answer to be given. *Id.* In the present case, the trial court should have refrained from ruling on the evidence. However, the trial court's failure to refrain from ruling on the objections does not provide the basis for remand.

Iowa Rule of Evidence 103, which was identical to existing Iowa law when adopted, governs the preservation of error predicated upon a ruling which excludes evidence. It states:

(a) *Effect of Erroneous Ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

This rule is applicable to equity actions. *See* Iowa R. Evid. 1101 (rules of evidence applies to all proceedings except as otherwise provided by statute, rules of evidence, or rules of the Iowa Supreme Court).

When the trial court refuses to admit evidence, the party offering the evidence has the burden to demonstrate the substance of the evidence by an offer of proof. Iowa R. Evid. 103(a)(2). The offer of proof fulfills two purposes. John W. Strong,

McCormick on Evidence § 51, at 195-196 (4th ed. 1992). First, it permits the trial judge to consider further the claim for admissibility. *Id.*

An offer of proof is intended to inform the trial court of the legal theory under which the proffered evidence is admissible, of the specific nature of its admissibility, of the nature and substance of the evidence offered, and, generally, of what the party making the proffer intends to prove, so that the court may rule intelligently upon the objections to questions which have been asked.

75 Am. Jur. 2d *Trial* § 437 (1991). Second, an offer of proof permits the proposed answer and expected proof to be included in the official record of the trial so on appeal from the judge's ruling, the appellate court may understand the scope and effect of the question and proposed answer in considering whether the judge's ruling sustaining an objection was proper. *Id.* See also *Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa App. 1994).

If the proponent of evidence fails to make an offer of proof, there is nothing in the record for the appellate court to consider when reviewing the objection to the evidence. The reviewing court cannot predicate error upon speculation as to what testimony would have come in the record had the objection not been sustained. *Id.* (citation omitted). When the court rules on an objection and excludes evidence, failure to make an offer of proof amounts to failure to preserve error. *Rothamel*, 523 N.W.2d at 599; *Anderson*, 509 N.W.2d at 142.

An exception to the requirement of an offer of proof to preserve error is also set out in Iowa Rule of Evidence section 103(a)(2). No offer of proof is necessary

when the substance of the evidence is apparent from the context within which the questions were asked. Further in order to make the exclusion of an answer to a question put to a witness reversible error, the question must clearly reveal an answer favorable to the party proposing it on a matter manifestly relevant to the issue. 75 Am. Jur. 2d *Trial* § 443 (1991).²

In the present case, Tammy made no offer of proof. Moreover, in each instance, the substance of the evidence was not apparent from the context of any of the questions. Tammy failed to preserve error. Accordingly, we proceed to consider the case on the record presented.

II. SUBSTANTIAL CHANGE OF CIRCUMSTANCES

Child support provisions of a dissolution decree may be modified where there has been a substantial change of circumstances. Iowa Code § 598.21(8) (1995). Iowa Code section 598.21(9) provides a substantial change of circumstances exists when the court-ordered child support award deviates by ten percent or more from the amount that would be due pursuant to the most current child support guidelines. Iowa Code § 598.21(9).

² See also 75 Am. Jur 2d *Trial* § 445-451; *McCormick* § 51 n. 7 (quoting Mason Ladd, *The Need of an Offer of Excluded Testimony for Appeal*, 18 Iowa L. Rev. 304, 318 n. 28 (1933)); and Kermit L. Dunahoo & Tim A. Thomas, *Preservation of Error and Making the Record in the Iowa Criminal Trial and appellate Processes*, 36 Drake L. Rev. 45, 52 (1986-87)(describing methods of making an offer of proof).

In this case, the trial court denied Tammy's application for modification for child support, finding there was no substantial change of circumstances under 598.21(8) or 598.21(9). The court concluded there was insufficient evidence presented for it to determine "net monthly income" under the child support guidelines. We disagree, and find sufficient evidence to demonstrate a substantial change of circumstances under section 598.21(9).

Under the original dissolution decree, the court ordered Larry to pay \$260.00 per month for the two children. His current net monthly income includes \$363.65 from the school district for driving a bus and \$700 from his wife for his work as a farmhand. This alone would be sufficient to support a modification of child support based on a ten-percent deviation. Additionally, we believe a deviation from the guidelines is justified based on the additional benefits Larry derives from the rent-free living arrangement, and the needs of the children. Furthermore, Larry's earning capacity based on his income history exceeds his current net monthly earnings.

Tammy's net monthly income was \$850.00. Applying the child support guidelines, the monthly child support for two children is \$334. This is more than ten percent of the original amount of child support and constitutes grounds for modification. Additionally, we deviate from the guidelines and set the monthly support at \$554. We modify the district court order to require Larry to pay monthly support of \$554 for both children. This modification is effective from the date of the

district court order denying the modification. See Iowa Code 598.21(8); *In re Marriage of Lee*, 486 N.W.2d 302, 306 (Iowa 1992).

III. ATTORNEY FEES: Tammy contends Larry should pay all of her attorney fees. The trial court's ruling on Tammy's application for modification did not address attorney fees. It is well settled that a motion under Iowa rule of civil procedure 179(b) is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. *Claus v. Whyle*, 526 N.W.2d 519, 527 (Iowa 1994). Tammy did not meet this requirement because she failed to file a motion to enlarge or amend the finding of the trial court pursuant to rule 179(b). Accordingly, she waived this issue on appeal. Tammy has not filed a separate application for appellate attorney fees. Therefore we will not consider this issue.

AFFIRMED AS MODIFIED.