IN THE COURT OF APPEALS OF IOWA

No. 6-736 / 96-0934

IN RE THE MARRIAGE OF McVEIGH JOHN GRIFFIN AND ANNE ELIZABETH GRIFFIN

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Upon the Petition of
McVEIGH JOHN GRIFFIN,

Petitioner-Appellant,

And Concerning
ANNE ELIZABETH GRIFFIN,

Respondent-Appellee.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, Richard J. Vogel, Judge.

McVeigh Griffin appeals from the district court's order denying his petition for modification of the parties' dissolution decree. **AFFIRMED.**

J. Terrence Denefe of Kiple, Kiple, Denefe, Beaver & Gardener, Ottumwa, for appellant.

Allan C. Orsborn of Orsborn, Bauerle & Milani, Ottumwa, for appellee.

Considered by Habhab, C.J., and Cady and Huitink, JJ. Sackett, J., takes no part.

HABHAB, C.J.

McVeigh ("John") and Anne Griffin's marriage was dissolved in August 1985. Anne was granted physical care of the parties' three children, Neil, born March 17, 1972; Benjamin, born June 13, 1975; and Nicholas (Nick), born July 31, 1982. The original decree provided John could claim Neil as a dependent for tax purposes, and Anne could claim Benjamin and Nick. John was also required to pay child support.

In 1989, after Benjamin was evaluated by Tom Lazio of the American Home Finding Association, the parties agreed to transfer physical care of Benjamin to John because Benjamin was not adjusting well in school and did not have many friends. John's child support was reduced accordingly. The court also ordered that once Neil reached majority, John did not have to pay support until Benjamin graduated from high school. The modification also provided John the dependency exemption for Benjamin, and Anne the exemptions for Neil and Nick.

After Benjamin graduated from high school, the court ordered John to pay monthly support of $503. This was upheld on appeal. *See In re Marriage of Griffin*, 525 N.W.2d 852 (Iowa 1994). In July 1995, John filed for modification requesting to be designated as Nick's primary caretaker. Anne filed a cross-application to increase child support payments. The parties agreed to have Nick evaluated by Tom Lazio.

Lazio met with Nick and opined that physical care should be given to John. He found Nick to be very intelligent and mature, and he had a very positive attitude

towards both parents. Lazio stated his decision was not based upon John being more capable of ministering to the needs of Nick, but indicated both John and Anne were capable parents.

The parties did not allege that either was an inappropriate caretaker. Nick wanted to live with his father because they shared common interests such as computers, motorcycles, and mechanics. Nick had made friends in Indiana and he observed the positive effect of the move on Benjamin.

At the time of the trial, Nick was thirteen. John was living in Indianapolis, Indiana, with his live-in girlfriend, Dawn, and Benjamin. He was employed as the chairman of the Department of Aviation Maintenance Technology at Vincennes University, earning a gross income of $58,263. Anne and Nick were living in the marital home in Ottumwa. She was employed as the program director for Child Development at Indian Hills Community College, earning a gross income of $39,267.

On April 9, 1996, the court denied John's request to be awarded primary care. It determined there was no material or substantial change in circumstances since the decree, and although Nick's preference was a factor considered, there was "no logical or practical reason to make the change." It also increased John's child support payment from $503 per month to $618.30 per month. The court denied John's rule 179(b) motion.

In an appeal from an action to modify custody, our review is de novo. Iowa R. App. P. 4.; *In re Anderson*, 530 N.W.2d 741 (Iowa App. 1995). We give weight

to the findings of the trial court, but we 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.

I. Primary Physical Care. As this is a modification action, the question before us is not which home is better for Nick, but whether John has met his heavy burden of demonstrating he can offer Nick superior care. The legal principles governing our review of a modification action 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 only for the most cogent reasons.

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

Lazio's testimony at trial revealed he felt both Anne and John were good parents and he did not believe this "was a case of either one being more capable." Lazio testified that Anne and John were basically equal in terms of their parenting capabilities and Nick was a delightful young man. When both parents are equally competent to minister to the child, as is the case here, custody should not be changed. *See In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App. 1992).

At trial Neil testified Nick was not experiencing the difficulties that Benjamin experienced with his peers. He testified Nick told him on previous occasions over the years that he wanted to live with John; however, Neil did not see any reason for Nick to move because Anne provided a very good home environment and encouraged contact with John. Other witnesses also testified that Nick is friendly, outgoing, well-adjusted, and gets along well with his peers.

We look to Nick's age and maturity when considering his stated preference to live with John. Iowa Code § 598.41(3)(f) (1995). We find although Nick was of sufficient age and maturity to testify as to his preference for primary physical care, his wishes are not controlling. We consider his preference as a factor, along with other relevant evidence that should be taken into consideration. *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).

From our de novo review of the record, we find while it is clear both John and Anne are excellent and loving parents to Nick, we affirm the trail court's decision denying John's motion for modification. We agree with the trial court there has not been a substantial change of circumstances warranting the transfer of primary physical care of Nick to John. John has not shown that he can more effectively minister to Nick's well being than Anne.

We commend the parties for looking past their own differences and working together in their son's best interests. It is apparent to us their efforts in this regard

have been of great benefit to Nick. We encourage them to continue to work together in this manner. Nick, to his credit, told Mr. Lazio that he "wanted to make it perfectly clear" he was not unhappy with his mom and that she was a good mom and has taken good care of him.

II. Dependency Deduction. It is true that if primary care remains in one parent, and the noncustodial parent is current on all child support obligations, then the noncustodial parent *may* be awarded the dependency deduction. *In re Marriage of Pothast*, 539 N.W.2d 199, 203 (Iowa App. 1995) (emphasis added). At the time of the transfer of primary care of Benjamin, John received the dependency deduction for Benjamin while Anne retained the deductions for both Neil and Nick. We give deference to the district court's finding that the deduction should remain with Anne and affirm the court's determination in this regard.

III. Appellate Attorney Fees. Anne requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Schepple*, 524 N.W.2d 679, 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 do not find equity warrants an award of appellate attorney fees to Anne.

AFFIRMED.