IN THE COURT OF APPEALS OF IOWA

No. 6-343 / 95-1634

IN RE THE MARRIAGE OF SALLY J. SMITH AND HOWARD D. SMITH

Upon the Petition of
SALLY J. SMITH,

Petitioner-Appellant/Cross-Appellee,

And Concerning
HOWARD D. SMITH,

Respondent-Appellee/Cross-Appellant.

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 district court's refusal to modify custody.

AFFIRMED.

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

Robert B. Deck, Sioux City, for appellee.

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

HABHAB, J.

At issue in this appeal and cross-appeal are the modification of custody and child support and requests for trial and appellate attorney fees. We affirm.

Sally and Howard Smith's nineteen-year marriage was dissolved in May 1992. The parties have four children: Heather, born November 1973; Tiffany, born January 1975; Niki, born March 1977; and Eric, born December 1980.

The three youngest children were minors at the time of the dissolution and, pursuant to the parties' stipulation, the dissolution decree awarded primary physical care of Niki to Sally, and Tiffany to Howard. The parents stipulated to shared primary care of Eric, and the stipulation provided he was to "spend one-half of his time with each party."

In March 1995, Sally filed a modification petition requesting sole primary care of Eric and an increase in child support. Howard filed a response requesting he be awarded the sole primary care of Eric. Following a hearing, the district court denied both parties' requests concluding there had not been a material and substantial change in circumstances justifying modification. Sally now appeals and Howard cross-appeals.

I. Modification of Custody. Sally argues she should be awarded the sole primary care of Eric because Howard, among other things, has condoned illegal drug use by the children, used drugs with his children, provided Eric access to adult

magazines and movies, maintained an unsanitary home, consorted with prostitutes, drank alcohol, gambled, and failed to supervise the children.

Howard claims Sally cannot minister to Eric's needs better than he can, and he cites the serious troubles their three daughters had while in Sally's care. Howard contends Sally condoned moral misconduct by living with a married man and by allowing their teenage daughter's boyfriend to reside in her home. Sally's own testimony revealed she cannot or will not communicate with Howard about their children's activities, needs, or problems.

This case presents the unusual situation in which it is a shared physical care arrangement from which modification is sought. Shared physical care is generally disfavored. *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa App. 1994). However, both parties stipulated to, and the district court approved, a shared custody arrangement when the parties' marriage was dissolved in 1992. The standards to modify this arrangement are the same as those utilized in the typical modification action in which only one parent has the physical care of a child. *See e.g., In re Marriage of Levsen*, 510 N.W.2d 892, 893-94 (Iowa App. 1993).

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). We are particularly influenced in this case by the fact the district court concluded Eric had not been adversely affected by the moral deviations of either Howard or Sally. The evidence revealed Eric does well in school and is generally not a discipline problem.

This is not a case in which the child wanted the shared physical care arrangement modified. *See Levsen*, 510 N.W.2d at 894 (fifteen-year-old testified she wanted shared physical care modified because she desired to live in one place longer than one week at a time). Eric is fourteen years old and testified he did not want the

present custody arrangement to be changed. He presently spends Monday, Thursday, and Friday nights at his mother's home and Sunday, Tuesday, Wednesday, and Saturday nights at his father's residence. His parents live six blocks apart and this close proximity of his parents' homes makes the shared custody arrangement feasible for Eric.

The evidence reveals both parents are responsible for Eric's incidents of tardiness at school and each must take responsibility to ensure he arrives at school on time when he is in his or her care. Likewise, joint legal custody requires the parties to communicate about Eric's education and activities, and Sally's testimony indicates she needs to improve in this area.

Howard's testimony adequately addressed Sally's concerns regarding the condition of his home and his past drug usage. The heat and water problems in his home were isolated in nature and were repaired. Howard admitted his prior use of illegal drugs and his poor judgment in using them. He testified he no longer engages in such conduct. Howard responded to the allegations pertaining to adult magazines and movies, prostitutes, alcohol use, and gambling. Given his explanations and responses, we find Sally has not met her burden to prove she could better minister to Eric's well being.

We cannot find a material and substantial change in circumstances which warrants modification of the shared physical care arrangement. The district court properly denied both parties' requests to modify custody.

II. Modification of Child Support. Under the decree and stipulation, Howard was to pay $150 per month for child support for Eric until he reached age fourteen and $125 per month thereafter. In addition, he is to pay for Eric's private school tuition, his health insurance, and his uncovered medical expenses. On appeal, Sally contends Howard's support obligation should be increased to $600.60 per month.

The district court presumed Sally sought to modify the child support award only if she were successful in obtaining the sole physical care of Eric. In its ruling, it concluded "no party has asserted that the guidelines require a change in the child support if shared physical care continues." Sally did not file a rule 179(b) motion seeking any correction of this conclusion.

Absent a rule 179(b) motion to enlarge, Sally has not preserved error to claim the child support award should be modified irrespective of the denial of the request to modify custody. *See Claus v. Whyle*, 526 N.W.2d 519, 527 (Iowa 1994) (motion to enlarge necessary to preserve error where trial court fails to resolve claim). We cannot address matters on appeal which were not preserved below.

III. Trial Attorney Fees. Sally contends the trial court erred in failing to award her 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 denial of an award for fees, Sally must establish the trial court abused its discretion. *Id.*

Given that neither party's request for modification of custody was granted, neither was the prevailing party. Sally was not entitled to an award of trial attorney fees, and we find no abuse of discretion in the trial court's denial of fees.

IV. Appellate Attorney Fees. Sally requests 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 in this case.

AFFIRMED.