IN THE COURT OF APPEALS OF IOWA

No. 0-543 / 00-206
Filed September 27, 2000

IN RE THE MARRIAGE OF TRAVIS J. STRUNK AND PAPAE L. STRUNK

Upon the Petition of
TRAVIS J. STRUNK,
Petitioner-Appellee,

And Concerning
PAPAE L. STRUNK,
Respondent-Appellant.

FILED
SEP 27 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Mahaska County, James P. Rielly Judge.

Papae Strunk appeals from the denial of her petition to modify the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Martha L. Mertz of Mick & Mertz, Knoxville, for appellant.

Garold F. Heslinga of Heslinga, Heslinga, Dixon & Moore, Oskaloosa, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Papae L. Strunk appeals from a district court ruling denying her petition to modify the physical care provisions of the parties' dissolution decree.

I. Background Facts and Proceedings.

Papae and Travis Strunk were married on September 28, 1991. The petition for dissolution was filed on January 21, 1997. The decree of dissolution was entered on March 7, 1997.

The parties had only one child, Erica, born March 12, 1992. During the dissolution process, the parties stipulated Travis would have primary physical care and Papae would be entitled to visitation of Erica. Since that time, Papae has twice petitioned the court to modify the physical care provisions of the dissolution decree. The first petition was filed September 9, 1997, and was subsequently denied. The second such petition, filed August 9, 1999, is the subject of this appeal. Papae maintains that Travis has failed to provide a stable, healthy living environment for Erica and that she should be named as primary caretaker as she is graduating from college and will have full-time employment. The district court denied this petition, determining that Papae had failed to show a substantial change in circumstances warranting such modification.

II. Standard of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). We are not bound by the district court's findings, but we do give them deference considering its opportunity to view, firsthand, the demeanor of the witnesses

when testifying. 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 presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. The Merits.

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 child's best interests make it expedient to make the requested change. *Smiley*, 518 N.W.2d at 378-79. The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The trial 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 Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987); *In re Marriage of Vettemack*, 334 N.W.2d 761, 762 (Iowa 1983).

The question is not which home is better, but whether Papae has demonstrated she can offer the child superior care. *See In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Papae must show an ability to minister to the child's needs superior to Travis. *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981). If both parents are found to be equally competent to minister to the child, custody should not be changed. *Whalen,* 569 N.W.2d at 628.

We decline to consider Papae's contention that the district court erred in limiting its review to events that occurred after the ruling on Papae's first motion. This issue was not properly preserved for review. *See Mensch v. Netty*, 408 N.W.2d 383, 386 (Iowa 1987) ("An equity case is tried de novo on appeal; however, the appellant cannot try the case here on a new theory that was not advanced in the trial court.").

The district court weighed the conflicting testimony as follows:

> Papae contends that the number of moves made by Travis and the various relationships that he has had with other women have had an adverse effect upon Erica. The Court finds that this contention is without merit and is not borne out by the evidence.
>
> In addition to the school records introduced, Cynthia Wilkie, the day care provider, testified that Erica is a happy, normal, clean and well-cared for child.

Our review of the record, in combination with the deference owed the trial court in matters of witness credibility, indicates Papae has failed to provide sufficient evidence to demonstrate a substantial and material change in circumstances warranting a modification of custody. Although Travis's lifestyle has required Erica to make many adjustments, he has nevertheless adequately accommodated Erica's primary care needs. The evidence in the record supports the conclusion that Erica is a well-adjusted, happy child. It is a settled principle that once custody is fixed it should seldom be disturbed and only then for the most cogent reasons. *In re Marriage of Melton*, 256 N.W.2d 200, 205 (Iowa 1977). We, therefore, affirm the district court decision in full.

AFFIRMED.