FILED
AUG 17 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-354 / 94-1521

IN RE THE MARRIAGE OF PATSY BEAVER AND DAVID BEAVER

Upon the Petition of
PATSY BEAVER,

Appellee,

And Concerning
DAVID BEAVER,

Appellant.

Appeal from the Iowa District Court for Floyd County, Paul W. Riffel, Judge.

David Beaver appeals a district court order refusing to modify the custody of the parties' youngest child. **AFFIRMED.**

Roger L. Sutton of Sutton & Troge's Law Office, Charles City, for appellant.

Megan M. Antenucci and Bernard L. Speath, Jr., of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

DONIELSON, C.J.

This is an appeal from an action to modify custody. Our review of this matter is de novo. *In re Marriage of Montgomery*, 521 N.W.2d 471, 473 (Iowa App. 1994). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, 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. *Montgomery*, 521 N.W.2d at 473. Upon our de novo review of the record, we affirm.

I. MODIFICATION OF CUSTODY.

The legal principles governing modification actions 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.

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)).

Patsy and David were married on February 1, 1975. They had two children, Ammie, born December 10, 1977, and Kevin, born May 16, 1984. Patsy and David's marriage was dissolved on October 5, 1987. The dissolution decree incorporated the parties' stipulation that they would have joint legal custody and the primary physical placement of the children was to be with Patsy. Both parties resided in Charles City at the time of the dissolution.

In 1989 Patsy moved from Charles City to Fort Dodge in order to obtain employment which would allow her to spend more time with the children. This move complicated David's visitation and created problems in the parents' ability to communicate with each other about their children. In May 1992 both parties executed a Temporary Placement Agreement. This agreement provided Ammie would reside with her father commencing June 2, 1992. This agreement was apparently the result of a strained relationship between Patsy and Ammie.

On June 2, 1992, David filed a petition for modification of the dissolution decree. He sought to have custody modified so both children were placed in his physical care. A trial on David's petition was held in March 1994. On August 18, 1994, the district court entered its Findings of Fact, Conclusions of Law and Decree. The district court concluded Ammie should reside with her father and Kevin should remain in his mother's care. David has appealed the issue of Kevin's custody, Patsy did not cross-appeal the modification of Ammie's custody.

David set forth a number of considerations in support of his request for a modification of Kevin's custody. We have carefully considered them all and find modification of Kevin's custody was not warranted. Neither Patsy's move to Fort Dodge nor Kevin's school transfers amount to a material and substantial change in circumstances. Kevin's preference to live with his father is not entitled to much weight given his young age and lack of maturity. *See generally In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa App. 1985). Furthermore, a child's preference is given less weight in a modification action than when a court is making an original custody decision. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa App. 1993). The district court properly accorded more weight to Ammie's preference given her older age and the fact she had resided with her father for over two years preceding entry of the modification decree.

Due to a strained mother-daughter relationship, Ammie resided with her father for two years prior to the modification of the decree without any apparent objection by Patsy. Patsy and Ammie have had very little contact since Ammie went to live with David. Ammie is nearly of the age of majority. Kevin is now only eleven years of age and has always resided in the care of his mother. Each child is doing well in his or her respective situation. Both children spoke with the district court judge regarding their custodial arrangements, and there is no evidence of serious problems in their sibling relationship due to their separation.

We are aware of the presumption that the custody of siblings ordinarily should not be separated. *See In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). However. the circumstances of this case support such a separation. Given the gap in their ages and their history of living apart, we find this is the type of compelling situation where separate custody is warranted. *See Will*, 489 N.W.2d at 399 (best interest of children promoted where younger children were placed in mother's care and preference of older child to live with father was granted).

It is clearly evident from the record both parents have difficulty communicating with one another. and this adversely impacts upon their children's well-being. We agree with the district court's conclusions that "both parties have on occasion exercised poor judgment in communicating with each other on matters concerning the children," and "[t]here is definite room for improvement on both sides of this controversy." Each parent has a poor track record in communicating about the children and in facilitating visitation between the child in his or her care and the noncustodial parent. Ammie will soon be eighteen years of age and beyond the court's jurisdiction. However, Patsy is cautioned that continued efforts to undermine Kevin's relationship with David could support a future modification of Kevin's care.

David bore a heavy burden to establish he could presently minister more effectively effectively to Kevin's needs. David did not meet this burden. The record indicates Patsy is able to provide Kevin with love and support. Kevin is developing

and functioning well in her care. The testimony of Kevin's school principal revealed Kevin is an average student who gets along with his classmates. Patsy has taken efforts and supported changes intended to make Kevin a better student. The district court properly denied David's request to modify Kevin's custody.

II. APPELLATE ATTORNEY FEES.

Both parties have requested an award of appellate attorney fees. Attorney fees are not recoverable as a matter of right but rest within the discretion of the court. *In re Marriage of Russell*, 479 N.W.2d 592, 596 (Iowa App. 1991). We find equity does not warrant an award of attorney fees to either party.

AFFIRMED.