

IN THE COURT OF APPEALS OF IOWA

No. 6-276 / 04-1929

Filed May 10, 2006

JODI DIANE SMITH, n/k/a/

JODI DIANE RAU,

Petitioner-Appellee,

vs.

JAMES LYLE LITTREL,

Respondent-Appellant.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon,
Judge.

James Littrel appeals from the district court's order denying his application
for modification of a prior decree. **AFFIRMED.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Jodi Rau, Marshalltown, pro se.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

EISENHAUER, J.

James Littrel appeals from the district court's order denying his application for modification of a prior decree. He contends the court erred in failing to grant him sole custody of the parties' daughter, Lyndi Littrel. He further contends the court erred in refusing to require supervised visitation with Lyndi's mother, Jodi Rau. Finally, he contends the court erred in refusing to prevent Jodi from seeking medical care of Lyndi.¹

Following Lyndi's birth in May 1998, her parents, who have never married, began a legal fight over her that has become, as the district court noted, "a saga of near epic proportions." There has already been one modification of physical care, in which Lyndi's care was changed from a shared care arrangement to James being granted physical care. This action was initiated by James a mere three months after this court affirmed the modification on appeal. See *Smith v. Littrel*, No. 02-1477 (Iowa Ct. App. July 10, 2003).

Child abuse allegations have been made by both parties. Three founded reports of child abuse reports have been entered against Jodi. The third report was a result of Jodi's attempts to secure evidence of abuse against James. The parties' contentiousness has also been documented. In its ruling, the district court stated:

Neither party is candidate for parent of the year. Each continues in his or her own way to subjugate what is in Lyndi's best interests in deference to doing battle with the other; James in an aggressive, persistent manner; Jodi in a passive, aggressive style. The only potential casualty in this war is Lyndi herself as the surest

¹ Rau had also filed an application for modification, requesting physical care of Lyndi. The district court denied her application. Originally, Rau appealed and Littrel cross-appealed. Rau's appeal was dismissed for lack of prosecution and Littrel's cross-appeal then became the primary appeal.

way to impede healthy development of a child in the wake of parental separation is for hostility to continue unrestrained by the parents.

A modification of child custody is appropriate only when there has been a substantial change in circumstances since the time of the last modification that was not contemplated when the order was entered. *Mears v. Mears*, 213 N.W.2d 511, 514 (Iowa 1973). 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 Ct. App. 1998). We review the record before us de novo. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). De novo review requires us to review the facts as well as the law and adjudicate rights anew on those propositions properly presented, provided the issue has been raised and error, if any, preserved in the course of the trial court's proceedings. *Long v. Long*, 255 N.W.2d 140, 143 (Iowa 1977). We give weight to the findings of the trial court although they are not binding. *Id.*

We first consider James's contention that the district court erred in denying his request for sole custody of Lyndi. Although James raised the issue in his application to modify, the district court did not address the issue in its order. The order stated: "This matter is currently before the court upon respondent's application to limit the visitation petitioner has with the parties' minor child, Lyndi Jo Littrel." James did not raise the issue again in his motion to amend or enlarge the district court's findings. It is well settled that a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) 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. *PEB Practice Sales, Inc. v. Wright*, 473 N.W.2d 624, 625-26

(Iowa Ct. App. 1991). Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and decided upon appeal. *Id.* at 626. Because James failed to properly preserve error on this issue, we will not consider it on appeal.

James next contends the court erred in failing to order supervised visitation with Jodi. Generally, a court does not impose conditions upon a parent's visitation. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 4 (Iowa Ct. App. 1994). Any conditions which are imposed must be in the best interests of the children. *Id.* at 5. A parent's visitation should not be restricted unless direct physical harm or significant emotional harm to the children or a parent is likely to result from such contact. *In re Marriage of Gilliland*, 487 N.W.2d 363, 366 (Iowa Ct. App. 1992). Despite the turmoil between her parents, the child is well adjusted, well nourished, properly clothed, and healthy. The trial court found she is thriving, but she has had difficulties. She was seen by a counselor primarily to help her deal with the conflict between her parents. We quote with approval the following conclusions of the trial court: "It would serve absolutely no purpose to restrict her visits by reducing the number of visits or by mandating that they be supervised," and, "The court is well aware of the founded child abuse reports, but does not believe that the nature and quality in those reports constitute behavior sufficient to withhold visitation." We reject James's claims that visitation should also be reduced because Lyndi is bonded with Jodi, and maximum contact with her mother is in her best interest. The district court is ill-equipped to deal with the continuing allegations of child abuse. Iowa Code chapter 232 may be the proper avenue to address these issues.

Finally, James argues Jodi should be prevented from seeking medical care for Lyndi due to the number of times Jodi has taken Lyndi to the emergency room in recent years without good cause. We cannot find where this issue was considered or ruled on by the trial court. It was not brought to the court's attention in the motion to reconsider and is therefore not preserved for our consideration.

AFFIRMED.