IN THE COURT OF APPEALS OF IOWA

No. 1999-506 (9-763) / 99-531
Filed January 12, 2000

IN RE THE MARRIAGE OF TIMOTHY JOE HADAN AND JUDY LYNN HADAN

FILED
JAN 1 2 2000
CLERK SUPREME COURT

Upon the Petition of
TIMOTHY JOE HADAN,

Petitioner-Appellant,

And Concerning
JUDY LYNN HADAN, n\k\a
JUDY LYNN RICHIE,

Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

The petitioner appeals a district court ruling denying his petition to modify physical care of the parties' minor child. **AFFIRMED.**

Stephen C. Ebke of Porter, Tauke & Ebke, Council Bluffs, for appellant.

Michael J. Murphy of Rodenburg Law Offices, P.C., Council Bluffs, for appellee.

Heard by Vogel, P.J., Vaitheswaran, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

VAITHESWARAN, J.

Timothy Hadan sought primary physical care of his son after his ex-wife was charged with possession with intent to deliver drugs. The trial court denied the application. We affirm.

I. Background Facts and Proceedings

Timothy and Judy Hadan were divorced on December 7, 1993. The trial court awarded the parties joint custody of their four year old son Timmie, with Judy assuming primary physical care. Timmie lived in Tabor with Judy, her new husband Shawn, and half brothers Josh, Jerod, and Dustin. Timothy remarried and lived in Clear Lake.

In May 1998, Judy forced eighteen year old Josh to move out of the home. The State subsequently raided Judy's home and seized drugs from Josh's locked bedroom. On May 18, 1998, the State charged Judy and Shawn with possession with intent to deliver drugs. The charges against Judy were subsequently dismissed.

On June 12, 1998, Timothy applied to modify the decree. Alleging a substantial change of circumstances, he sought physical care of Timmie and termination of child support. The trial court denied the application, but amended the visitation schedule set forth in the decree. This appeal followed. As neither party contests the court's modification of visitation terms, the sole issue on appeal is whether primary physical care of Timmie should be transferred to Timothy.

II. Modification of Primary Physical Care

A court may modify child custody only when there is a substantial change in circumstances. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The change must essentially be permanent and relate to the welfare of the children. *Id.* The person seeking a change in the physical care arrangement must demonstrate an ability to offer superior care. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997).

Timothy contends he should serve as the primary caretaker because: (1) illicit drug activity in Judy's home may continue; (2) until he became involved, Timmie failed to perform well at school; and (3) Judy leaves Timmie home alone. Judy claims the physical care arrangment should not be disturbed because: (1) Timmie is well-adjusted; (2) Timmie has a close relationship with his half-brother, Dustin; and (3) Timothy took little interest in Timmie until he remarried. The trial court dismissed the modification petition, reasoning:

> This court feels that both parties deeply love this child and that both sides are capable of providing an appropriate home for the minor child. The court does not want to separate siblings and considers the impact of separation of Timmy from his half-brother, Dustin.

On our de novo review, we find the record supports the trial court's ruling.

A. Drug Activity

Timothy's primary argument in support of modification is the drug activity in Judy's home. We find this activity, although not to be condoned, is not of a permanent nature. The drugs were in a locked room previously used by Judy's adult

son. Although Judy had a key to the room, there is no evidence she knew the room contained drugs. There also is no evidence Josh exposed Timmie to the drugs while he lived in the home or that Judy sanctioned drug use in her home. Instead, the record reveals Judy forced Josh to leave the home to prevent him from adversely influencing her younger children. Additionally, Judy took a drug test, which revealed no illicit drugs in her system. The State ultimately dismissed the charges against Judy. Under these circumstances, we conclude the 1998 drug incident did not constitute a substantial change of circumstances to warrant modification of the physical care arrangement. *Cf. In re Marriage of LeGrand*, 495 N.W.2d 118, 120-21 (Iowa App. 1992) (modifying physical care where drinking and driving incident traumatized children and there was insufficient evidence father effectively addressed drinking problem).

B. School

Timothy concedes he did not participate in Timmie's schooling until Timmie was in second grade, but asserts his homework assistance since then has improved Timmie's performance. Timmie's teachers reported Timmie was always clean, healthy, and had good hygiene. Although his third grade teacher stated Timmie was very happy to go to his father's house on Fridays, she did not ascribe his happiness to problems in Judy's home. She stated Timmie is a smart boy and a good student but sometimes "his play gets in the way of what he is doing." On our de novo review, we find insufficient evidence to warrant modification of the physical care arrangement based on Timmie's school performance. *Cf. In re Marriage of Erickson*, 491 N.W.2d

799, 802 (Iowa App. 1992) (citing children's testimony that mother did very little to help with school work).

C. Home Alone

Timothy's contention Judy fails to adequately supervise Timmie is troubling in light of the guardian ad litem's similar findings and his recommendation that Timmie live with his father. If this were an original custody proceeding, the guardian ad litem's conclusions may have proved dispositive. However, on this review of a modification application, we are not convinced Timothy would provide superior supervision. At most, Timothy established Timmie spent too much time with a neighbor. When asked whether Judy left Timmie alone, Timothy responded, "I don't know for positive." Judy vehemently denied leaving him home alone. We will only disturb custody for the most cogent reasons. *In re Marriage of Whalen*, 569 N.W.2d at 628. We find insufficient evidence on this record to warrant modification based on inadequate supervision.

III. Sibling Bond

Timothy finally challenges the trial court's refusal to separate half-siblings. Timothy points to the five year age difference between the children, Timmie's close bond with a friend his own age, and the disruptive influence of his older half siblings, from whom he is already separated. We find this evidence insufficient to overcome our strong preference to keep siblings together. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). Accordingly, we conclude the trial court acted equitably in

relying on the sibling bond between Timmie and Dustin as a basis for denying the modification application.

IV. Attorney Fees

Judy seeks an award of appellate attorney fees. An award rests within the court's discretion after consideration of the parties' ability to pay, the needs of the party making the request, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Moore*, 526 N.W.2d 335, 338 (Iowa App. 1994). We award Judy $750 because she was obligated to defend the trial court's decision on appeal, and assess the costs to Timothy.

AFFIRMED.