

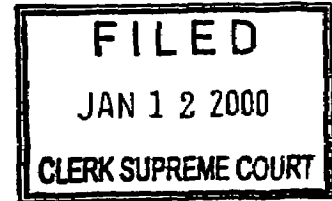
IN THE COURT OF APPEALS OF IOWA

No. 1999-342 (9-595) / 98-1635

Filed January 12, 2000

**IN RE THE MARRIAGE OF PAMELLA A. STER
AND DAVID A. STER**

Upon the Petition of
PAMELLA A. STER n/k/a PAMELLA A. SPRATTE,
Petitioner-Appellee,



And Concerning
DAVID A. STER,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

David Ster appeals from a district court order refusing to modify the decree dissolving his marriage to Pamella Ster (now Spratte). **AFFIRMED.**

David A. Ster, Center Point, pro se, appellant.

Pamella A. Spratte, Marion, pro se, appellee.

Considered by Streit, P.J., and Vogel, and Vaitheswaran, JJ.

VAITHESWARAN, J.

David Ster appeals a ruling on his application to modify a dissolution decree. He contends the district court should not have: (1) left primary physical care of his younger child with his wife and (2) ordered him to pay one-third of his older child's college expenses. We affirm.

I. Background Facts and Proceedings

David and Pamella Ster jointly have two children, Adam and Beth. When they divorced in 1990, the district court approved a stipulation granting Pamella and David joint legal custody, with Pamella assuming primary physical care of the children.

On October 25, 1994, Pamella sought an upward modification of the child support provisions contained in the decree. David responded by seeking primary physical care of Beth. The court granted Pamella's application for increased support and did not change the physical care arrangement. In an unpublished opinion, we affirmed the district court.

On August 28, 1997, David filed a second modification application, seeking primary physical care of Beth. Alleging Adam had renounced him, David also sought to absolve himself of the responsibility for payment of Adam's postsecondary expenses. The district court denied David's application and ordered him to pay one-third of the total costs of Adam's postsecondary education. This appeal followed.

II. Timeliness of Appeal

The district court issued its ruling on July 16, 1998. David filed a "request for reconsideration" on July 24, 1998. The court denied the request on August 21, 1998.

David filed his appeal on September 10, 1998.

We construe David's motion for reconsideration as a motion to enlarge or amend findings and conclusions under Iowa Rule of Civil Procedure 179(b). *See Lundberg v. Lundberg*, 169 N.W.2d 815, 817 (Iowa 1969). The motion tolled the time for filing an appeal until the court ruled on it. Iowa R. App. P. 5(a); *In re Marriage of Fountain*, 492 N.W.2d 707, 709 (Iowa App. 1992). Accordingly, we conclude David timely filed his appeal.

III. Primary Physical Care

David's application for modification alleges he is entitled to primary physical care of Beth because: (1) Pamela has an unstable employment history; (2) Pamela fails to cooperate in providing for her daughter's special needs; (3) Pamela's allegations of child abuse proved unfounded; (4) Pamela refuses to provide medical treatment; and (5) Beth wishes to live with her father.

The district court denied David's application. Although the order does not contain findings of fact or conclusions of law, the record is sufficient to enable us to decide this issue anew. *Cf.* Iowa R. Civ. P. 179(a); *Conklin v. Conklin*, 586 N.W.2d 703, 706-707 (Iowa 1998) (reversing in the absence of findings pertaining to witness credibility); *In re Marriage of Meier*, 267 N.W.2d 46, 47 (Iowa 1978) (concluding record inadequate to permit de novo review); *Lessenger v. Lessenger*, 258 Iowa 170, 175-76, 138 N.W.2d 58, 61 (Iowa 1965) (noting record inadequate to permit de novo adjudication).

Our de novo review establishes that little has changed since December 1995, when the district court considered and denied David's prior application to modify the decree. In affirming that denial, we stated continued failure by Pamela to address Beth's special needs and cooperate with counseling could result in modification of physical care. We find no evidence of such failure.

With Pamela's cooperation, Beth's learning disabilities were addressed by resource teachers at the school she attends. They provided special education teachers for math and reading and integrated her into all other classes. Although David suggested a school in another district would provide better opportunities for Beth, he conceded he had not visited this other school or looked into its resources for children with special needs. We find Pamela has more than adequately met Beth's educational needs and reject this grounds for modification.

We also find little support for David's contention that Pamela was not attentive to Beth's nutritional needs. Pamela stated Beth was approximately twenty pounds overweight. Pamela went to a nutritionist with David, made adjustments to her grocery list by buying more fruits and vegetables, and heeded the nutritionist's advice to avoid pushing Beth to lose weight. We find no reason to change physical care based on Beth's weight or Pamela's response to her weight.

David additionally states Beth would prefer to live with him. Absent a showing the preference is based on material or substantial changes in the living conditions at Pamela's home, we are unwilling to modify the custody arrangement

on this basis. *See In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998).

David finally argues that Pamela inappropriately deals with anger, as reflected by abuse charges she filed against David, which were ultimately dismissed. We find this contention without merit. The child abuse allegation arose from an altercation David admittedly had with his son Adam. The district court addressed this issue in its 1995 modification order, noting David “inexcusably down played” the incident. We find the fact that administrative abuse proceedings were ultimately dismissed has no bearing on whether David has demonstrated a substantial change in circumstances and superior caretaking. We reject this ground for modification.

Finally, David contends Pamela has an unstable employment history, warranting a transfer of physical care. This contention is not supported by the record evidence. At the time of the proceedings, Pamela had been working for an agency for over a year, earning \$9.11 per hour and did not express an intent to leave that position.

We conclude the trial court acted equitably in refusing to transfer physical care of Beth to David.

IV. College Expenses

David contends he should not be required to pay Adam’s college expenses because Adam shunned and repudiated him at Pamela’s urging.

A. Substantial Change in Circumstances

The stipulation supporting the original decree contains a separate subsection for college expenses, which provides: “no provision is being made at this time concerning the amount, if any, either party is to pay toward the college education expenses of the children.” Further, the stipulation provides that if the parties cannot agree on college expenses, either party may apply to the court for a ruling, without showing a material and substantial change of circumstances. The stipulation was incorporated into the decree. The parties, therefore, left open the college education issue, for litigation at a later date.

B. Merits

A court may award a postsecondary education subsidy if good cause is shown. Iowa Code § 598.21(5A) (1997). In determining whether good cause exists, a court must consider the child’s age, the ability of the child to perform at the postsecondary level, the child’s financial resources, whether the child is self-sustaining, and the financial condition of each parent. *Id.* § 598.21(5A)(a). If the court decides good cause exists, it must determine the cost of postsecondary education and the amount the child may reasonably be expected to contribute. *Id.* § 598.21(5A)(a)(1)-(2). Next, the court must apportion costs. *Id.* § 598.21(5A)(a)(3). The amount paid by each parent may not exceed one-third of the total costs. *Id.*

Postsecondary education expenses will not be awarded if a child repudiates a parent. *Id.* § 598.21(5A)(c). The district court found Adam had not totally severed his relationship with his father nor had he publicly disowned his father. The court

further found David actively attempted to alienate his son in an effort to release himself from any financial obligation for Adam's college education. On our de novo review, we find ample evidence to support the district court's finding that Adam did not repudiate his father. Adam invited David to a football banquet, invited him to graduation, and got together with David at a recreation center. Although their relationship was strained, Adam did not sever ties with his father.

The court additionally found Adam saved "some money for college but much of it will be used in the cost of the operating while intoxicated charge." The court noted both parents were employed and David had "saved some money in a college fund for Adam." The court stated Adam would possibly attend Kirkwood Community College. The court concluded David should pay one-third of Adam's college expenses.¹

The record reviewed de novo contains adequate evidence to affirm the secondary education subsidy. Adam is nineteen years old, has graduated from high school, and wishes to go to Kirkwood Community College. The parties' financial statements filed several months before the modification proceedings support payment of the subsidy. Although the record does not reveal the cost of an education at Kirkwood Community College, we find Adam can contribute little if any to these costs, David had saved \$1100 for Adam's education as of the time of the proceedings,

¹ David has not argued and, therefore, we need not consider whether the court was estopped from applying a 1997 law to his modification action, which was based on a stipulation and decree entered in 1990. See Iowa Code § 598.21(5A); *In re Marriage of Williams*, 595 N.W.2d 126, 132 fn.2 (Iowa 1999).

and David has the ability to contribute more. Accordingly, we find good cause supports the order of a secondary education subsidy and conclude the district court acted equitably in ordering David to pay one-third of Adam's college expenses. The district court's ruling is affirmed.

AFFIRMED.

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