IN THE COURT OF APPEALS OF IOWA

No. 0-838 / 00-1090
Filed May 9, 2001

IN RE THE MARRIAGE OF KATHRYN GRAHAM AND DENNIS GRAHAM II

Upon the Petition of
KATHRYN GRAHAM, n/k/a KATHRYN SMITH,
Petitioner-Appellant,

And Concerning
DENNIS GRAHAM II,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Monroe County, Richard J. Vogel, Judge.

The petitioner appeals a district court order granting the respondent's petition to modify the child custody provisions of the parties' dissolution decree. Petitioner contends the district court erred in: (1) transferring to respondent physical care of their minor children; (2) failing to divide the children's custody; and (3) failing to fix child support consistent with the child support guidelines. Petitioner and respondent request an award of appellate attorney fees. **AFFIRMED IN PART; REVERSED IN PART.**

Lynn J. Wiese of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellant.

Michael P. Brice of Brice & Smith, L.L.P., Oskaloosa, for appellee.

Heard by Streit, P.J. and Zimmer and Miller, JJ.

MILLER, J.

The Petitioner, Kathryn Graham, appeals the district court order granting the Respondent, Dennis Graham, II's, petition to modify the child custody provisions of the parties' dissolution decree. Kathryn contends the district court erred in: (1) transferring physical care of their minor children to Dennis; (2) failing to divide the children's custody; and (3) failing to fix child support consistent with the child support guidelines. Both parties request an award of appellate attorney fees. We reverse the modification of physical care, but affirm the expansion of summer visitation to six weeks.

I. BACKGROUND FACTS

Kathryn and Dennis were divorced on June 3, 1991. The parties are the parents of three children: Erik, born September 4, 1982; Heather, born January 8, 1984; and Brett, born September 29, 1988. The dissolution decree awarded the parties joint legal custody of their children and placed their physical care with Kathryn. The children thereafter resided with Kathryn, and with Kathryn's husband Paul after her marriage to him.

In October of 1991 Kathryn married Paul Smith. Paul is presently a Methodist minister in Ackley and Geneva, Iowa, a position he has held for approximately seven years. Dennis is married to Cindy Conley. Although Dennis and Cindy had lived together for some time, they did not marry until April of 2000.

At the time of trial Kathryn was thirty-eight years old and lived in Ackley, Iowa with Paul. She is employed as a part-time secretary with the churches Paul ministers to and part-time at a Kum & Go convenience store. She receives

approximately $150 per month net income from her secretarial position and $200 per month net income from the convenience store. Dennis was forty years old at the time of trial and lived in Avery, Iowa with Cindy. He works full-time at an auto body repair shop and part-time for the U.S. Postal Service.

In October of 1999 Dennis file a petition to modify the decree requesting the physical care of the children be placed with him. As the ground for modification Dennis alleged the children were no longer able to develop emotionally in Kathryn's physical care and that their best interests would be better served in his physical care. In January of 2000 Erik left the Smith household unbeknownst to Kathryn or Paul sometime between 11:00 p.m. and midnight on a Saturday night. Erik called Dennis who drove to Ackley and picked him up. Dennis did not contact Kathryn regarding Erik's whereabouts, and she found out only by calling him the next day. Erik returned to the Smith home two days later on the following Monday night.

Two weeks prior to trial Heather also ran away from the Smith home in the middle of the night. Like Erik, Heather called Dennis who then drove to Ackley and picked her up. Dennis did not contact Kathryn regarding Heather's whereabouts, and Kathryn found Heather by calling the next morning. Heather remained with Dennis for summer visitation up to and including the time of trial.

Aside from these "running" incidents the children are all good, well-adjusted children. None of them have been in trouble with the law. They all do well in school, are involved in several school activities and the trial court found them to be obedient and polite.

Prior to trial the parties were ordered to participate in a custody evaluation. It was conducted by Dr. Keri Kinnaird of the Des Moines Child & Adolescent Guidance Center, Inc. Dr. Kinnaird's final report was received in its entirety as part of the record. As part of the evaluation Dr. Kinnaird interviewed all of the parties involved, including both of the parents, the stepparents and all three children. Additionally, both the parents and the stepparents completed the Minnesota Mutiphasic Personality Inventory (MMPI-2). Ultimately, Dr. Kinnaird recommended the children remain in the care of the Smiths, but with a significant expansion of summer visitation and with the recommendation that the Smiths seek family therapy.

Erik and Heather were both interviewed by the court and counsel. Erik told the court he preferred to spend the summer with Dennis but planned to return to Ackley to finish the school year. He told the court that as soon as he turned eighteen he was moving into an apartment on his own in order to keep it from appearing he was "siding" with either parent. Notwithstanding this intent, Erik agreed the rules imposed in the Smith house were fair, have been consistently applied, and he has been able to adapt to them and live with them.

Heather was more definitive in her expression of a preference to live with Dennis. She stated she likes her dad better and gets along with him more. She also stated she does not get along with Paul at all and characterized life at the Smith home as "hell." The court did not allow counsel to call or question Brett. Dr. Kinnaird's report stated that Brett would "kinda" like to live with his father, he feels there are "no rules" at his father's house, and he views his father as "more of a kid" while his mother and stepfather are "more serious" parents.

Dr. Kinnaird characterized the children's statements of wanting to leave the Smith home as a product of both the contrast between two very different parenting styles and Dennis' reinforcement of hostility toward Paul. Furthermore, Kinnaird characterized Dennis' agreement to Erik's desire to live on his own in an apartment as demonstrative of Dennis' desire to "simply give the children what he believes they want."

Following trial the district court found there had been a change in circumstances warranting a change in physical care, support and visitation. The court concluded it was in the children's best interest that their physical care be transferred to Dennis. However, the court determined that Erik was old enough and mature enough to decide where he would live, and stated he "may make his own decision in that regard."[1] The court ordered Kathryn to pay child support of $200 per child per month but awarded her an offset until Dennis's $15,000 child support delinquency was extinguished. It also ordered that summer visitation be six weeks. Kathryn appeals the district court's modification of physical care and support. Both parties seek appellate attorney fees.

I. SCOPE AND STANDARD OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of

[1] Erik turned eighteen on September 4, 2000, during this appeal, and is therefore now of legal age. Thus, Erik's physical care is no longer an issue in this appeal and no determination as to his physical care need be made here. Furthermore, based on the original dissolution decree, entered June 3, 1991, any support payments for Erik concluded when he turned eighteen and thus this issue is also now moot.

witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value with respect to custodial issues, and this court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

III. MERITS

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 the 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.

Petition of Anderson, 530 N.W.2d 741, 741-42 (Iowa Ct. App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Here, unlike in an original custody determination, the question is not which home is better, but whether the parent seeking the change has demonstrated he or she can offer the child superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). If the parents are found to be equally competent to minister to the children, custody should not be changed. *Id.* The burden upon

the parent seeking to change custody is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty theses proceedings cause all children." *Id.* at 213-14. Children's preference of where to live is given some weight, but less weight in a modification than in an original custodial determination. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998); *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987).

After summarizing the evidence and finding facts the trial court stated that its decision "is not an easy decision." We agree, for the record provides no easy answers in this case. However, for the reasons that follow we respectfully disagree with the trial court's decision to change physical care. The issues are moot as to Erik, and therefore events involving him are of relevance only to the extent they shed light on the relationships of the parties, their spouses, and the children. Our focus is on Heather and Brett and the issue of their physical care.

It appears from our reading of the trial court's decision that the material and substantial change in circumstances it primarily relied on was Heather's, and to a lesser extent Erik's, unhappiness in the Smith home, resulting from what they believed to be rather arbitrary rules, unreasonable restraints, and communication problems consisting of a failure of Kathryn and Paul to consider their opinions. The evidence shows that the rules in the Smith household have been somewhat arbitrary, and the children's beliefs that communication problems had developed are correct. Heather's feelings, and to a lesser extent Erik's, appeared to be primarily directed at Paul, whom they view as the person who makes and enforces the rules and either does not hear or does not seriously

consider their opinions. Heather in particular seemed to strongly believe that Kathryn has abdicated her rights and responsibilities as a custodial parent to Paul. In contrast to their views of the Smith household, Erik and Heather feel that Dennis listens to them and respects their opinions. The trial court determined that the situation which had developed in the Smith home constituted a change in circumstances resulting in the best interests of the children justifying a change of their physical care from Kathryn to Dennis.

The fact that Erik's and Heather's unhappiness had become strong enough to result in Erik leaving home unannounced for two days and Heather doing so for two weeks as of the time of trial can be seen as a change in circumstances. However, we believe it is not uncommon for seventeen-year-old and sixteen-year-old children to believe that parental rules are arbitrary, some restrictions on their social and other activities are unreasonable, and that their opinions and wishes should be accorded more consideration than they are. We have some doubt whether the development of such opinions and unhappiness in seventeen and sixteen-year-old children is a change in circumstances that is beyond the contemplation of a trial court when it enters a custodial decree. We need not answer this question, however, because we find Dennis has not proved by a preponderance of the evidence that he can minister more effectively to the children's well-being than Kathryn can, or that he has parenting abilities superior to Kathryn's.

The children believe that the Smith household rules and any restrictions on their activities are the product of decisions made by Paul. Kathryn testified that, contrary to these perceptions, Smith family rules are the product of

decisions made jointly by Paul and her. However, the children's perceptions are generated by the fact Kathryn is quiet and reserved, Paul is vocal and assertive, Paul has taken the lead in informing the children of the Smith's rules and enforcing them, and Kathryn has allowed him to do so despite the fact that she, and not he, is their parent and has been the parent with responsibility for their physical care. The evidence shows that, as suggested by the trial court, Paul has been somewhat domineering and inflexible.

It is readily apparent that Paul and the children have had problems communicating with each other and the children have come to believe they could not communicate effectively with him. Further, they had come to believe they could not do so with Kathryn, whom they viewed as essentially acquiescing in decisions made by Paul. Dr. Kinnaird recommended that the Smiths seek family therapy with all three children to address communication and "negotiating" problems. Notably, the Smiths had started such family counseling even before receiving Dr. Kinnaird's report and recommendation. Kathryn, and the family's counselor, Mr. Garris, thought the counseling was progressing well. Then Heather left home and went to Dennis's home shortly before trial, effectively ending any effort on her part to deal with and resolve the very problems that had led to her unhappiness and that she purportedly wished to have addressed.

When a child is of sufficient age, intelligence and discretion to exercise an enlightened judgment, the child's wishes, although not controlling, may be considered, with other relevant factors, in determining custody. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). However, the child's preference is entitled to less weight in a modification case than in an original custody

proceeding. *Id.* Furthermore, the analysis involved in deciding a custody issue is far more complicated than determining which parent the child wishes to live with. *Id.* at 101-02.

Heather is of sufficient age and intelligence to have her wishes considered. However, the evidence indicates that she lacks the discretion, maturity and judgment that would be expected of most sixteen year olds. She describes her life in the Smith household as "hell," as burdened by such rules and restrictions as prevent her from having a semblance of a normal teenager's recreational and social life. To the contrary, the evidence shows that she is doing well in school, is involved in high school athletics and choir, is in an art club, participates in a church youth group, is allowed to have a part-time job, is allowed some use of a family automobile, and has friends in her school and community. She ran away from home shortly before trial without informing her employer that she would be gone. After arriving at her father's home she did nothing to inform Kathryn where she was. When Kathryn located her and called her she refused to speak to her and "hung up" the phone. She nevertheless complains that Kathryn called only once and claims this demonstrates that Kathryn does not really care. We give little weight to Heather's stated preference to have her physical care placed with Dennis.

Dr. Kinnaird was of the opinion that "communication problems" were at the root of the children's dissatisfaction with their life in the Smiths' home. In her opinion the parent-child negotiations were not successful in most instances because of how Erik and Heather had responded, using coercive measures such as running away to gain concessions or forsaking the effort to resolve differences

while nevertheless complaining to others about the problems. She believed that Dennis had modeled a hostile, disapproving attitude toward Paul for years and openly expressed it to the children regularly, fueling their blame of Paul and labeling him as the source of all problems. She recommended that the children remain in Kathryn's physical care, with their summer visitation with Dennis increased from three weeks to six to eight weeks. She strongly recommended that the Smiths seek family therapy with all three children to address the difficulties they have had "negotiating" with each other.

It is clear that despite the problems that may have developed in the Smith home the children have done well physically, academically, morally and socially in that home. All are in good health. All are doing well in school. Brett in fact is in a school program similar to one for talented and gifted children. The children have had no involvement with drugs or alcohol, juvenile or criminal authorities, or disciplinary action at school. Erik participates in athletics and band, has a paper route and a part-time job, and was selected as a delegate to Boys' State. He is on the student council. Heather's activities and friendships are noted above. Brett plays summer baseball. He has a good relationship with his mother, and usually has a good relationship with Paul, with whom he shares numerous interests and activities. All the children are generally polite and well-mannered. In summary, all three children have done and are doing well, except for their unhappiness about rules and communication in the Smith household. The majority of the credit for the children's successful development must go to Kathryn, with whom their physical care had been placed for over nine years at

the time of the modification trial, and to Paul, with whom they had then lived for almost nine years.

The trial court found that Dennis would have to change his attitude and actions in order to better provide for the children's long-term best interests than Kathryn would. It expressed the belief he could and would do so, but cited no evidence to support that hope. In contrast, the evidence shows that Kathryn and Paul had begun family counseling some two months or more before trial and they and the children were making progress. We find no substantial evidence to support a belief that Dennis had either changed his attitude or intended to change his actions, and the following substantial evidence to the contrary.

Dennis expresses the view that child support money should be used only for direct expenses for the children and not for any common household expenses. At the time of the modification trial he was over $15,000 in arrears in his support obligation in this case and was falling further behind each month. Although he disagrees with Kathryn's and Paul's methods of raising the children, he will not discuss such matters with Kathryn. Instead, he criticizes Paul to the children and expresses to them his disagreements with the Smiths' methods of child rearing. He believes it is appropriate for him to do so when the children initiate discussion of any such matters. His criticisms no doubt undermine the Smiths and contribute to any tensions in their household.

Dennis's refusal to communicate with Kathryn concerning the children, and the attitude he demonstrates to the children concerning the Smiths, are perhaps best shown by his acts at the times when Erik and Heather left home. When Erik left home Dennis took Erik to his home but then did not even call

Kathryn to let her know where Erik was. Before Heather ran away from home she discussed her intentions with Dennis two or more times over a period of about a week. Dennis said nothing to Kathryn about those discussions or Heather's plan. He picked Heather up and took her to his home, but again did nothing to let Kathryn know where she was.

Contrary to all reason, Dennis expresses the opinion that his actions do nothing to undermine the relationship between the Smiths and the children. He testified that he had no regret about having been involved in helping Erik and then Heather run away from home. He testified that he would do so again, even if doing so were in violation of a court order.

Until recent disagreements over household rules and problems with communication, the children have done very well in the Smith household. The Smiths have taken steps to deal with the disagreements and problems. Dennis disagrees with and does not obey court orders concerning child support. He believes the children should make their own choices as to where they live. He has no hesitation to violate court orders if the children or he disagree with them. He does not support the Smiths' relationship with the children. He does and says things that undermine that relationship. The evidence does not convince us that there is likely to be a change in his attitude or actions. He has not shown that he is able to minister more effectively to the children's well-being than Kathryn is, or that his parenting ability is superior to hers. We therefore reverse those portions of the modification decree that changed physical care of the parties' children from Kathryn to Dennis and ordered Kathryn to pay child support.

We understand the difficulties that may result from our decision, given Heather's adamant, if unjustified, opinion that her life in the Smith household is unbearable and her statement that she does not intend to return to that home. While we are reluctant to order that a child who is of sufficient age and intelligence to make an enlightened choice live in a home the child does not wish to live in, we are loath to allow a child who does not demonstrate adequate discretion, maturity or judgment to hold a court hostage to that child's desires or whims. To do so would be to abandon our responsibility in favor of the wishes of the child. A trial court is often faced with the need to enforce a custody order with which a child does not agree, has the power and means to do so, and will do so when necessary. *Leo v. Leo*, 213 N.W.2d 495, 497 (Iowa 1973).

After ordering modification of physical care the trial court ordered that Kathryn have six weeks of summer visitation. Kathryn had testified she had no problem with Dennis having six weeks summer visitation. Although we reverse modification of physical care and child support, we affirm the expansion of summer visitation to six weeks. We need not consider Kathryn's alternative claim that the trial court should have ordered divided physical care or her claim the trial court erred in failing to fix her child support obligation consistent with the child support guidelines.

IV. APPELLATE ATTORNEY FEES

Both Kathryn and Dennis have requested appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). We consider the needs of the party making the request, the ability of the party to pay, and whether the party making the request

was obligated to defend the trial court's decision on appeal. *Id.* After considering these relevant factors, we conclude each party should be responsible for their own appellate attorney fees.

V. CONCLUSION

Based on our de novo review of the entire record, for all of the reasons set forth above we conclude Dennis failed to met his heavy burden to show that the children's best interests require their physical care be changed from Kathryn to him. Therefore, the trial court order modifying the decree to change physical care is reversed and the physical care of Heather and Brett is continued with Kathryn. We therefore also reverse the trial court's order that Kathryn pay child support and reinstate the original support order. We affirm the trial court's expansion of summer visitation to six weeks, and otherwise reinstate the original visitation schedule. Because Erik reached the age of eighteen shortly after this appeal was filed, both the issue of his physical care and his support have been rendered moot. We award no appellate attorney fees. Costs are taxed to Appellee Dennis.

AFFIRMED IN PART; REVERSED IN PART.