IN THE COURT OF APPEALS OF IOWA

No. 3-092 / 92-1306

FILED
MAY 0 4 1993
CLERK SUPREME COURT
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IN RE THE MARRIAGE OF SANDRA J. CROSS AND DENNIS L. CROSS

Upon the Petition of SANDRA J. CROSS,

Appellee,

And Concerning DENNIS L. CROSS,

Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Dennis Cross appeals from a judgment of the district court denying his application for modification of physical custody involving his thirteen-year old son, Simon. **AFFIRMED.**

Betty J. Ratekin of Aspelmeier, Fisch, Power, Warner & Engberg, Burlington, for appellant.

Michael J. Schilling of Cahill, Dieterich & Schilling, Burlington, for appellee.

Heard by Oxberger, C.J. and Donielson and Hayden, JJ.

OXBERGER, C.J.

Dennis Cross appeals the district court's denial of his request for modification of the physical care provision of a dissolution decree. The original decree dissolving the marriage of Dennis and Sandra was entered on October 21, 1985. The decree awarded physical care of the parties' son, Simon, to Sandra.

On December 20, 1991, Dennis petitioned to modify his child support obligation. On March 11, 1992, he amended his petition to include a request for primary physical care of Simon. Sandra resisted his request.

Following trial, the district court concluded Dennis failed to establish a material and substantial change in circumstances not within the contemplation of the court at the time the decree was issued. The court determined Dennis' primary reason for requesting modification was to lower his child support obligations. The court found Sandra provided Simon with adequate living accommodations, a well-kept home, nutritious meals and access to educational opportunities. The court found Dennis might better help his son by finding employment.

Scope of Review

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id.

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Discussion

Dennis contends the district court erred in failing to find a material and substantial change in circumstances not within the contemplation of the court at the time the decree was filed.

> 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 only for 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)).

Dennis contends Sandra's alleged heavy use of alcohol and Simon's behavior problems constitute a material and substantial change in circumstances not within the contemplation of the court at the time the decree was filed. He claims his ongoing recovery from addiction and participation in Alcoholics and Narcotics Anonymous also constitute a material change in circumstances. We acknowledge support in the record for the allegations regarding Sandra's alcohol abuse. However, we do not

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believe this evidence, without more, meets the requisites necessary for modification of the dissolution decree. Sandra has continuously provided for Simon's daily needs. She provided ongoing physical and emotional care and supported Simon's educational goals.

Likewise, we do not find Dennis's recovery sufficient to satisfy the requirements necessary to support a modification. We applaud his involvement in 12 Step recovery programs. However, we share the trial court's concern that Dennis is interfering with Sandra's relationship with Simon. We caution against this interference and encourage cooperation between the parties.

Dennis also requests his child support obligation be modified to reflect his current monthly income. The district court found Dennis failed to establish that any change in his financial condition, not of his own making, was so substantial that it warrants modification.

The dissolution court found Dennis's net monthly income to be $1,499.34. Since that time, Dennis was injured at work and receives $1000.00 tax free income per month. He also received a lump sum settlement in excess of $28,000. Dennis is currently enrolled in school on a primarily part-time basis. He is learning a new vocation which will likely result in a $35,000 to $45,000 annual earning capacity. At the time of trial, he was expected to complete the program within two years.

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Dennis's change in income is temporary and will soon return to a level which will at least be comparable to his income at the time of the dissolution. He chose the amounts and duration of payments resulting from his settlement and he did so with full knowledge of his child support obligation. He has elected to remain unemployed while maintaining part-time student status. We agree with the district court's finding that Dennis did not show a substantial change in circumstances and affirm the district court's denial of Dennis's request for modification.

Sandra requests attorney fees on appeal.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Sandra's lower income, Dennis's increased ability to pay and Sandra's obligation to defend this action on appeal combine to persuade us to award her attorney fees. We award Sandra $2,441.50 in appellate attorney fees.

We affirm the district court.

AFFIRMED.