IN THE COURT OF APPEALS OF IOWA

No. 1999-515 (9-772) / 99-774
Filed February 9, 2000

IN RE THE MARRIAGE OF JENNIFER ANN GORDON AND KEVIN DALE GORDON

Upon the Petition of
JENNIFER ANN GORDON,

Petitioner-Appellee/Cross-Appellant,

And Concerning
KEVIN DALE GORDON,

Respondent-Appellant/Cross-Appellee.

FILED
FEB 0 9 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Calhoun County, Ronald H. Schechtman, Judge.

The respondent appeals, and petitioner cross-appeals, from a district court ruling modifying primary physical care of the parties' minor child and setting visitation. **AFFIRMED.**

James W. McCarthy, Fort Dodge, for appellant.

Dan T. McGrevey, Fort Dodge, for appellee.

Considered by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

ZIMMER, J.

Kevin Gordon appeals from a district court ruling modifying primary physical care of the parties' minor child, Mason. On cross-appeal, Jennifer Gordon requests an award of appellate attorney fees. We affirm the district court's decision to award primary physical care of Mason to Jennifer.

I. Background Facts and Proceedings. Kevin and Jennifer Gordon were married in June of 1994. Their son, Mason, was born in September 1994. The couple separated in early 1996. Jennifer filed for divorce in April that same year. The marriage was dissolved by a stipulated decree of dissolution entered in June of 1997. The parties agreed to share both joint legal custody and physical care of Mason. Their divided custody arrangement provided for three alternating periods of physical care each week. Their agreement did not specify when alternating weekday custody periods were to begin and end. Not surprisingly, problems with the shared custody arrangement developed almost immediately. In February 1998, Kevin and Jennifer jointly requested the court to enter an order clarifying their own stipulation. An order was entered by the district court specifying the time when Kevin's alternating periods of weekday physical care were to begin and end. However, even after the clarifying order was entered, significant problems with the divided custody arrangement continued.

In October 1998, Kevin petitioned for modification of the original decree, requesting: (1) a decrease in his child support obligation; (2) a clarification regarding the school district which Mason was to attend; and (3) an order requiring Jennifer to pay her share of Mason's uninsured medical costs within a certain time

period. Jennifer filed a counterclaim, requesting the court to modify the split custody arrangement and award her primary physical care. At trial, Kevin requested that primary physical care of Mason be awarded to him. Trial was held in April 1999. The district court modified the decree, placed Mason in Jennifer's primary care, awarded Kevin visitation, and ordered him to pay $425 per month in child support. Kevin now appeals.

II. Scope of Review. We review the record de novo in a proceeding to modify the custodial provisions of a decree. *Dale v. Pearson,* 555 N.W.2d 243, 245 (Iowa App. 1996). We give weight to the findings of the trial court, although they are not binding. *Id.*

III. Modification of Primary Physical Care. Kevin contends the district court should have placed Mason in his primary physical care. Although Jennifer has filed a "cross appeal," she does not challenge any substantive ruling made by the district court but only seeks an award of appellate attorney fees.

The court can modify custody only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa App. 1998). A change must be more or less permanent and relate to the welfare of the child. *Id.* The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. *In re Marriage of Courtade,* 560 N.W.2d 36, 37 (Iowa App. 1996) (citations omitted). In child custody cases, the best interest of the child is the governing consideration. *Id.* (citation omitted) The

critical issue in determining the child's best interests is which parent will do better in raising the child. *Id.* (citation omitted). The objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *Id.* (citation omitted). Separation of siblings and half-siblings must promote the child's best interests. *See In re Marriage of Orte,* 389 N.W.2d 373 (Iowa 1986).

The original stipulated decree gave Kevin and Jennifer joint custody and joint physical care of Mason. Their joint physical care arrangement was a disaster. Joint physical care agreements require communication and cooperation. Kevin and Jennifer cannot cooperate, they communicate poorly, and show little respect for each other as parents. On appeal, neither party contends their shared physical care arrangement is workable and should continue. Our de novo review of the record leads us to the same conclusion—one of the parents must be selected as Masons' primary physical caregiver.

At the time the marriage was dissolved, Kevin was employed by the Chicago Central Railroad. His hours were unpredictable and his job sometimes required him to be out of town for several days at a time. Kevin resigned from the railroad in August 1998. He was then employed by Fort Dodge Laboratories working a 4:15 p.m. to 12:45 a.m. shift. Kevin was laid off in January of 1999 but expects to be called back to work. He earned fifteen dollars per hour working for the railroad and slightly less than that at the laboratory. At the time of trial, Kevin was helping his father-in-law in the construction business, without reimbursement, and receiving unemployment benefits.

Jennifer has a child by a previous relationship. Her other son, Logan Shane Fischer, was born in February 1992. Jennifer was never married to Logan's father, although they lived together before and after his birth. After Kevin's and Jennifer's marriage was dissolved, she moved to Fort Dodge and married Bryan McCarthy. He works as a machine technologist, has no children, and has a good relationship with Mason and Logan. Jennifer has been employed by a dentist in Fort Dodge since 1995. She works Tuesdays, Thursdays and Fridays. Jennifer and Bryan are purchasing a four-bedroom home on the outskirts of town. Mason has his own room.

Kevin remarried in November of 1997. His new spouse, Cindy, is the primary custodian of three children from a previous marriage. The five reside together. Cindy works full time as a dental hygienist.

Both Kevin and Jennifer point to the other's past behavior as evidence of unfitness for custodial care responsibilities. No useful purpose would be served by reciting each one's list of the other's respective errors in conduct. It suffices to say that both have engaged in immature and inappropriate conduct which reflects poorly on their abilities to parent. Despite their sometimes bitter criticism of one another, we agree with the trial court's conclusion either parent, assisted by his or her respective spouse, would be an appropriate caretaker for Mason.

After carefully considering the evidence presented, the trial court found the long-range best interests of Mason would be better served by placement with Jennifer. The trial court gave a number of reasons in support of its decision. It found separation of Mason from his half-brother, Logan, was not in his best

interests and compelling reasons did not exist to split them. It found Jennifer did a commendable job serving as Mason's principal caretaker under difficult circumstances until the separation. It noted the home environment she provided was more than adequate. It found Jennifer respected the visitation rights of the fathers of Mason and Logan. It found that a report by the Spencer Child Consultation Clinic vindicated Jennifer's stance on health issues related to Mason's asthma and allergies. Finally, the court found Kevin had sought to gain custody of Mason by a plan designed to denigrate Jennifer. It gave several credible examples of that conduct.

Kevin complains bitterly about the conclusions drawn from the evidence by the trial court. After the court entered its modification decree, Kevin filed a "Motion to Expand Findings" that was highly critical of the trial court and unduly pejorative in tone. In ruling on the motion, the trial court made an observation worth repeating:

> Kevin's motion appears to disregard the fact that the Court observes the parties and measures each of their credibility [sic]. Because evidence is submitted does not mean that it is necessarily probative, credible, material to an issue, or contradictive of other findings.

We agree with this observation.

Deciding custody cases is never easy. Making a custody assessment requires trial judges to look at both the affirmative and negative attributes of each parent and their plans for future care of the children. *See In re Marriage of Daniels,* 568 N.W.2d 51, 57 (Iowa App. 1997). Inevitably, evidence presented at trial is conflicting. In this case, our de novo review of the record reveals the trial court examined the negative attributes of each parent and considered them adversely on each parent's ability to parent Mason. The court also considered positive attributes.

It found each party had capable parenting skills and would be an appropriate custodial parent. The court selected Jennifer to be Mason's primary physical caretaker, subject to liberal visitation with Kevin. The record supports this conclusion. The trial court personally observed the parties and their witnesses. It made credibility, maturity and stability assessments based on its observations and the evidence. Giving due deference to the trial court's findings, we affirm the modification.

IV. Appellate Attorney Fees. Jennifer requests appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Vieth,* 591 N.W.2d 639, 641 (Iowa App. 1999) (citations omitted). 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 district court's decision on appeal. *Id.* On Jennifer's cross-appeal, we award her $500 in appellate attorney fees.

We have considered all of the arguments of the parties but have addressed only those of material significance to our decision. We conclude the trial court was correct in sustaining Jennifer's application to modify. Costs of this appeal are taxed to Kevin.

AFFIRMED.