IN THE COURT OF APPEALS OF IOWA

No. 1-693 / 01-0154
Filed December 28, 2001

IN RE THE MARRIAGE OF DOVE E. VON AHSEN AND CRAIG ALAN VON AHSEN

Upon the Petition of
DOVE E. VON AHSEN,
Petitioner-Appellant,

and Concerning
CRAIG ALAN VON AHSEN,
Respondent-Appellee.

FILED
DEC 28 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Douglas S. Russell, Judge.

Dove Von Ahsen appeals the district court's order modifying the dissolution decree and awarding primary physical care to Craig Von Ahsen. **AFFIRMED.**

Linda Hansen Robbins of Irvine & Robbins, L.L.P., Cedar Rapids, for appellant.

Karen Volz of Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Mahan and Hecht, JJ.

000496

MAHAN, J.

Dove Von Ahsen appeals the district court's order modifying the parties' dissolution decree and awarding primary physical care to Craig Von Ahsen. She contends (1) Craig failed to meet his burden of proof the shared care arrangement was not in the best interests of the children; (2) the trial court erred in changing this arrangement; and (3) she is entitled to trial and appellate attorney fees. We affirm.

Background Facts and Proceedings. Dove and Craig are the parents of two children, Kirsten, born January 14, 1989, and Kylee, born June 10, 1993. The parties' marriage was dissolved on September 25, 1996. The decree of dissolution incorporated the parties' stipulation, which provided Dove and Craig would have joint legal and physical custody of the children. By agreement of the parties, the decree also provided the children would attend school in the Center Point-Urbana school district. Any change in school districts would require a written agreement of the parties.

Since the original decree, both parents have failed to cooperate in their joint custodial roles with the children. The parties have had difficulty with the care schedule, and arguments in front of the children have become common. In November 1999 Craig filed a petition to modify the decree claiming there had been a substantial change in circumstances and that primary physical care of the children should be awarded to him. Dove filed a cross-petition claiming primary physical care of the children should be awarded to her.

000437

Following a trial the district court entered a ruling in December 2000, modifying the decree by awarding primary physical care of the children to Craig and providing Dove with a regular visitation schedule. The court found there had been a material and substantial change of circumstances, in that the shared custody arrangement was no longer workable. The court also found Craig's home provided the most stability and he would be most likely to assure the children have relationships with all members of their family. Each party was ordered to pay his or her own attorney fees. Dove appeals.

Standard of Review. Our review of child custody modifications is de novo. *In re Marriage of Fox,* 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact-findings, particularly when considering the credibility of witnesses, but they do not bind us. *Id.*

Modification of Custody. The court can modify custody only when there has been a material and 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 Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the children. *Id.* The burden to modify custody provisions is a heavy burden. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). The question is not which home is better, but whether the parent seeking modification can offer the children superior care. *In re Marriage of Whalen,* 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). Therefore, the parent seeking custody must prove an ability to minister

more effectively to the child's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996).

There is no disputing that there has been a material and substantial change in circumstances. Both parties so pled in their respective applications for modification, and each requested the court to make such a finding. As a result, the district court concluded, and we agree, the actual breakdown of the joint physical care arrangement, and the agreement of the parties that said arrangement is unworkable, is a material and substantial change of circumstances such as to allow modification of the original decree.

The question on appeal is whether the court erred in granting primary physical care of the children to Craig. As in all cases involving the question of custody, our first consideration in proceedings to modify custody is the best interests of the children. *Id.* "In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity." *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

After careful consideration of all of the evidence, the district court concluded the children's primary care should be transferred to Craig. Upon de novo review of the record, we reach the same conclusion.

Both parents love their children and are capable of providing a good home. Craig, however, is more suited to be the primary physical caregiver because he provides the more stable home environment for the children. Craig has had the same job since the decree of dissolution was entered, and he has a

flexible work schedule allowing him to leave the workplace at will as the need may arise. The children have adjusted to Craig's marriage to Linda. Craig and Linda are actively involved in the children's school activities. The district court found, and we agree, Craig is more likely to assure the children will have an ongoing relationship with Dove and all of their relatives. Therefore, we conclude Craig will provide the environment most likely to bring the children to a healthy physical, mental, and social maturity.

There is no doubt Dove loves her children. However, we agree with the district court that she is less mature than Craig and would provide a less stable home for the children. Dove has not shown a willingness to support the relationship between Craig and Linda. Without elaborating on the details reflected in the record, Dove does not like Linda, and she has shown hostility toward her in the presence of the children. On several occasions Dove has lost her temper and exhibited inappropriate behavior while the children were in her presence. In addition, she changed the children's school from Center Point-Urbana to Cedar Rapids without notice to Craig in direct violation of the stipulation.

We conclude Craig has shown a superior ability to minister to the children's needs. The children's best interests are served by granting primary physical care to Craig. Accordingly, we affirm the district court's ruling.

However, we do agree with Dove's argument as set forth in her request for rehearing. Paragraph 4b of the stipulation is vacated, and Dove is granted six weeks of summer visitation with the children. Dove is to notify Craig in writing at

least thirty days in advance concerning the dates that she will be exercising this summer visitation. Paragraph 4c is amended to grant Dove one-half of the children's Christmas break and one-half of spring break. Dove shall exercise this visitation during the first half of each break unless the parties agree otherwise.

Attorney Fees. Ordinarily, an award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels,* 542 N.W.2d 486, 490-91 (Iowa 1995). Attorney fees in actions for modification of dissolution decrees are not a matter of right. *In re Marriage of Krone,* 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). An award of attorney fees depends upon the financial circumstances of the parties and their respective ability to pay. *Wessels,* 542 N.W.2d at 491. The district court ordered each party to pay his or her own attorney fees. We conclude the district court properly considered this issue and we find no abuse of discretion.

Similarly, an award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Wood,* 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* We deny Dove's request for appellate attorney fees.

AFFIRMED.