IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1999-298 (9-528) 99-0113
Filed December 13, 1999

IN RE THE MARRIAGE OF ALMA ANDERSON AND GEORGE J. ROBINSON

Upon the Petition of
ALMA ANDERSON, f/k/a
ALMA AHERN,
Petitioner-Appellee/Cross-Appellant,

And Concerning
GEORGE J. ROBINSON,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Johnson County, William L. Thomas, District Court Judge.

Respondent appeals certain provisions of a ruling on the parties' petitions for modification contending the district court erred in awarding joint physical care. Petitioner requests appellate attorney fees if the respondent is unsuccessful.

AFFIRMED IN PART; REVERSED IN PART.

Davis E. Foster of Foster Law Office, Iowa City, for appellant.

Linda M. Levey of Levey Law Office, Iowa City, for appellee.

Considered by Sackett, C.J. and Zimmer and Miller, J.J.

MILLER, J.

George J. Robinson appeals those parts of a district court modification order which order shared physical care of the parties' child and deny George's request to decrease visitation.

The parties' marriage was dissolved by a January 5, 1995 consent decree. It provided for joint legal custody of the parties' child, George J. Robinson, III (Jackie) born July 18, 1990, and placed his "primary physical care" with Alma, subject to George's right to visit.

A "stipulated modification of decree" was approved by the court on June 26, 1996. It continued joint legal custody, and changed "primary physical care" to George, subject to Alma's right of visitation. The modification decree provided for Alma to have visitation from Wednesday morning to Saturday afternoon each week.

George filed an "Application to Modify Decree" on September 2, 1997. He seeks a drastic reduction in Alma's visitation with Jackie, related changes in child support, an award of attorney fees, and any other appropriate relief. Alma filed a resistance to George's Application, together with a counterclaim. In her counterclaim she alleged that the terms of the June 26, 1996 decree were misrepresented to her by George's attorney. She sought to have that decree set aside, Jackie's physical care restored to her, an award of attorney fees, and any other relief the court deemed appropriate.

Trial was held on November 4, 1998 and the court filed its ruling on November 23, 1998.

Testimony of the parties revealed that in practice they had divided equally Jackie's physical care at almost all times since their separation in 1994, each taking care of him three and one-half consecutive days each week. They had followed this practice regardless of who had "primary physical care". They had confirmed this arrangement through the June 26, 1996 stipulated modification decree.

Jackie has been diagnosed with ADHD, or Attention Deficit-Hyperactivity Disorder. Due to this condition his behavior, particularly at school, is at times difficult to control. A major point of contention between the parties is how to handle his discipline. Structure and consistency is important and needed. George is somewhat firmer with Jackie and more demanding of him than Alma is. He suggests that his method of disciplining Jackie is more consistent than Alma's and concludes that "primary physical care" should remain with him. Alma argues that consistency would be best served by continuing and formalizing, as the trial court did, the joint physical care which at the time of trial the parties had practiced for over four years, as it will continue to maximize Jackie's physical and emotional contact with each parent.

Testimony of several witnesses shows that Jackie likes the present arrangement by which he spends equal amounts of time with each parent, is comfortable with it, and wishes it to continue. The witnesses that so testified included an expert witness

presented by George who is a clinical psychologist and an expert witness presented by Alma who works as a child therapist, marriage and family therapist, custody evaluator and mediator. The clinical psychologist presented by George made it clear that she did not recommend any change in the parties' shared physical care arrangement.

In its ruling the trial court stated that "[t]he key problem appears to be the parties' failure to reach an agreement concerning appropriate discipline." It found that "[t]here otherwise does not appear to be any change of circumstances." It ordered that the parties "shall share physical care pursuant to the schedule that they have previously adopted ...". In doing so it implicitly denied George's request for a drastic reduction in the time which Jackie has been able to spend with Alma.

Having noted the parties' apparent failure to reach agreement concerning appropriate discipline of Jackie, the trial court remarked that "[t]he test in this case will be whether these parties can l ehave more maturely than their child in dealing with each other to reach agreement concerning consistent discipline for this child." It ordered the parties to meet with a mediator, if necessary, to discuss and reach agreement on a consistent set of rules for Jackie, a consistent set of discipline techniques for dealing with him, and a scheme for parental communication concerning him and his needs.

George urges that the district court "erred in the awarding joint physical custody" and that the environment which he offers is superior to Alma's, especially

in terms of stability and consistency. Alma urges that the district court properly awarded "joint physical custody", but that if the trial court's order is not upheld, Jackie's "primary physical care" should be placed with her. The trial court's ruling ordered "shared physical care". Our statutes speak in terms of "joint physical care". *See*, Iowa Code §§ 598.1(4) and 598.41(5) (1999). It is thus somewhat unclear what Alma means by "primary physical care" and what the parties mean by "joint physical custody", and whether either is what the trial court ordered. We will assume that the trial court intended "joint physical care", that is what George challenges, and that is what Alma supports.

In this equity case our review is de novo. Iowa R. App. P 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App.P.14(f)(7).

To change the physical care provisions of a dissolution decree, the petitioning party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the child's best interests make it expedient to make the requested change. Iowa Code § 598.21(8) (1999). The changed circumstances must not have been contemplated by the court when the decree was entered. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). They must be more or less permanent or continuous, and not temporary.

Id. They must relate to the welfare of the child. *Id.* The parent seeking to have physical care changed must prove an ability to minister more effectively to the child's well-being. *Id.* The heavy burden upon a party seeking to modify physical care stems from the principle that once physical care of a child has been fixed it should be disturbed only for the most cogent reasons. *Id.*

To justify a change of visitation rights the petitioning party must show there has been a change of circumstances since the decree. *Donovan v. Donovan*, 212 N.W.2d 451, 453 (Iowa 1973). However, the general rule is that a much less extensive change of circumstances need be shown to modify visitation than custody or physical care. *Id.*; *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998).

Although we review orders on petitions to modify custody and physical care provisions de novo, the trial court has reasonable discretion in passing upon the advisability or necessity for modification of custodial and visitation provisions of a decree, and on appeal we will not disturb its decision unless the record fairly shows it fails to do equity. *Norenberg v. Norenberg*, 168 N.W.2d 794, 797 (Iowa 1969).

At the time of trial the parties had for over four years equally shared Jackie's physical care. The trial court found that there had been no significant change in circumstances since the June 26, 1996 modification decree other than the parties' failure to reach an agreement concerning appropriate discipline. That finding is fully supported by the record. In its ruling it ordered the parties to take actions designed

to resolve that problem. For two reasons we conclude the trial court should not have modified the decree to provide joint physical care. First, neither party requested such a modification. Second, the one change in circumstances shown by the record and found by the trial court is of a limited nature and the trial court's ruling ordered the parties to take actions designed to resolve the problem caused by that change in circumstances. Accordingly, that limited change in circumstances is not of such a material, substantial and more or less permanent or continuous nature as would require or justify such a modification. We reverse that part of the trial court's decree of modification which ordered joint physical care.

As noted above, a much less extensive change of circumstances need be shown to modify visitation than custody or physical care. The trial court found only one limited change in circumstances, a finding fully supported by the record, and concluded it did not justify modification. We agree and affirm the trial court on this issue.

Alma requests appellate attorney fees. 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 Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996). We are to 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.* The trial court found Alma's income to be $29,000 per year and George's at $14,000 per year. Although Alma was obligated to defend

the district court's decision on appeal, she has been only partly successful in doing so. Further, neither her needs for an award of attorney fees nor George's ability to pay is great. We decline to award appellate attorney fees.

Disposition. We reverse that part of the trial court's modification ruling which ordered joint physical care. We affirm the denial of George's request for a decrease in Jackie's visitation with Alma. We decline to award appellate attorney fees.

AFFIRMED IN PART; REVERSED IN PART.

Sacket, C.J. concurs; Zimmer, J. concurs in part and dissents in part.

ZIMMER, J. (concurring in part and dissenting in part)

I respectfully dissent from the majority's decision to modify the trial court's ruling ordering shared physical care. Without using the terminology "joint physical care," the parties have in practice had a joint physical care arrangement for more than four years. They share parenting time equally, maintain separate homes for their child, and share routine child care. Their child wishes to continue the current arrangement. I do not believe it was error for the trial court to accurately describe the parties' actual custodial arrangement as part of its modification decree. I concur in all other aspects of the majority opinion.