IN THE COURT OF APPEALS OF IOWA

No. 1999-148 (9-364) / 98-1859
Filed October 15, 1999

IN RE THE MARRIAGE OF ELIZABETH M. JOHNSON and BRIAN N. JOHNSON

Upon the Petition of
ELIZABETH M. JOHNSON,
Petitioner-Appellee,

And Concerning
BRIAN N. JOHNSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Lee (South) County, John C. Miller, Judge.

Brian Johnson appeals from a district court order modifying the decree dissolving his marriage to Elizabeth Johnson. He contends the district court erred in transferring primary physical care of their minor child to Elizabeth and in ordering him to pay all costs for the child's court-appointed attorney. **AFFIRMED.**

Steven E. Ort of Bell, Ort & Cornell, P.C., New London, for appellant.

Bruce C. McDonald of McDonald Law Office, Keokuk, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ. Miller, J., takes no part.

MAHAN, J.

Brian Johnson appeals from a district court order modifying the decree dissolving his marriage to Elizabeth Johnson. He contends the district court erred in transferring primary physical care of their minor child to Elizabeth and in ordering him to pay all costs for the child's court-appointed attorney. We affirm.

Brian and Elizabeth Johnson are the parents of Jeremy Johnson who was born on July 16, 1990. At the time of the dissolution in February of 1997, Jeremy's parents and both sets of grandparents lived within seven miles of each other in the Keokuk, Iowa area. The parties were awarded joint legal custody in the dissolution. Brian was awarded primary physical care of Jeremy. We affirmed on appeal.

In March of 1998, Brian filed a petition requesting modification of the visitation provisions of the dissolution decree alleging his acceptance of employment in Omaha was a material and substantial change in circumstances that warranted such a modification. The move to Nebraska placed Jeremy some 280 miles and five hours away from Elizabeth and his grandparents which Brian felt made the existing visitation schedule difficult or impossible to maintain. Elizabeth answered Brian's petition and filed her own petition for modification alleging Brian's repeated denial of visitation requests beyond the minimum ordered, his refusal to share information regarding Jeremy, and his intent to move to Nebraska constituted a material and substantial change in circumstances warranting a modification of the primary physical

care award. She also alleged it is in Jeremy's best interest to modify the decree and award her primary physical care.

The district court decision, in part, reads as follows:

> The Court concludes that Elizabeth has established by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that Jeremy's best interests make it expedient to change his physical care from Brian to her. These changed circumstances, which include but are not limited to Brian impeding the relationship between Jeremy and Elizabeth, ignoring Elizabeth's rights as a joint legal custodian, and ignoring his responsibilities as a joint legal custodian, were not in the contemplation of the Court when the decree was entered, appear to be more or less permanent or continuous rather [than] temporary, and clearly relate to Jeremy's welfare. Elizabeth has shown an ability to minister more effectively to Jeremy's well being through the evidence presented that Brian has impeded and frustrated Jeremy's relationship with Elizabeth and that Elizabeth would not impede or frustrate Jeremy's relationship with Brian.

Elizabeth's petition for modification was granted. A minimum schedule for visitation between Jeremy and Brian was established. Elizabeth's child support obligation was terminated and Brian's child support obligation was established. Brian was ordered to pay all costs for Jeremy's court-appointed attorney.

Brian appeals.

I. STANDARD OF REVIEW. Our review of child custody modifications is de novo. Iowa R. App. P. 4; *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 we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N. at 28.

II. MODIFICATION. Brian contends the move to Omaha and his post-decretal behavior do not constitute evidence that conditions since the order was entered have so materially and substantially changed that Jeremy's best interest makes it expedient to make the requested change. We disagree.

Custody, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). To change a custodial provision of a dissolution decree, the party seeking modification must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially changed that the child's best interest make it expedient to make the requested change. *See 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)). The change must be more or less permanent and relate to the welfare of the children but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998).

The burden to modify custody provisions of a dissolution decree is a heavy burden. *See In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998). The question is not which home is better, but whether the parent seeking modification can offer the child superior care. *Id.*; *Whalen*, 569 N.W.2d at 628. Elizabeth must show an ability to minister more effectively to Jeremy's well-being. *See Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the child, custody should not be changed. *Id.*

We consider the factors found in Iowa Code section 598.41 in determining whether to modify a custody arrangement. *See In re Marriage of Bolin*, 336 N.W.2d 441, 443, 445-46 (Iowa 1983); Iowa Code § 598.21(8). Our focus is on the long-range best interests of the child. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Those interests include the opportunity for maximum continuing physical and emotional contact possible with both parents. *Id.*; Iowa Code § 598.1(1). Refusal by one parent to provide this opportunity without just cause shall be considered harmful to the best interest of the child. Iowa Code § 598.1(1).

The original decree of dissolution was filed on February 17, 1997. The district court found the custody issue to be "extremely close" and concluded the case was "not about glaring flaws or deficiencies in either or both parents, as is sometimes the case. Both parents are capable, intelligent, hard-working, moral, and religious persons of good standing." Our court, in affirming the district court's decision, concluded "evidence of Brian's superior ability to communicate with [Elizabeth] on issues of mutual parental concern distinguish him as the preferred physical caretaker. Awarding Brian physical care increases the probability that the shared parenting objectives inherent in a joint custody award will be accomplished."

Brian had offered sworn testimony at the dissolution trial that if awarded primary physical care he would allow Elizabeth to spend quality time with Jeremy including, but not limited to, picking Jeremy up after school and spending time with him until Brian returned from work. However, shortly after the decree was filed,

Brian informed Elizabeth that for the first six months she would get no additional time with Jeremy over and above the minimum visitation ordered by the district court. From February, 1997 until June, 1998, Elizabeth was allowed to pick Jeremy up after school on only two occasions. Brian routinely denied Elizabeth's requests and had his parents and others pick Jeremy up from school. The record reflects he wrote Elizabeth on December 15, 1997, and stated, "due to your continuing poor behavior at KCA (Keokuk Christian Academy) there will no longer be any extra visitation arrangements taking place at KCA." Brian testified under oath that Jeremy's teacher, Mrs. Adams, and the teacher's aide, Mrs. McKnight, had reported the "poor behavior" to him. They both denied under oath ever making such a statement to Brian. In addition, Brian provided KCA with a list of people authorized to pick Jeremy up from school. Elizabeth was not authorized to do so even in the event of a medical emergency. The record shows Brian had enrolled Jeremy at KCA over Elizabeth's objection it was not accredited. Elizabeth was not informed of behavioral problems Jeremy was exhibiting or a potential problem with attention deficit disorder. When Elizabeth inquired about Jeremy's progress, Brian would respond "if it concerns you I'll tell you" or "if you have questions ask the teacher." Elizabeth finally set up weekly meetings with the teacher to discuss the child's progress.

The record establishes a pattern of denials of requested extra visitation including incidents where Elizabeth was not allowed to take Jeremy to celebrate his

maternal grandmother's birthday or allowed to take Jeremy to a memorial service for his great-grandmother.

Evidence presented at the dissolution trial established Brian and Elizabeth are both Methodists and Brian testified he planned to raise Jeremy as a Methodist. However, after he was granted primary physical care, he informed Elizabeth he had decided Jeremy would join the New Testament Christian Church.

Of great concern in this case is Brian's move to Bellevue, Nebraska. Brian had been employed by J.I. Case Corporation in Burlington at an annual salary of $36,000. This allowed Brian and Jeremy to live in Keokuk within seven miles of Elizabeth and the grandparents. On April 3, 1998, Brian began employment with Pinnacle Information Services of Omaha. His new annual salary was $44,000.[1] Brian and Jeremy moved to Bellevue on June 2, 1998. It is undisputed Brian did not consult with Elizabeth about the new employment or the move to Bellevue.[2] His stated reason for accepting new employment and moving was Case would require extensive travel on his part. Bellevue is 280 miles and five hours from Keokuk. This move had a direct effect on Jeremy's ability to visit with Elizabeth[3] and his grandparents. The

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[1] Brian was offered $40,000 annually to stay with Case in Burlington.

[2] Our supreme court has stated a "decision by a joint custodial parent with physical care of children to move out-of-state is obviously the kind of decision the other joint custodian has a right to be consulted about." *Frederici*, 338 N.W.2d at 159.

[3] On one occasion Brian and Jeremy came back to Keokuk for a weekend visit. Brian did not inform Elizabeth he was in the area or take any steps to insure contact between Jeremy and his mother. Elizabeth only found out about the weekend visit after Brian and Jeremy had returned to Bellevue.

district court also noted the move took Jeremy away from his friends, the neighborhood he lived in and the schools he had attended.

The district court granted Elizabeth's requested modification and concluded the decision was "not close". The district court noted Brian had denied many of Elizabeth's allegations but decided the credibility issue in Elizabeth's favor. The district court stated:

> The evidence makes it clear that through his attitudes, beliefs, acts and omissions Brian has not only failed to foster and support Jeremy's relationship with Elizabeth, but has in fact impeded and frustrated that relationship. Further, through his apparent desire to minimize Elizabeth's contacts with Jeremy he has also impeded Jeremy's relationship with both sets of grandparents and the other relatives which he has in the Keokuk, Iowa area. There is no reason to believe that Brian will change his attitudes, beliefs, acts or omissions if Jeremy's physical care remains with him. No substantial evidence suggests that if Jeremy's physical care is transferred to Elizabeth she will act in a similar manner. The evidence shows that she will support and foster Jeremy's relationship with Brian and other members of Jeremy's extended families.

The district court then concluded Elizabeth had established a material and substantial change in circumstance occurred and Elizabeth had shown an ability to minister more effectively to Jeremy's well being. We agree. We affirm the district court on this issue.

III. DEFERENCE TO DISTRICT COURT. Brian argues the district court's findings of facts should be given no deference. He alleges the district court allowed Elizabeth to present evidence regarding Brian's motives and on issues beyond the scope of her pleading but refused to allow Brian to present evidence regarding

Elizabeth's motives and on issues beyond the scope opf Elizabeth's pleadings. He contends he was prejudiced because the district court refused to consider relevant and material facts and relied upon matters not asserted in the pleadings as the basis for its ruling. We have reviewed the record and find these issues to be without merit.

IV. ASSESSMENT OF ALL COURT-APPOINTED ATTORNEY COSTS TO BRIAN. Brian argues the district court erred in assessing to him all of the costs of Jeremy's court-appointed attorney. We have carefully reviewed this issue and find it to be without merit. Iowa Code § 598.12(3); *In re Blessings Marriage*, 220 N.W.2d 599, 606-07 (Iowa 1974).

AFFIRMED.