IN THE COURT OF APPEALS OF IOWA

No. 1999-591 (9-852) / 99-0701
March 15, 2000

IN RE THE MARRIAGE OF GAIL A. FRUCHTENICHT AND JEROLD M. FRUCHTENICHT

Upon the Petition of
GAIL A. FRUCHTENICHT, n/k/a
GAIL A. SCHILLING,
Petitioner-Appellee,

And Concerning
JEROLD M. FRUCHTENICHT,
Respondent-Appellant.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

The respondent appeals a district court order: (1) denying his application to modify the child custody provision of the parties' dissolution decree; (2) increasing his child support obligation; and (3) ordering him to pay petitioner's attorney fees and fees for the guardian ad litem. **AFFIRMED AS MODIFIED.**

Elizabeth A. Lounsberry and Sarah Dooley-Rothman of Lounsberry Law Office, Independence, for appellant.

Charles P. Augustine of Dunakey & Klatt, P.C., Waterloo, for appellee.

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

HECHT, J.

Jerold Fruchtenicht, respondent, appeals a district court order: (1) denying his application to modify the child custody provision of the parties' dissolution decree; (2) increasing his child support obligation; and (3) ordering him to pay petitioner's attorney fees and fees for the guardian ad litem. Gail Fruchtenicht (n/k/a Gail Schilling) cross-appeals seeking appellate attorney's fees. We affirm as modified.

I. Factual Background and Proceedings. Gail Fruchtenicht ("Gail") and Jerold Fruchtenicht ("Jerold") were married in May of 1982. They have three children from that marriage: Kati, now sixteen; Joseph, now thirteen; and Sara, now twelve. Jerold and Gail divorced in October of 1992.

Both parties have remarried. Jerold married Teri Dufoe on July 10, 1993. They do not have children together but Cari, Teri's daughter from a previous marriage, lives with them. Gail married Ron Schilling on January 13, 1996. Gail and Ron have a two-year old son, Matthew.

In the original decree, the district court awarded joint custody to both parents with physical care to Gail. The district court awarded Jerold liberal visitation with his children, including weekends, some evenings, alternating holidays, and summers. Jerold was also ordered to pay child support of $404 per month. Gail appealed from the property division and child support provisions of the decree, and Jerold appealed on the issue of child custody. This court modified the property division and affirmed the district court on the issues of child

custody and child support. *See In re Marriage of Fruchtenicht,* No. 94-184 (Iowa App. Dec. 14, 1994).

Gail is currently employed as a loan processor for First Nashua State Bank. Her husband, Ron, is a self-employed farmer. Jerold is also a farmer and owns a fifty percent interest in a farm partnership with his uncle. Jerold's wife, Teri, is a self-employed cosmetologist.

Jerold initiated this action to modify physical care of the children because of his concern Kati might run away from her mother's home. He asserts Kati, Joseph, and Sara all indicated after entry of the dissolution decree they wanted to live with him instead of their mother. In her cross-petition, Gail requests an increase of Jerold's child support obligation. The parties make mutual attacks against each other with respect to various improprieties, and each claims to be able to better minister to the needs of the minor children. Kati has recently expressed the strong preference to live with Gail, but her two younger siblings have indicated a desire to live with Jerold. None of the three children presents behavior problems in their current living environment with Gail. The children are normal youngsters without special needs. Kati, Joseph, and Sara are doing very well academically.

On March 29, 1999, the district court determined the best interests of the children required they stay with their mother and overruled Jerold's petition for modification. The court granted Gail's petition for modification of child support and increased Jerold's support payments to $934 per month. The court further ordered Jerold to pay $1000 of Gail's attorney's fees. On June 11, 1999, the

guardian ad litem filed an application for compensation. On July 8, 1999, the district court ordered Jerold to pay the guardian ad litem's fees totaling $2,558.07. Jerold appeals.

II. Standard of Review. Because this is an equity action, our review is de novo. Iowa R. App. P. 4. In our review, we examine the entire record and adjudicate anew the rights on the issues properly presented. *In re Marriage of Maher,* 596 N.W.2d 561, 564 (Iowa 1999); *In re Marriage of Steenhoek,* 305 N.W.2d 448, 452 (Iowa 1981). Although we give weight to the district court's factual findings, we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Modification of Child Custody. Jerold claims the district court erred when it refused to modify the custodial terms of the dissolution decree. Courts can modify the custodial terms of dissolution decrees only when there has been a substantial post-decree change in circumstances. *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa App. 1998). The best interests of the children are paramount in this decision, and the court's objective is to place the children "in the environment most likely to bring them to healthy physical, mental, and social maturity." *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999). The parent who can administer most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives is chosen as primary physical caregiver. *In re Marriage of Daniels,* 568 N.W.2d 51, 53 (Iowa App. 1997). We are not bound by the district court's findings but give them deference because the district court had an

opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *Walton,* 577 N.W.2d at 871.

Jerold and Gail's relationship has been marked with animosity since their divorce. The record abounds with examples of the parents' accusations against each other. We decline to enter the fray by discussing specific allegations of mutual misconduct. Unfortunately, the children are caught in the middle. They are doing very well living with their mother and stepfather despite the discord between Gail and Jerold. Kati excels in school, gets along well with others, has many friends, and is involved in many activities. While she had originally expressed the desire to move to Jerold's home, she now states she wants to stay with Gail. The district court observed, "Kati does not want to live with their father. Her resistance is such that if the court were to order it, that order would be disregarded."

Joseph and Sara are also doing very well. They are both "A" students, are well behaved, and get along well with others. Jerold relies on statements made by Joseph and Sara declaring they would rather live with their father than their mother. We give some weight to the preferences of the children, but less weight in a modification than in an original custodial determination. *In re Marriage of Mayfield,* 577 N.W.2d 872, 873 (Iowa App. 1998). While Joseph and Sara expressed preferences, at trial they both admitted they would like to stay with their mother as well.

We also must consider Kati, Joseph, and Sara have a half-brother, Matthew, who lives with them. Siblings should not be separated from one

another without good and compelling reasons. *In re Marriage of Smiley,* 518 N.W.2d 376, 380 (Iowa 1994). We see no compelling reason in the record to separate Matthew from his siblings.

The guardian ad litem in this case also indicated the children are doing very well at the present time. He met with Kati, Joseph, Sara, their parents, and their stepparents. He opined, while there are difficulties between Gail and Jerold, they have raised their children well. After reviewing the record and attending the trial, he did not feel the children should be removed from Gail's primary physical custody.

While each parent tries to call attention to the faults of the other, both Jerold and Gail appear to be good parents. The parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. *In re Marriage of Gravatt,* 371 N.W.2d 836, 838 (Iowa App. 1985). This heavy burden comes from the principle once custody has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Moore,* 526 N.W.2d 335, 337 (Iowa App. 1994). Jerold has failed to meet his burden in this modification action of showing his ability to care for his children is superior to Gail's. We see no reason in the record to disturb the custody arrangement in this case. Consequently, we affirm the district court's denial of Jerold's petition to modify custody.

IV. Modification of Child Support. Iowa Code section 598.21(8) allows the court to modify an order of child support when a substantial change in circumstances is shown. The party seeking modification must establish there

has been a substantial change in circumstances by a preponderance of the evidence since the entry of the decree or its latest modification. *In re Marriage of Lee,* 486 N.W.2d 302, 304 (Iowa 1992).

The original decree ordered Jerold to pay $404 monthly in child support based upon findings he had a net monthly income of $1100 compared to Gail's net monthly income of $849. In its March 29, 1999 order, the district court found Jerold's monthly income was $2376 and increased the child support obligation to $934 per month. On appeal, Jerold contends there has been no substantial change of circumstances with respect to his net earnings since the entry of the decree. We agree.

Jerold's income from farming fluctuates significantly from year to year. Although it is not clear from the district court order, it appears Jerold's 1997 share of the net farm partnership income was used to calculate the support obligation. This produced an inequitable result given the substantial fluctuation of the farm partnership income from year to year since the dissolution decree was entered. When a parent's income is subject to substantial fluctuations, it may be necessary to average the parent's income over a reasonable period when determining the current monthly income. *In re Marriage of Knickerbocker,* 601 N.W.2d 48, 52 (Iowa 1999); *In re Marriage of Cossel,* 487 N.W.2d 679, 683 (Iowa App. 1992).

From the income tax returns in the record, we determine Jerold's share of the average annual farm partnership net income for the years 1993 through 1998

is $12,732, or a monthly average net income of $1031.[1] Although the record reflects Jerold's current monthly partnership "draw" is only $800, he continues to receive other benefits such as a rent-free residence from the partnership.[2] Applying the child support guidelines, and using Gail's monthly net income of $890, the monthly support obligation is $378.37 per month. This represents less than a ten percent deviation from the monthly support obligation of $404 established in the decree. Unless the deviation between an existing order for child support and the amount that would be due under the most current child support guidelines is ten percent or more, it does not constitute a substantial change in circumstances. *See* Iowa Code § 598.21(9); *In re Marriage of Wilson,* 572 N.W.2d 155, 156 (Iowa 1997). Accordingly, we find no substantial change of circumstances to justify a modification of the child support obligation. The district court erred in increasing Jerold's support payment to $934 per month.

V. Attorney's Fees.

A. Gail's Trial Attorney's Fees. The district court awarded Gail $1000 in attorney's fees. Jerold contends this award was an abuse of the district court's discretion. Attorney fees are not awarded as a matter of right. *In re Marriage of O'Rourke,* 547 N.W.2d 864, 867 (Iowa App. 1996). An award of attorney's fees is based on the parties' respective needs and ability to pay. *In re Marriage of Lattig,* 318 N.W.2d 811, 817 (Iowa App. 1982). The district court has

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[1] Jerold's fifty percent share of the net farm partnership income was as follows: $33,520 in 1993; a loss of $35,680 in 1994; $8300 in 1995; $29,891 in 1996; $39,552.50 in 1997; and $809 in 1998.

[2] Jerold's "draw" was $1000 per month at the time of the dissolution.

considerable discretion in awarding attorney's fees. *In re Marriage of Schettler,* 455 N.W.2d 686, 689 (Iowa App. 1990). We will not interfere unless there is a manifest abuse of discretion. *O'Rourke,* 547 N.W.2d at 867. Seeing no abuse of discretion in the district court's award, we affirm on this issue.

B. Guardian Ad Litem's Fees. The district court ordered Jerold to pay the guardian ad litem's fees. Jerold filed the action to modify custody and was not successful. We note Jerold requested the appointment of the guardian ad litem. We find no abuse of the district court's discretion in ordering Jerold to pay the guardian ad litem's fees.

C. Gail's Appellate Attorney's Fees. Gail requests an award of appellate attorney fees. When determining whether to award attorney's 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 district court's decision on appeal. *In re Marriage of Ales,* 592 N.W.2d 698, 704 (Iowa App. 1999); *In re Marriage of Wood,* 567 N.W.2d 680, 684 (Iowa App. 1997). After considering these factors, we determine the parties shall each pay their own appellate attorney's fees. Each party shall pay fifty percent of the costs of this appeal.

AFFIRMED AS MODIFIED.