IN THE COURT OF APPEALS OF IOWA

No. 0-013 / 98-2206
Filed March 15, 2000

IN RE THE MARRIAGE OF CAROL SUE FICKLING AND SCOTT F. FICKLING

Upon the Petition of
CAROL SUE FICKLING,

Appellee,

And Concerning
SCOTT F. FICKLING,

Appellant.

FILED
MAR 1 0 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Edward B. DeSilva, Judge.

Scott Fickling appeals the district court's order removing the physical care of the parties' minor child from him and placing the chid with Carol Fickling. **AFFIRMED.**

Harold DeLange, II, Davenport, for appellant.

M. Leanne Tyler of Tyler & Associates, P.C., Davenport, for appellee.

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

VAITHESWARAN, J.

Scott and Carol Fickling married in 1987. Together, they have one child, Chelsea, born on September 7, 1990. The parties divorced in 1994. The court awarded them joint custody and designated Carol as Chelsea's primary physical caretaker. On September 27, 1996, the court entered a stipulated order temporarily transferring physical care of Chelsea to Scott.[1] The order also cancelled Scott's child support obligation for the time that he would be caring for Chelsea. On January 9, 1998, Carol applied to modify the decree to restore her role as Chelsea's primary caretaker. The district court granted the application and Scott appealed. We affirm.

Carol contends the September 1996 order transferring physical care from Carol to Scott was a temporary order. Therefore, she maintains she was not required to prove a material and substantial change in circumstances to have the order vacated. We agree.

I. Status of Temporary Order

Parties may contract away certain obligations and the courts will give effect to the agreement as long as it is not inequitable. *In re Marriage of Handeland*, 564 N.W.2d 445, 447 (Iowa App. 1997). The parties did just that. In 1996, they jointly applied to transfer physical care of Chelsea to Scott. The court modified the decree to temporarily transfer primary physical care to Scott. The order did not require the parties to prove a material and substantial change in circumstances since entry of the decree.

[1] The court file does not contain the joint application to modify the decree.

Therefore, we conclude the September 1996 order was simply a ratification of a voluntary agreement between the parties, rather than a permanent modification of the decree. *See Davis v. Davis*, 237 N.W.2d 455, 456 (Iowa 1976) (district court entered temporary order directing that decree be temporarily modified to provide custody of children to non-custodial parent without need for showing of substantial change in circumstances); *cf. In re Guardianship of Stewart*, 369 N.W.2d 820, 823-24 (Iowa 1985) (holding parent did not relinquish presumptive right to custody when he agreed to appointment of temporary guardians over child).

II. Modification of Application

Carol's 1998 application to modify the arrangement states:

> The purposes for temporary custody are well known between the parties and the Petitioner, CAROL SUE FICKLING, is now capable of restoration of full physical care and sole custody to herself and same should now be granted.

The district court did not require Carol to prove a material and substantial change in circumstances. Instead, the court stated:

> The Court has heard the evidence offered and finds that at this time the Court has no alternative but to find that the previous temporary custodial order entered in this cause shall be and is hereby terminated. That said order is modified by this point awarding joint custody to petitioner and respondent with physical care in petitioner.

We conclude that Carol's 1998 modification application is in fact an application to set aside the temporary order and have the parties revert to the physical care provisions contained in the decree. *See In re Marriage of Springer*, 538 N.W.2d 897, 899-900 (Iowa App. 1995), *rev'd on other grounds*, *In re Marriage of Denly*, 590 N.W.2d 48 (Iowa 1999). Therefore, Carol was not obligated to show a material and substantial change in circumstances since entry of the temporary

order. Instead, if Scott wished to have permanent physical care of Chelsea the burden rested with him to seek modification of the decree and to prove a substantial and material change of circumstances since entry of the decree. *See Black v. Black,* 203 N.W.2d 121, 124-25 (Iowa 1972); *In re Anderson,* 530 N.W.2d 741, 742 (Iowa App. 1995); *In re Marriage of Smith*, 491 N.W.2d 538, 540 (Iowa App. 1992); *In re Marriage of Scott*, 457 N.W.2d 29, 31 (Iowa App. 1990). He did not do so. Accordingly, Carol retained primary physical care of Chelsea, pursuant to the terms of the dissolution decree. We affirm the district court's decision to transfer physical care of Chelsea back to Carol.

AFFIRMED.