IN THE COURT OF APPEALS OF IOWA

000159

No. 7-714 / 97-0884
Filed March 27, 1998

FILED
MAR 27 1998
CLERK SUPREME COURT

IN RE THE MARRIAGE OF SHARI HOEFLING AND GARY HOEFLING

Upon the Petition of
SHARI HOEFLING,
Appellee,

And Concerning
GARY HOEFLING,
Appellant.

Appeal from the Iowa District Court for Clay County, Patrick M. Carr, Judge.

Respondent appeals from the district court order denying his modification petition. **AFFIRMED.**

Edward N. Bjornstad of Narey, Chozen & Saunders, Spirit Lake, for appellant.

Nancy L. Whittenberg, Spencer, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

HUITINK, P.J.

Gary Hoefling appeals the district court's order denying his application for modification of the custodial provisions of the decree dissolving his marriage to Shari Hoefling. We affirm.

I. Background Facts and Proceedings.

Gary and Shari were married in June 1984. They have three children: Kari and Kory, twins born November 29, 1985; and Kevin, born August 4, 1989. Gary and Shari were divorced pursuant to written stipulation in April 1991. The district court's decree granted physical care of the children to Shari and provided Gary the right of reasonable visitation. Gary's involvement with the children following the divorce has been extensive, including personal and telephone contact and active participation in the children's formal educations.

In December 1995, Shari told Gary she was considering moving with the children to Tennessee, where she spent much of her childhood. Gary subsequently petitioned for an injunction restricting Shari's relocation. Gary also sought modification of the dissolution decree to change custody based on Shari's proposed move. The district court denied Gary's petition to modify custody and refused to issue an injunction restricting Shari's relocation.

On appeal, Gary argues Shari's proposed move to Tennessee supports modification of the children's custody. He asserts Shari is motivated by her parents' relocation to Tennessee and spite stemming from an episode Christmas day when

Gary left the children alone for a brief period while he spent time with his fiancee, Julie Mortenson.

Shari contends her proposed move is not motivated by ill-will, rather she seeks the emotional support of her extended family residing in Tennessee.

II. Standard of Review.

We review modification proceedings de novo. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the district court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Custody.

Gary maintains it is in his children's best interests to modify the dissolution decree and transfer custody of the children to him. He alleges Shari's proposed move to Tennessee constitutes a change in circumstances sufficient to warrant modification.

Our first consideration in custody modification is the best interests of the child. *In re Marriage of Junkins*, 240 N.W.2d 667, 668 (Iowa 1976). A party seeking to change a custodial provision of a dissolution decree must establish by a preponderance of the evidence there has been a material and substantial change in circumstances not contemplated by the court at the time of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)(quoting *In re Marriage of Mikelson*,

299 N.W.2d 670, 671 (Iowa 1980)). Additionally, the party seeking custody must prove an ability to minister more effectively to the children's well-being. *Id.* This burden is premised on the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d at 671.

The dissolution decree provided Shari with custody of the children and Gary with reasonable visitation. This arrangement has been successful. The children have had substantial access to each parent, and Gary has had a high degree of involvement with the children. We recognize Gary's success as a noncustodial parent is due, in part, to Shari's cooperation. We, like the district court, commend both parties for placing the children's need for ample contact with each parent ahead of their personal differences.

Change in residence is only one of a laundry list of factors the court considers in determining whether there is a substantial change in circumstances warranting custody modification. *See* Iowa Code § 598.21(8)(1997). While Shari's move to Tennessee will make physical contact with the children more difficult for Gary, there is no reason to believe Shari's cooperation with Gary's visitation will cease. Gary will retain visitation rights and may continue telephone contact with the children. Both parties agree Shari's move is not motivated by a desire to keep Gary away from the children. Moreover, we find leaving custody with Shari will be less disruptive to the children than changing custody to Gary. *See In re Marriage of Jerome*, 378

N.W.2d 302, 306 (Iowa App. 1985)("[children's] [s]tability can be nurtured as much by leaving them with the same custodial parent as requiring that they live in the same neighborhood").

Upon reviewing the record, we find Gary has failed to carry his burden to show a material and substantial change in circumstances exists. *See In re Marriage of Whalen*, 569 N.W.2d 626, 630 (Iowa App. 1997)("[w]here there is good reason for moving children in our highly mobile society, a change in the custodial parent's geographic location is not justification in itself for change of custody. . . . A move in and of itself does not justify changing physical care")(citations omitted). We affirm the district court on this issue.

IV. Injunction.

Gary also seeks an injunction restricting Shari's ability to relocate. He argues Shari will reap no significant economic benefit from moving to Tennessee.

The original decree does not prohibit Shari from moving. Accordingly, Shari, as the parent with primary physical care, has the right to determine where the children will reside, which may include an area away from the proximity of the nonprimary physical care parent. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996). As stated before, the record does not indicate Shari's proposed move is motivated by an intent to injure Gary's relationship with the children. To the contrary, the record reflects Shari is willing to make arrangements to accommodate Gary's visitation rights upon moving.

Implicit in our finding Shari's proposed move does not warrant custody modification is our finding it is in the children's best interests to remain with Shari, regardless of her move to Tennessee. We accordingly deny Gary's request for an injunction prohibiting Shari's move. We affirm the district court on this issue.

V. Attorney Fees.

Shari requests the court award her appellate attorney fees.

An award of attorney fees is not a matter of right, but rests with the court's discretion. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995). We consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996).

Shari has successfully defended the district court's decision on appeal. After consideration of the aforementioned factors, we award Shari $500 in appellate attorney fees.

AFFIRMED.