FILED
JUN 25 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-230 / 90-1597

IN RE THE MARRIAGE OF KATHLEEN M. BENBOW AND PAUL R. BENBOW

Upon the Petition of

KATHLEEN M. BENBOW,

Petitioner-Appellee,

And Concerning

PAUL R. BENBOW,

Respondent-Appellant.

27

Appeal from the Iowa District Court for Lee County, Harlan W. Bainter, Judge.

Respondent appeals the district court's ruling which modified the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Cynthia H. Danielson of Danielson Law Office, P.C., Mt. Pleasant, for appellant.

Carl A. Saunders of Saunders, Humphrey, Johnson & Hoyer, Ft. Madison, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Respondent-appellant Paul Benbow appeals from the district court's ruling which modified the parties' dissolution decree contending the trial court should not have (1) terminated his right to joint custody and eliminated his midweek visitation; (2) increased his child support from $585 per month to $1,084 per month; and (3) ordered him to pay $1,500 toward petitioner-appellee Kathleen Benbow's attorney fees. We affirm as modified.

On August 14, 1984, the district court dissolved the marriage of Paul and Kathleen Benbow. The court awarded the parties joint custody of their three minor children born in 1976, 1979, and 1981. The terms of the joint custody were not specifically defined. Paul was, however, given liberal visitation, including midweek visitation. Since the decree, Kathleen has remarried.

In June 1989 Paul sought to modify the decree to more clearly define and expand the joint custody provisions. He also asked that the decree make provision for him to obtain the income tax exemption for the children. The trial court modified the decree to award Kathleen sole custody and increase Paul's child support.

I.

Paul's first contention is the joint custody award should not have been terminated. We agree.

Following the entry of the decree, Paul and Kathleen did not have a harmonious relationship. They experienced difficulties in communicating. Paul, after a period of emotional instability, continued with therapy for two and one-half years until he felt that the issues created by the dissolution had been resolved and he had developed appropriate tools for coping. Paul has not supported the relationship between Kathleen and her daughters. Kathleen has changed the children's doctor, churches and activities without prior discussion with Paul.

Despite these problems, the parties have been able to make and live with decisions regarding the children. They admit things have gone well since 1987. The children are well-adjusted, doing well in school, and are involved in a number of extracurricular activities. The children enjoy a close relationship with both parents and manifest and display affection for both parents. Paul does enjoy a good relationship with the children and that relationship is important to them.

The trial court found Paul's failure to support Kathleen's relationship with the children and his effort to undermine her relationship with the girls constituted a substantial change of circumstances warranting modification of the decree. The court awarded Kathleen sole custody and terminated Paul's midweek visitation. We review the record de novo. See In re Marriage of Zabecki, 389 N.W.2d 396,

398 (Iowa 1986). We give weight to the findings of the trial court, especially where the credibility of the witnesses is involved, but we are not bound by them. In re Marriage of Stafford, 386 N.W.2d 118, 121 (Iowa App. 1986).

Our first consideration in looking at a custody issue is the best interest of the children. See In re Marriage of Weidder, 338 N.W.2d 351, 356 (Iowa 1983). The specific factors listed by the legislature in section 598.41(3) are to be considered when a parent requests joint custody. See In re Marriage of Miller, 390 N.W.2d 596, 599 (Iowa 1986). The best interest of a child includes the opportunity for a continuous relationship with both parents. Id.

The ability to communicate is one, but only one, of the factors to be considered in determining the propriety of a joint custody award. See In re Marriage of Short, 373 N.W.2d 158, 160 (Iowa App. 1985).

Even though the parents are not required to be friends, they owe it to the child to maintain an attitude of civility, act decently toward one another, and communicate openly with each other. In re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983).

Parents in accepting an award of joint custody accept a responsibility to communicate with each other and to support the other parent's relationship with the child. In re Marriage of Fortelka, 425 N.W.2d 671, 672 (Iowa App. 1988). Parents must put away their personal animosities

toward each other and work together to meet the children's needs. Id.

The Iowa legislature has adopted a strong policy in favor of joint legal custody. The policy should be deviated from only in the "most compelling circumstances." Stafford, 386 N.W.2d at 121. Joint custody is an award of custody of a minor child to both parents under which both parents have rights and responsibilities toward the child and under which neither parent has rights superior to those of the other parent. See Zabecki, 389 N.W.2d at 399. Joint custody includes the obligation to put personal biases aside and to work with the children's other parent to meet the needs of the children. Fortelka, 425 N.W.2d at 673. The parent with physical care is required to share with the other parent the need to make a decision and provide all information necessary to make such a decision. Id. Both parents are required to personally discuss their children's problems and are expected to meet with medical and school personnel jointly in order to arrive at solutions that are in the children's best interests. Id.

Both parties have exhibited lack of maturity and cooperation in scheduling visitations. However, matters have substantially improved since 1987.

Kathleen has not met the burden necessary for a change. See Stafford, 386 N.W.2d at 121. The custody and visitation should not have been modified.

II.

The trial court increased the monthly child support from $585 to $1,084 per month. Paul was given the dependency exemption for all three children. Paul contends Kathleen failed to show a change of circumstances sufficient to justify a modification.

In 1984 Paul anticipated his monthly income at the employment he was about to commence at $2,500. He was not correct. In 1985 Paul earned $9,764; in 1986, $14,318; in 1987, $21,798; in 1988, $21,063; and in 1989, $24,514. His annual income at the time of trial had never reached the $2,500 per month anticipated at the time of trial in 1984. Paul has paid the $135 per week child support even during times of unemployment. In 1985 the $7,020 yearly child support paid exceeded Paul's net income. He met his child support obligation by borrowing from his father. In addition to the court ordered child support, Paul has also provided additional support for the children by paying for gymnastics, clothing, medical expenses, dental expenses, and miscellaneous expenses.

At the time of the decree of dissolution, Kathleen's financial affidavit showed she had a net monthly income of between $400 and $500 per month. After the dissolution, Kathleen was not employed outside the home. The situation continued until May 1989 when Kathleen started working sixteen hours a week at a preschool. At the time of trial

she earned $260 per month. Kathleen had remarried four days after the decree, and immediately had a fourth child by the man she married.

Paul changed positions at his place of employment during the pendency of this action in March 1990. He had worked as a customer service representative and received a monthly salary of about $2,000 a month. In March 1990 he became a sales manager for the same employer. He received a guaranteed salary of $500 per month and a commission of three percent of the new and used vehicle sales from the prior month. Paul's income went up to about $3,100 a month in the three months prior to trial. Evidence at trial disclosed a decline in car sales was anticipated to continue in a downhill fashion due to the Mideast crisis and other economic factors. Paul's general manager verified Paul had no control over the decrease in income and there is no way to accurately predict Paul's future income.

Child support was set in the original decree on the assumption Paul would have an income of $2,500 per month. He only reached and then exceeded these figures in the three months preceding trial. The evidence is that this increase will not continue.

In order to obtain additional child support, Kathleen must prove (a) a material and substantial change in circumstances, (b) the change must be more or less

permanent, and (c) the change must not have been within the contemplation of the trial court. In re Marriage of Mueller, 400 N.W.2d 86, 88 (Iowa App. 1986); In re Marriage of Mayer, 347 N.W.2d 681, 683 (Iowa App. 1984).

Not every change of circumstances is sufficient for modification of child support provisions. In re Marriage of Bonnette, 431 N.W.2d 1, 2 (Iowa App. 1988). A child support award entered in a final Decree of Dissolution of Marriage is not to be regarded as a variable sum to be adjusted either upward or downward with each fluctuating change in the respective conditions of the party. Mueller, 400 N.W.2d at 88. The changed circumstances must be material, substantial and continuous. See In re Marriage of Dawson, 467 N.W.2d 271, 274 (Iowa 1991); Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978).

Furthermore, because the original decree was entered prior to October 12, 1989, the adoption of the child support guidelines standing alone does not constitute a change in circumstances as to a child support order. See Dawson, 467 N.W.2d at 274; In re Marriage of Bergfeld, 463 N.W.2d 865, 869-70 (Iowa 1991).

Kathleen has not met her burden. We find the support provision should not have been modified. Having so found, we determine the tax exemptions allocated to Paul were excessive. The change in tax laws denied him exemptions he had taken under prior law. See In re Marriage of Feustel,

467 N.W.2d 261, 263-64 (Iowa 1991). We modify to provide that he only be granted a tax exemption for the youngest child. The provisions made by the trial court establish the mechanism for him to claim the deduction.

III.

The trial court ordered Paul to pay $1,500 for Kathleen's attorney fees. Paul contends this was not justified. We disagree. See In re Marriage of Phipps, 379 N.W.2d 26, 30 (Iowa App. 1985). We affirm the award.

Costs on appeal are taxed one-half to each party. Each party shall pay his or her own attorney fees.

AFFIRMED AS MODIFIED.