IN THE COURT OF APPEALS OF IOWA

No. 0-123 / 99-1365
Filed April 12, 2000

FILED
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CLERK SUPREME COURT

Upon the Petition of
LA LOVAN,
Petitioner-Appellee,

And Concerning
BRIAN RICHARD GERBER,
Respondent-Appellant.

Appeal from the Iowa District Court for Floyd County, Jon S. Scoles, Judge.

Brian Gerber appeals the custody modification giving primary physical care of their child to the mother, La Lovan. **AFFIRMED.**

Mark W. Schwickerath, New Hampton, for appellant.

Ann M. Troge, Charles City, for appellee.

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

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MAHAN, P.J.

Brian Gerber appeals the custody modification giving primary physical care of their child to the mother, La Lovan. He contends the district court (1) improperly applied the standard of substantial change in circumstances in modifying the custody decree, and (2) erred in its best interest analysis. We affirm.

La Lovan and Brian Gerber lived together until October 1994. It is not clear exactly when the parties began cohabitating, but it appears to be prior to the birth of their son, Cody, on June 27, 1990. Following the parties' separation, Cody lived with Brian's parents, Nancy and Richard Gerber. In May of 1995, Brian took custody of Cody.

A stipulation was signed by the parties and filed with district court in November 1995. Pursuant to the stipulation, La and Brian shared joint legal custody of Cody while Brian retained primary physical care subject to La's rights to visitation. La was also ordered to pay $187 per month in child support.

The parties disagree as to how much of an influence Brian's relationship and living situation with his then girlfriend Lori had on La's decision to sign the stipulation giving Brian primary physical care of Cody. Brian and Lori did get married, but divorced in March 1999. While they were together, Lori provided most of the care for Cody. This continued for a period after they separated when Lori continued to provide care for Cody. Lori stopped providing care for Cody in June 1999. Cody then went to live with La where he remained until the time of trial.

Brian works the third shift at his job and plans to send Cody to a babysitter that would provide overnight supervision for him. Brian also wants to attend school during the day and plans to sleep for just a couple hours after Cody goes to bed and before he goes to work.

La admits she did not give Cody the attention he deserved because she was too busy partying and working during the first couple years following the separation. However, for the last year and a half, La has had regular visits with Cody. In addition, she has provided primary care since June 1999. La has been employed at Fort Dodge Animal Health for the past one and a half years where she works from 6:00 a.m. until 2:30 p.m. Therefore, La would be home when Cody returned from school.

In January 1999, La filed a petition to modify the November 1995 stipulation and decree regarding custody, visitation, and child support based on a material and substantial change of circumstances since the entry of that stipulation and decree.

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.W.2d at 28.

II. Modification. Brian contends the district court should not have granted La's petition for modification. We disagree.

To change the custodial provision of a dissolution decree, the party seeking the modification must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the child's welfare supports the requested change. See *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994) (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 principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons justifies placing a heavy burden upon a party seeking to modify custody. *Clifton*, 526 N.W.2d at 577.

La must also show she has the ability superior to that of Brian's to minister to Cody's needs. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Therefore, the question is not which is the better home but whether La has demonstrated she can offer Cody superior care. *Id.* Custody should not be changed if both parents are found to be equally competent to minister to the needs of the child. *Id.*

The stipulation that gave Brian primary physical care of Cody was filed with the court in November 1995. At the time of this stipulation it was within the court's contemplation if Brian was awarded primary physical care of Cody he would take care of his own child. Instead, it was Brian's new wife Lori, who became the primary caregiver for Cody. Brian worked the second shift at his job

until the last several months of his marriage to Lori. During this time, Brian would leave for work in the middle of the afternoon and not return until late at night. He only saw Cody for a few minutes each morning before Cody left for school. When Lori discontinued further care of Cody in June 1999, Brian had the opportunity to assume the primary caregiver role. Instead of caring for Cody himself, Brian sent him to live with La, where he remained until the time of trial. In the meantime, Brian moved to Fredericksburg and lived with his new fiancé, Darcy.

The evidence established Brian has never provided primary care for Cody. We agree with the district court's conclusion there has been a material and substantial change in circumstances. Furthermore, the record convinces us La has the ability superior to that of Brian to minister to Cody's needs.

We agree with the district court's determination and, therefore, affirm the decision of the district court.

AFFIRMED.

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