FILED
FEB 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-604 / 93-136

IN RE THE MARRIAGE OF MAUREEN COWNIE AND T. M. FRANKLIN COWNIE

Upon the Petition of

MAUREEN COWNIE,

Appellee/Cross-Appellant,

And Concerning

T. M. FRANKLIN COWNIE,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, William H. Joy, Judge.

Father appeals and mother cross-appeals district court's refusal to modify physical care of minor child. **AFFIRMED AS MODIFIED.**

Steven H. Shindler and Michael E. Marshall of Smith, Schneider, Stiles, Wimer, Hudson, Serangeli, Robinson, Mallaney, Shindler & Scalise, P.C., Des Moines, for appellant/cross-appellee.

Victoria L. Herring, West Des Moines, for appellee/ cross-appellant.

Heard by Oxberger, C.J., and Habhab, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

This matter comes before us on the appeal of the respondent, T. M. Franklin Cownie, from the decision of the district court denying his petition to modify a prior decree of dissolution. The petitioner, Maureen Cownie, has cross-appealed from such decision.

We affirm the decision of the district court as to both the appeal filed by T. M. Franklin Cownie (appellant) and as to the cross-appeal filed by Maureen Cownie (appellee and cross-appellant).

The appellant and Maureen were married in 1971, and, in 1981, their marriage was dissolved by decree of court.

The parties have two children, Kathryn (Katie) born on April 16, 1975, and Charles born on March 22, 1978.

Subsequent to the dissolution, the parties have been before the court on four separate occasions seeking and obtaining various modifications of the initial decree of dissolution. This unhappy matter is the fifth modification sought since the dissolution.

The two children have spent time with both parents, the appellant residing in Des Moines, Iowa, and the appellee, Maureen, residing in Hawaii.

In 1990 and as a consequence of the fourth modification, it was determined that both children would reside with the appellant in the Des Moines area for a period of two years beginning in the latter part of August 1989 until July 30, 1991. At that latter date, placement

of the children would be again with the petitioner "unless she agrees otherwise in writing."

As a consequence, the two children did reside with the appellant (except for periods of vacation with their mother) until the summer of 1991. Pursuant to the January 1990 order, the son returned to Hawaii, but the daughter chose to remain with her father, the appellant. Maureen agreed to the transfer of physical placement of the daughter to appellant. The appellant, in his petition to modify, asserts that the son should also be physically placed with him rather than with Maureen.

In support of his allegations, he alleged that there had been an oral agreement between the parties that the son would be physically placed with the appellant at the close of the said two-year period, i.e. July 30, 1991. He further alleged that educational opportunities for the son were better in the Des Moines area than in Hawaii and, finally, that Maureen had undergone such emotional trauma that it was for the child's well being that the son remain with the father in Des Moines.

The cross-appeal seeks to have the trial court order enlarged and amended to require the appellant to provide medical expenses for the children without a written preapproval by the appellant and to direct the appellant to forthwith provide monies received from medical insurance companies to the appellee. She seeks litigation expense

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which, she asserts, were occasioned by the failure of appellant to adhere to the rules of civil procedure.

The trial court dismissed the petition of the appellant for modification of the decree and subsequently overruled, in large part, the motions filed by both parties to enlarge and amend the findings of fact and conclusions of law and order entered by the trial court.

We affirm the actions of the trial court with one modification hereinafter noted.

The burden of proof is upon the appellant, on his petition to modify the decree, with respect to placement of the son of the parties, that he is better able to provide appropriate care and nurture, not simply that he could do as good a job as the existing placement parent. He must show that the better interests of the child will be served by such change. In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976); In re Marriage of Smith, 471 N.W.2d 70, 72 (Iowa App. 1991).

Our review is de novo, and while we are not bound by the factual findings made by the trial court, we give them considerable weight, especially when considering the credibility of the witnesses. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990).

The last modification before this instant petition to modify was filed of record on January 12, 1990. It provided, in part, that both children, placed with the appellant for two years, return to the appellee on July 30,

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1991, unless there was an agreement "in writing" to the contrary. We agree with the trial court, given the litigiousness of these parties that it is not probable that a firm oral commitment was made by the parties that the children would remain with the appellant at the termination of the two-year period, i.e. July 30, 1991.

Insofar as his allegation that better education could be received by the son in the Des Moines area, the record on balance does not support that contention. Adequate schooling is available in Hawaii, and the son is receiving such an education.

Although the appellee and her daughter have experienced a most unhappy falling-out, in large part attributable to emotional problems experienced by the appellee, she has obtained professional help and guidance dealing with her problems. She has not permitted these problems to go untreated and is dealing with them in a forthright and appropriate manner.

Based on the foregoing, we conclude that the appellant has failed to sustain his burden of proof in these respects. We note here that the son prefers to remain with his mother, and at his age, his wishes must be accorded some respect and consideration.

The cross-appeal by Maureen, in which she asserts that she should not longer be required to notify the appellant and obtain his preapproval for elective medical services to be provided the children, has not been sustained by her.

The parties have experienced difficulties in these regards. If difficulties continue, they can be best handled in a hearing directed to those issues, rather than obligate the appellant for any and all elective medical services decided upon by the appellee only.

This matter, however, should be remanded to the trial court concerned in the trial of this cause for the limited purpose of determining what, if any, sums are due the appellee from the appellant and attributable to final litigation expenses. The appellee asserts that the appellant was recalcitrant in providing information necessary for trial and which information was to be made available under the rules of civil procedure.

The appellee seeks attorney fees for this appeal. Such an award is not a matter of right but rests within the discretion of the court and the financial positions of the parties. In re Marrige of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). In considering their relative economic conditions, we determine that the appellant should pay $2,000 to the appellee to be applied towards the attorney fees she has incurred in this appeal.

In summary, therefore, we affirm the order of the trial court and dismiss the appeal of the appellant; we further affirm the ruling and order of the trial court with respect to the requests made by the appellee in her motion to enlarge and amend findings except for the remand heretofore ordered for the limited purpose of determining

what, if any, monies should be appropriately awarded to the appellee which she asserts were occasioned by the purported recalcitrance of the appellant in providing appropriate discovery. Costs of this appeal are taxed to the appellant.

AFFIRMED AS MODIFIED.