IN THE COURT OF APPEALS OF IOWA

No. 1999-575 (9-836) / 99-311
Filed February 9, 2000

UPON THE PETITION OF JAMIE M. PATTERSON,

Appellant,

vs.

And Concerning
ROBIN L. HUMPHREY,

Appellee.

FILED
FEB 0 9 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Mitchell County, Jon Stuart Scoles, Judge.

A father appeals the district court's refusal to modify primary physical care.

AFFIRMED.

Mark McCormick of Belin, Lamson, McCormick, Zumbach, Flynn, P.C., Des Moines, and Craig G. Ensign of Ensign Law Office, Northwood, for appellant.

Jessica J. Geil of Legal Service Corporation of Iowa, Mason City, for appellee.

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

ZIMMER, J.

Jamie Patterson appeals the district court's refusal to modify primary physical care of the parties' minor child. We find no substantial change in circumstances and affirm.

Jamie Patterson and Robin Humphrey lived together for six years, but never married. They have one child together, Dargan, born in August of 1993. When the two separated in June of 1996, Jamie petitioned for custody. After a trial, Robin was awarded primary physical care of Dargan in a decree entered in March of 1997. In November of 1997, Robin and Dargan moved to Garrison, Minnesota where they currently reside with Robin's fiancé, Tim VanBuskirk. Garrison is approximately 250 miles from Jamie's residence in St. Ansgar, Iowa.

Approximately nine months after entry of the original decree, Jamie filed for modification of primary physical care, alleging the following constituted a substantial change in circumstances: Robin's move, physical abuse of Dargan by VanBuskirk, Dargan's behavioral problems and Robin's inability to control him, difficulties with visitation and communication regarding the child, and various other general concerns. In a counterclaim, Robin requested modification of the child support provision. Following trial in December 1998, the district court concluded neither modification was warranted. Jamie appeals, but Robin does not.

I. Scope of Review. We review the record de novo in a proceeding to modify the custodial provisions of a decree. *Dale v. Pearson,* 555 N.W.2d 243, 245 (Iowa App. 1996). We give weight to the findings of the trial court, although they are not binding. *Id.*

II. Modification of Custody. The court can modify custody only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The change must be more or less permanent and relate to the welfare of the child. *Id.* Additionally, the parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Dale*, 555 N.W.2d at 245. This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons. *Id.*

Our de novo review of the record reveals that many of Jamie's allegations are a rehash of issues considered by the trial court when Robin was awarded primary physical care in 1997. He has not met his burden of showing that circumstances have changed since the initial decree in a way not contemplated by that decree.

The record does not bear out many of Jamie's new allegations. Although abuse was alleged in the modification petition, nothing in the record indicated Dargan was being abused by Robin's fiancé or anyone else. Neither the court-appointed psychologist nor Dargan's kindergarten teacher thought Dargan had been abused. The department of human services has not received any abuse reports from Jamie or any other source.

Similarly, while there are some concerns with how Dargan behaves around his mother, he is not the 'problem child' his father seeks to portray. The kindergarten teacher testified Dargan does not misbehave in the classroom and

appears well-rested, well-fed and appropriately dressed. According to her, Dargan is "flourishing wonderfully"; he enjoys school, has friends and exhibits no signs of a behavior disorder. The psychologist favored Jamie and noted that Robin had difficulty controlling Dargan at times; however, she did not diagnose Dargan with any behavioral disorders. Although we agree Robin has been lenient with Dargan in the past, approximately eleven months lapsed between the psychologist's interview and the time of trial and Robin became more consistent with discipline in that time period. The trial court put it best: "While Robin may not be a perfect mother, the evidence established that Dargan is doing well in school and otherwise."

After considering all evidence of material significance to its decision, the trial court concluded the concerns expressed by Jamie did not constitute a substantial change in circumstances. The court also determined that even if a substantial change in circumstances had been shown, Jamie failed to prove an ability to minister more effectively to Dargan's well-being. We agree with the conclusions reached by the trial court.

Robin's relocation is of greater concern in this modification action. Iowa Code section 598.21(8A) (1997) permits a custodial parent's relocation of 150 miles or more to be considered a substantial change in circumstances:

> If a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is 150 miles or more from the residence of the minor child at the time that custody was awarded, the court *may* consider the relocation a substantial change in circumstances. If the court determines that the relocation is a substantial change in circumstances, the court shall modify the custody order to, at a

> minimum, preserve, as nearly as possible, the existing relationship between the minor child and the nonrelocating parent. . . .

Iowa Code § 598.21(8A) (emphasis added). Clearly, section 598.21(8A) does not *require* the court to find a substantial change in circumstances from the mere fact of a distant relocation. Although this move has made visitation more difficult, Jamie has not asserted or shown that he has been unable to exercise his scheduled visitation. In addition, the record does not indicate Robin's move was motivated by a desire to defeat Jamie's visitation rights or undermine his relationship with Dargan. *See In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983). Jamie's relationship with Dargan remains unaffected by the distance. We conclude the evidence falls short of demonstrating Robin's move is a material and substantial change of circumstances making it expedient and in Dargan's best interests to shift his primary physical care to Jamie. We affirm the denial of the application to modify custody.

Costs of this appeal are assessed to Jamie.

AFFIRMED.