IN THE COURT OF APPEALS OF IOWA

No. 0-116 / 99-1084
Filed August 16, 2000

Upon the Petition of
RODNEY P. WELSHER,
Petitioner-Appellant,

And Concerning
CHRISTINE BLANCHARD,
Respondent-Appellee.

FILED
AUG 1 6 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert D. Wilson, Judge.

The petitioner appeals a district court ruling denying his request for modification of the child custody and support provisions of the parties' paternity decree. **AFFIRMED.**

Ryan A. Genest of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Timothy McCarthy II of McEnroe, McCarthy & Gotsdiner P.C., West Des Moines, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MILLER, J.

Overview: The petitioner-appellant, Rodney Welsher, appeals the district court's denial of his request for modification of the child custody and support provisions of the parties' paternity decree. He claims the court erred in finding he had failed to show a substantial change in circumstances justifying a change in physical care, and erred in failing to allow him to claim prior court-ordered support as a deduction in calculating his net income for child support. We affirm.

Background: In August 1993, in a paternity action, Rodney Welsher, was adjudicated to be the father of Jasmine Blanchard, born in August 1992. The court ordered Rodney to pay $159 per month in child support. In October 1994 the court established Rodney and Jasmine's mother, Christine Blanchard, as joint legal custodians with Christine having physical care.

Modification proceedings: In May 1998, Rodney filed a petition to modify the decree, alleging a substantial change in circumstances justified transferring physical care of Jasmine to him. At trial, Rodney claimed Christine moved at least ten times since the original paternity decree was entered, and had not held a steady job. He further alleged Christine was living with a man diagnosed as bi-polar, and that she recently had sought a protective order based on her fears that her boyfriend's mental illness could result in harm to the family. Rodney also asserted Christine failed to cooperate regarding visitation and failed to keep him properly informed of Jasmine's school performance and health records. He additionally maintained Christine abrogated her role as primary care giver when she left Jasmine with her parents for a year while she attended cosmetology school and did not inform him of the change in residence.

Christine argued that despite her somewhat chaotic lifestyle following entry of the paternity decree, she had settled down. She stated she was employed full-time, and that her boyfriend had obtained medication for his bi-polar disorder and was no longer a threat. Christine also claimed she planned on marrying him in the near future. At the time of trial, Christine had a ten month old child with her boyfriend.

Although Christine had not made a request for an increase in child support in a pleading, she made such a request at trial and the issue was tried and submitted. The district court denied Rodney's request for modification, concluding he failed to show a substantial change in circumstances and that he could provide superior care. The court found Christine's earlier troubles had all been worked out and she was supported by a loving family now. The court discounted Rodney's allegations of the boyfriend's physical abuse because they remained only unproven allegations. The district court modified Rodney's child support obligation. In setting a new support amount it took into consideration the salary increases he received over the years. It also concluded it would be unfair to allow him to deduct the child support he pays his ex-wife because they have resided together with their two children as a family since their reconciliation in 1992. This increased Rodney's child support obligation for Jasmine to $427.21 month. Rodney's rule 179(b) motion was denied.

Scope of review: Our review is de novo. Iowa R. App. P. 4; *In re Marriage of Sires*, 506 N.W.2d 813, 814 (Iowa App.1993). We give weight to the findings of the trial court, which had an opportunity to view the demeanor of the

witnesses when testifying, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

Appellate claims: On appeal, Rodney argues the district court erred in failing to award him Jasmine's physical care and in not allowing him to take the deduction allowed by the child support guidelines for the court-ordered child support he pays his ex-wife.

Discussion: The burden of proof required to modify child custody is greater than that required for the initial custody determination. *Petition of Anderson*, 530 N.W.2d 741, 742 (Iowa App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)). Modification requires a showing of a substantial change in circumstances and a superior claim that the party seeking physical care can provide more effectively for the child's well being. *In re Marriage of Dethrow*, 357 N.W.2d 44, 45 (Iowa App. 1984) (quoting *In re Marriage of Gutermuth*, 246 N.W.2d 272, 274 (Iowa 1976)). Rodney presented evidence of instability in Christine's life after the entry of the custody order. However, Christine presented evidence her life is more settled now. The earlier instability is past. Rodney did not carry the burden to demonstrate physical care should be modified. Once fixed, custody of children should seldom be disturbed and then only for the most cogent reasons. *Gutermuth*, 246 N.W.2d at 274. Rodney has not provided a sufficient basis for modifying physical care. We affirm the district court's decision not to modify physical care.

Concerning the district court's modification of Rodney's support obligation, Rodney presents well-reasoned arguments why, absent unusual circumstances, a court should not deny a deduction for child support paid under a prior support

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order. The guidelines were designed to promote consistency in support calculations and equitable treatment of the parties. *Gilley v. McCarthy*, 469 N.W.2d 666, 667 (Iowa 1991). The support calculated according to the guidelines is presumptively correct. Iowa Code § 598.21(4); *In re Marriage of Gehl*, 486 N.W.2d 284, 286 (Iowa 1992). To vary from the guidelines, a court must make a finding it would be unjust or unfair to use the guideline amount. Iowa Code § 598.21(4)(a); *In re Marriage of Thede*, 568 N.W.2d 59, 61 (Iowa App. 1997) Deviation from the guidelines may occur if it is found "adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case." *State ex rel. Cacek v. Cacek*, 484 N.W.2d 592, 593 (Iowa 1992); *In re Marriage of Will*, 602 N.W.2d 202, 206 (Iowa App. 1999).

However, Rodney's circumstances are special. He reconciled with his wife soon after the dissolution and they continue to cohabit. Although not remarried, they and their children live as a family. The district court recognized the reality of the situation and found it would be unfair to allow Rodney to deduct the child support payments from his monthly income. We find "substantial injustice would result" to Jasmine and Christine if the child support guidelines were strictly applied under the circumstances of this case. Iowa Child Support Guidelines (July 1, 1995). We find an adjustment is necessary "to provide for the needs of the child and to do justice between the parties." *Id.* We therefore affirm the district court's modification of Rodney's child support obligation.

AFFIRMED.