IN THE COURT OF APPEALS OF IOWA

No. 1999-90 (9-277) / 98-1456
Filed August 27, 1999

IN RE THE MARRIAGE OF CARL BENEDICT, JR., AND CYNTHIA BENEDICT

Upon the Petition of
CARL BENEDICT, JR.,

Petitioner-Appellant,

And Concerning
CYNTHIA BENEDICT a/k/a CYNIA REED,

Respondent-Appellee.

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AUG 27 1999

Appeal from the Iowa District Court for Dallas County, Peter Keller, Judge

Carl Benedict appeals from a district court order modifying the parties' Nebraska dissolution decree. **AFFIRMED.**

Thomas J. McCann of Law Office of Thomas J. McCann, Des Moines, for appellant.

David P. Kozlowski of Phillips, McCollom, Kozlowski & Vald, P.L.C., West Des Moines, for appellee.

Decided en banc.

PER CURIAM

Carl Benedict appeals a district court ruling on his petition for modification declining to grant him primary physical care of the parties' children. We affirm

I. Background Facts and Proceedings. Carl and Cynia Benedict were married in Nebraska in 1987. Their twin children, Chelsey and Chad, were born in September 1987. Jason, Cynia's child from a previous relationship, also lived with the parties.

In January 1991, the parties' marriage was dissolved in Nebraska by decree of dissolution. Cynia was granted sole custody of the children, subject to reasonable visitation by Carl. Carl was ordered to pay child support. Following the dissolution, the parties agreed to a more liberal visitation schedule than provided under the decree and Cynia agreed to return some of her child support payments to Carl.

In August 1992 Cynia married Kelly Moore. In 1994, Carl and Cynia reconciled and together they moved to Redfield, Iowa. Carl helped Cynia obtain her divorce from Kelly. The parties lived together for approximately one year. In December 1995, Cynia moved in with Dennis Read. The parties continued to live in the same town and they split time caring for their children.

Near the end of 1997, Cynia and Dennis were informed by their landlord they would have to move from their rented home. In January 1998, they moved to St. Charles, approximately forty-five minutes away from Redfield. Cynia did not inform Carl of the relocation until just before they moved. She testified at the modification hearing that she did not tell him because she was afraid he would try to prevent her

from moving the children. She also testified she did not inform the children's schools because she feared the schools would contact Carl.

This move prompted Carl to file an application for modification of the parties' dissolution decree in January 1998. He requested primary physical care of the children. Cynia filed an application seeking to increase Carl's child support obligation.

Following a hearing, the district court determined the decree should be modified to grant the parties joint legal custody of the children. However, the court determined Cynia should retain primary physical care. The court also increased Carl's child support obligation to comply with the Iowa child support guidelines and ordered Carl to pay $2000 for Cynia's trial attorney fees.

Carl now appeals. He contends there has been a substantial change in circumstances sufficient to award physical custody of the children to him. He argues placement of the children with Cynia is not in their best interests. Carl also challenges the award of attorney fees.

II. Scope of Review. Custodial modification proceedings are held in equity, and are therefore reviewed de novo. *See* Iowa R. App. P. 4; *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). We examine the entire record and adjudicate anew rights on the issues properly presented. *See In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). At the same time, we recognize the virtues inherent in listening to and observing the parties and witnesses. *Id.* Consequently, though we are not bound by them, we give weight to the findings of

the trial court, especially when considering witness credibility. *Id.*; *see also* Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *See In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Modification of Custody. Custodial terms of a dissolution decree may be modified when there has been a substantial change in circumstances since the time of the decree which was not contemplated by the dissolution court when the decree was entered. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). The change must be more or less permanent and relate to the welfare of the children. *See In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). District courts have reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. *See In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)).

The question is not which home is better, but whether Carl has demonstrated he can offer the children superior care. *See In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Carl must show an ability to minister to the children's needs superior to Cynia. *See In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *In re Marriage of Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the children, custody should not be changed. *Id.*; *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App. 1992).

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *See In re Marriage of Smiley*, 518 N.W.2d at 378–79 (Iowa 1994) (citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)). The criteria for determining child custody in original dissolution actions are applied in modification proceedings as well. *See In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996). These include factors enumerated in Iowa Code section 598.41(3) (1997), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355–56 (Iowa 1983), and in *In re Marriage of Winter*, 223 N.W.2d 165, 166–67 (Iowa 1974). *Id.* In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *See In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa App. 1993).

Carl argues that despite Cynia having been granted sole legal custody, he has been the primary parent of the children during the past several years. He contends that for this reason the district court erred in determining circumstances since entry of the dissolution decree had not substantially changed.

Upon de novo review of the record, we agree with the district court's determination the children should remain in Cynia's primary physical care. We recognize Carl has exercised visitation in excess of that granted under the parties' dissolution decree. Nevertheless, we do not find Carl has, in fact, become the

children's primary caretaker during the past several years. To the extent Carl's role as a caregiver has increased since the entry of the original decree, we determine this has not amounted to a change in circumstances sufficient to warrant a change in primary physical care.

Nor do we determine the best interests of the parties' children demand transfer of primary physical care from Cynia to Carl. Carl argues Cynia's actions in moving the children were deceitful and underhanded. He contends this demonstrates their best interests are not served with Cynia as their primary physical caregiver. From the record, however, it does not appear Cynia's move was motivated by an attempt to alienate the children from their father. At the modification hearing, Cynia explained the move was necessitated by the termination of her rental agreement. She further explained she did not tell Carl about the move because she feared he might try to prevent her from moving the children given his controlling nature.

Carl also asserts Cynia has in recent years led an unstable lifestyle which has not promoted the children's best interests. However, the district court considered this issue and found no demonstrated detriment in her ability to effectively parent the children. We agree with its conclusion both parties are good parents who love their children. This finding further supports the conclusion custody should not be changed. *See In re Marriage of Whalen*, 569 N.W.2d at 628; *In re Marriage of Smith*, 491 N.W.2d at 541.

Finally we determine the best interests of Chad and Chelsey would not be furthered by separating them from their half-brother Jason. *See In re Marriage of*

Smiley, 518 N.W.2d 376, 380 (Iowa 1994) (there is presumption against separation of siblings); *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993) (compelling reasons must exist to depart from the presumption against separation), *In re Marriage Holcomb*, 471 N.W 2d 76, 80 (Iowa App. 1991) (half-brothers and sisters should be separated only where it better promotes the long-range interests of the children).

For the foregoing reasons, we affirm the decision of the district court on the issue of primary physical care.

IV. Trial Attorney Fees. Carl asserts the district court abused its discretion in awarding $2000 in attorney fees to Cynia. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *See In re Marriage of Francis*, 442 N.W.2d 59, 67 (Iowa 1989). The test is whether the fee is reasonable and based on the parties' respective abilities to pay. *See In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa App. 1997). In reviewing the district court's decision, we do not find an abuse of discretion. We affirm the award of trial attorney fees to Cynia.

We affirm the decision of the district court. Costs of this appeal are assessed to Carl.

AFFIRMED.