IN THE COURT OF APPEALS OF IOWA

No. 8-301 / 97-1765

IN RE THE MARRIAGE OF RICKY LEE PORTER AND CINDY BOBETTE PORTER

FILED
AUG 28 1998
CLERK SUPREME COURT

Upon the Petition of
RICKY LEE PORTER,

Appellant,

And Concerning
CINDY BOBETTE PORTER, n/k/a CINDY BOBETTE RIPPEY,

Appellee.

Appeal from the Iowa District Court for Jefferson County, Daniel P. Wilson, Judge.

Ricky Porter appeals from a district court ruling denying his petition for modification of the primary care provision of the decree dissolving his marriage to Cindy Porter. **AFFIRMED.**

Robert E. Breckenridge of Johnson, Hester, Walter & Breckenridge, Ottumwa, for appellant.

J. Terrance Denefe of Kiple, Kiple, Denefe, Beaver & Gardner, L.L.P., Ottumwa, for appellee.

Heard by Cady, C.J., Vogel, J., and Schlegel, S.J.*
*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

CADY, C.J.

Ricky Porter appeals from the district court ruling dismissing his petition for modification of the dissolution decree. He claims the district court erred by finding he failed to show a substantial change in circumstances occurred warranting a transfer of primary physical care of the parties' children to him. We affirm the district court.

Ricky and Cindy Porter dissolved their marriage on February 16, 1994. They were granted joint custody of their two children, Casie and Cari, with primary physical care to Cindy. Cari was eleven-years-old at the time of the divorce and Casie was seven-years-old. Both parties remarried following the dissolution.

The relationship between Cindy and Cari began to deteriorate following the dissolution. They frequently argued and on one occasion Cindy spanked Cari with a yardstick. Cari contemplated running away from Cindy's home at one point. Cindy provided the children with a very structured environment and was a strict disciplinarian. She monitored Cari's friendships and limited her association with individuals she felt adversely influenced Cari. Cari resented her mother's interference and disliked the constant arguing at her mother's home. Both Cari and Casie expressed a preference to live with Ricky.

Ricky enjoys a good relationship with both daughters. He is an emotional person and has cried on several occasions in front of the children. He also plays a game with the children when they talk on the phone involving who can say "I love you" last. While Ricky is a good parent, he provides less discipline than Cindy.

On February 28, 1996, Ricky filed an application for modification of the decree claiming Cindy engaged in mental and physical abuse of the children. A home study worker recommended Ricky be awarded primary care of the children. Both children expressed a preference to live with Ricky.

The district court determined Ricky failed to show a substantial change in circumstances occurred warranting a modification of the decree. It found the children's best interests would not be served by a change of primary physical care.

On appeal Ricky claims the district court erred by failing to modify the decree to award him primary physical care of the children. Cindy also requests appellate attorney fees.

I. Standard of Review

We review the record de novo in a proceeding to modify child custody. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). This requires us to examine the complete trial record and determine the issues presented anew unimpeded by the findings of the trial court. *In re Marriage of Salmon*, 519 N.W.2d 94, 95 (Iowa App. 1994). At the same time, we recognize the inherent virtues in listening to and observing the parties and witnesses. *Dale*, 555 N.W.2d at 245. Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

II. Primary Physical Care

Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the children. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Id.*; *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. *In re Petition of Anderson*, 530 N.W.2d 741, 741-42 (Iowa App. 1995). Moreover, as in all cases involving custody, our first consideration in custody modifications is the best interests of the children. *Dale*, 555 N.W.2d at 245.

Ricky maintains a substantial change in circumstances occurred warranting a transfer of physical care of the children to him. He asserts the trial court erred by: (1) failing to give proper consideration to the home study report; (2) failing to give proper weight to the children's desire to live with him; and (3) concluding the best interests of the children would be served by continuing placement with Cindy.

On our de novo review, we conclude the district court correctly determined Ricky failed to establish a substantial change in circumstances warranting a change in custody. Although Cindy and Cari are struggling in their relationship, this does not

constitute a substantial change in circumstances, or an ability to minister more effectively to the children's needs.

A parent has an obligation to support a healthy and positive relationship between the children and the other parent. Ricky, intentionally or not, has not done this. He has directly undermined Cindy's relationship with the girls by his comments and, indirectly, by his actions. Although we do not recognize the display of emotions by a parent to a child to be a negative parenting trait, it can, in some situations, influence children, as well as their relationship with the other parent. In this case, Ricky's emotional displays and behavior at the conclusion of visitation periods or other times of separation has helped generate feelings of sympathy and support by the children.

We approach a claim for change in primary care based on the impaired relationship between the custodial parent and the children by carefully examining the role of the noncustodial parent. A change in custody based on the impaired relationship between the custodial parent and children is not in the best interest of the children when the noncustodial parent shares responsibility for the impaired relationship.

III. Attorney Fees

An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). In determining whether to award appellate attorney fees, we consider the needs of the

party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. *Id.*

Considering both parties' need and ability to pay, we find each should pay their own appellate attorney fees.

We have considered all of Ricky's arguments and affirm the district court.

AFFIRMED.