IN THE COURT OF APPEALS OF IOWA

No. 0-157 / 99-0596
Filed June 14, 2000

FILED
JUN 14 2000
CLERK SUPREME COURT

IN RE THE MARRIAGE OF CARRIE JO SHIPLEY AND PATRICK MARK SHIPLEY

Upon the Petition of
CARRIE JO SHIPLEY, n/k/a CARRIE JO KOSTER,
Petitioner-Appellee/Cross-Appellant,

And Concerning
PATRICK MARK SHIPLEY,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Story County, David R. Danilson, Judge.

The respondent appeals a district court ruling granting petitioner's request for modification of the child custody provisions of their dissolution decree. Respondent contends the district court erred by awarding petitioner physical care of their children. On cross-appeal, petitioner argues the district court erred in: (1) calculating respondent's net income and failing to order an annual exchange of their respective tax returns and (2) failing to order respondent to pay certain costs. Petitioner requests an award of appellate attorney fees. **AFFIRMED ON APPEAL AND CROSS-APPEAL.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown, for appellant.

John R. Hearn, Des Moines, for appellee.

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

MILLER, J.

Patrick Shipley ("Pat") appeals an order modifying custodial provisions of the dissolution decree, contending no "material change in circumstances" exists to warrant the change of physical care of the parties' children from him to appellee/cross-appellant Carrie Koster ("Carrie"). Carrie cross-appeals, contending the trial court erred in calculating Pat's child support obligation, not ordering an annual exchange of tax returns, and assessing the costs of a "home study" to her. She also asks for appellate attorney fees. We affirm on both the appeal and cross-appeal.

Patrick and Carrie are the parents of two children, a son Aaron, born in January 1987, and a daughter Jordan, born in January 1990. The parties' marriage was dissolved by stipulation and decree in 1992. The decree awarded Pat and Carrie joint custody, Pat physical care, and Carrie visitation. Upon dissolution of the marriage, Carrie moved to Des Moines, while Pat and the children continued to reside on a farm near State Center, Iowa. Carrie remarried in 1993, but that marriage was dissolved in 1997. Pat also remarried in 1995, and he and his current wife, Myra, have one child of their marriage. A 1996 modification action resulted in, among other things, clarification of Carrie's visitation rights. Carrie later filed this modification action, seeking physical care of Aaron and Jordan. The modification was granted. Pat was ordered to pay $97.85 per month in child support, and was given the same rights of visitation Carrie previously had enjoyed.

Pat appeals, contending the district court erred in transferring physical care from him to Carrie. Carrie cross-appeals, contending the court erred in

computing Pat's child support obligation, not ordering an annual exchange of income tax returns, and assessing certain costs to her. She also requests appellate attorney fees.

In this equity action, our review is de novo. Iowa R. App. P. 4. This court has a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). Weight must be given to the fact findings of the trial court, especially when considering the credibility of witnesses, but the court is not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Rierson*, 537 N.W.2d at 806, 807 (Iowa App. 1995). Prior cases have little precedential value with respect to custodial issues, and the court must make its decision on the particular circumstances unique to each case. *Rierson*, 537 N.W.2d at 807.

> The legal principles governing modification actions are well established.
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> 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

Petition of Anderson, 530 N.W.2d 741, 741-42 (Iowa App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

We find Carrie has met this heavy burden. Of first and primary concern is the methods of discipline Pat and his new wife, Myra, have used on the children.

See generally In re Marriage of Forbes, 570 N.W.2d 757, 760-61 (Iowa 1997) (discussing significance of excessive corporal punishment in making custody decisions). Despite knowledge of alternative, non-corporal methods of discipline, Pat still believes corporal punishment to be appropriate. It is the nature of the physical discipline, such as hitting then rather young children with a belt and slapping one in the face, that was of concern to the trial court and is of concern to us. The record discloses, however, that corporal punishment has been infrequent, and we therefore do not rest our decision on this factor alone.

The trial court had even greater concern, as we do, with how Pat and Myra punished Jordan for her refusal to eat certain foods. When a meal is served at Pat and Myra's house containing food Jordan fails to eat because she doesn't like it, Jordan is sent to her room for the balance of the evening, and is only allowed to read or put clothes away. This punishment, on occasion, extended entire weekends and also "precluded" Jordan from participating in activities such as trick-or-treating. On occasion, the "offensive" food was served to Jordan for the next morning's breakfast, which resulted in Jordan going to school hungry. Her teacher kept crackers available for her to eat at school, and her brother sneaked food to share with her. It appears this punishment occurred one to two times per week over a period of up to three years and caused Jordan to cry when she sat at the dinner table and saw food she disliked. We agree with the district court that, "this punishment inflicted upon Jordan far exceeds the offense committed", and is "unreasonable." This excessive discipline has had a harmful effect on Jordan. We can look to a parent's past performance to determine the best interests of the child as it may be indicative of the quality of

the future care that parent is capable of providing. *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa App. 1992).

Aaron has not escaped undeserved humiliation. At one time he had a problem with bed-wetting. Pat commented on the problem in front of others, causing Aaron shame and embarrassment.

Pat has failed, in several ways, in his role as parent to foster his children's relationship with their mother. Pat instructed school officials not to inform Carrie of various school events the children were involved in. Frequently, Pat would not allow Aaron to call Carrie, even after Carrie purchased a phone card for Aaron. On one occasion when Aaron did call Carrie, Myra hit him repeatedly on the back and made him cry for making the phone call. Pat has failed to inform Carrie when school events are cancelled. On one occasion, Carrie drove from Des Moines to Marshalltown to take Aaron to play in a football game only to find out the game had previously been cancelled.

Pat has failed to cooperate in a reasonable manner with the children's visitation with Carrie. On several occasions he has made Carrie drive many extra miles to pick up the children, when a little patience on his part would have saved his children the extra travel time. On one occasion, Pat saw Carrie following him to pick the children up twenty five miles from his house. Instead of pulling over and saving the children almost an extra hour of travel, Pat drove all the way to his home before he allowed the children to go back with Carrie. This court has held the custodial parent's lack of cooperation with the non-custodial parent's efforts to maintain satisfactory visitation and communication with the children evidenced a substantial change in circumstances warranting a

modification of the dissolution decree. *In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa App. 1988) (citing *In re Marriage of Grabill*, 414 N.W.2d 852, 853 (Iowa App. 1987)). The Iowa Code provides the court shall consider denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement. Iowa Code § 598.41(1)(c) (1999). In these instances, there was no just cause for Pat to deny the children the time they could have spent with their mother.

Of further concern is the fact Pat has physically abused Carrie on more than one occasion, and at least one of the incidents occurred in the presence of the parties' children. Although Pat was not convicted of domestic abuse, we find, as the trial court did, the evidence shows the abusive incidents did in fact occur.

Pat and Myra did not allow into their home any clothing or toys purchased by Carrie or her family for the children. On one occasion, Carrie returned the children to Pat and Myra's house at 1:00 a.m. following Midnight Mass. Pat made the children stand in the doorway, remove all their clothes and give them back to Carrie. It appears, fortunately, that through counseling the parties have resolved their differences over clothing. Nonetheless, such incidents are indicative of Pat's reluctance at times to put his children's needs above his conflicts with Carrie. Tension between parents is a factor we take into consideration when determining if a custody modification is appropriate. *In re Marriage of Winnike*, 497 N.W.2d at 174. Further, we give great weight to Pat's

[1] We also recognize that Carrie has not always been timely with respect to picking the children up, and has asked the visitation schedule be changed to meet her needs. However, we do not find any difficulties in visitation caused by Carrie have denied her children time with their father.

attempts to alienate the children from Carrie, as evidenced in part by his refusal to allow his children to call their mother and not allowing Carrie's gifts into his house. *See id.* Pat's behavior in this regard has had an adverse effect on the children.

Carrie has proven she has a greater interest in the children's welfare in several different ways. In order to further foster her relationship with her children, she changed employment, and now works in Marshalltown and plans on living in the children's school district. The Iowa Code mandates we take into consideration changes in residence of a party. Iowa Code § 598.21(8)(f). We find Carrie's move to be very positive for the children. Carrie is more concerned about the children's health, hygiene and appearance than Pat is. On one occasion, Carrie purchased deodorant for both children, as they were not provided any in Pat's home. When Aaron brought his deodorant into Pat's home, Pat threw it away, telling him if he wanted it, it had to be kept at Carrie's. Poor hygiene and appearance have had a negative effect on the children's self esteem. Further evidence of Carrie's greater commitment to parenting is the fact that even though she lived in Des Moines, she attended many more of the children's extra-curricular activities than Pat and Myra did.

For all the reasons stated above, we agree with the district court Carrie has shown substantial changes in circumstances and that she has an ability to minister more effectively to the children's well-being than Pat. We therefore affirm the modification of physical care.

Carrie contends on cross-appeal the trial court erred computing Pat's child support obligation because the trial court computed Pat's net monthly income

incorrectly. It does not appear from the record either party filed with the trial court the child support guidelines worksheet required of each by the child support guidelines adopted by the Iowa Supreme Court pursuant to Iowa Code section 598.21(4). Carrie provides such a worksheet in her brief on appeal, apparently attempting to present on appeal evidence that should have been presented to the trial court.

Evidence of Pat's income was presented at trial through Pat and Myra's 1997 joint U.S. and Iowa income tax returns. Those returns disclose $9,936 net profit from business, clearly Pat's income from self-employment; $55 of taxable interest and $11 of net rental income, with it unclear whose income each is; and $9,693 of wages. The evidence shows Myra has worked for Alliant Utilities for the last three years. The evidence does not show Pat has any income other than his self-employment income. It is therefore reasonable to assume the wages were Myra's income, and not Pat's. The trial court did not err, as claimed by Carrie, by using $9,936 as Pat's gross income for computing his child support obligation. (In addition to it being unclear whether the $55 and $11 were Pat's income, Myra's income, or their joint income, those amounts are not of substantial significance.)

Carrie also contends the trial court erred in failing to order the parties to annually exchange income tax returns with all schedules and attachments. Pat does not respond to this contention in his reply brief. However, we do not find in the record where Carrie requested such an order in pleadings, evidence or argument. Nor do we find such a request was made by a motion pursuant to Iowa rule of civil procedure 179(b). *See Nepstad Custom Homes Co. v. Krull,*

527 N.W.2d 402, 405 (Iowa App. 1994) (holding a 179(b) motion is necessary to preserve error when the court fails to resolve a matter properly submitted). While we review this equitable action de novo, our duty is limited to adjudicating anew rights on issues properly presented. *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa App. 1995). This claimed error again appears to be an afterthought on appeal. The trial court did not err in not ordering relief not requested of it. Matters not raised in the trial court will not be considered on appeal. *In re Marriage of Okonkwo*, 525 N.W.2d 870, 872 (Iowa App. 1994).

Carrie further contends on cross-appeal the trial court erred by not taxing costs of a "home study" to Pat. Pat again does not respond to this contention. Carrie had earlier sought a custody evaluation. In ordering it, the trial court ordered that Carrie advance the evaluator's fees, but that ultimate responsibility for the fees would be assessed as part of the court costs at the conclusion of this case. The trial court ordered on page 16 of its modification ruling, "The Respondent [Pat] shall be responsible for the court costs of this action." Nowhere does the ruling make Carrie responsible for the custody evaluator's fees or for any other part of the court costs. We find no merit to Carrie's contention. (Although not necessary to resolution of this issue, we note Carrie apparently did not file in the trial court either a motion to re-tax costs or a motion pursuant to Iowa rule of civil procedure 179(b), one of which would be necessary to preserve claimed error on this issue.)

Carrie requests appellate attorney fees. Pat again does not resist this request in his reply brief. The trial court did not award Carrie attorney fees in the appealed action "in light of Pat's annual income." Carrie does not appeal this

part of the trial court's ruling. We also find Pat's annual income inadequate to enable him to contribute to Carrie's attorney fees in this appeal. We decline to award Carrie appellate attorney fees. In doing so we note part of those fees were no doubt engendered by her meritless cross-appeal.

Each party shall be responsible for one-half the costs on appeal.

AFFIRMED ON APPEAL AND CROSS-APPEAL.