IN THE COURT OF APPEALS OF IOWA

No. 4-270 / 93-1925

LOUIS JOSEPH SCORPINITI,

Appellant,

vs.

JANA CROW,

Appellee.

FILED
SEP 16 1994
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Michael J. Streit, Judge.

Father appeals from a judgment of the district court denying his application for modification of primary care. **AFFIRMED.**

Ronald L. Wheeler, Des Moines, for appellant.

James P. Piazza, Des Moines, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

CADY, J.

This is an appeal of an action to modify child custody. We are asked to reverse the decision of the district court and grant appellant primary care of the child. On our review of the case, we decline to alter the district courts' decision.

Ryan Scorpiniti was born on March 26, 1985, to Louis Scorpiniti and Jana Crow. Louis and Jana never married. Their relationship subsequently withered and Jana was awarded physical custody of Ryan on October 25, 1986 as a result of a paternity action brought by Louis. The court granted joint legal custody, with liberal visitation to Louis. Louis was also ordered to pay monthly child support of $150 per month. The order was modified in 1988 to expand visitation to every other Wednesday through Monday and Wednesday through Friday.

Jana filed the present application for modification. She believed Ryan needed a more stable home environment and sought to curtail Louis' visitation rights. Louis filed a counterclaim, asserting it would be in Ryan's best interest that he be granted physical custody.

The evidence at trial was conflicting. Louis presented testimony that Jana provided little assistance and support for Ryan and was self-centered. Ryan, who was 8 years old at the time of trial, testified consistent with Louis' concerns. Jana presented testimony that Louis was manipulative and had effectively brainwashed Ryan through a variety of tactics.

A child custody investigator, William Pearce, submitted a written report after observing Jana and Louis, and interviewing a number of people. Pearce noted Louis was quick to contact school officials whenever Ryan had a problem at school. He further observed Ryan appeared at school haphazardly dressed on several occasions while in Jana's care and was frequently tardy. Pearce also noted that Ryan's interaction with his mother appeared normal but uninspired, while Ryan was animated and happy when with his father. Pearce recommended that Louis be given primary care of Ryan.

The district court found Jana to be open and honest in her testimony. In contrast, it believed Louis was not credible, and far from genuine. It also felt Ryan's testimony was programmed by Louis. The child custody investigator perceived Louis to be highly manipulative.

The district court found Louis had failed to show a substantial change in circumstances justifying a modification of custody. It believed Louis attempted to alienate Ryan from his mother and exaggerated her defects as a parent. The district court modified Louis' visitation, ordering he be granted visitation every other weekend from 6:00 p.m. Friday until 6:00 p.m. Sunday, plus two two-week periods each summer and alternating holidays and birthdays. Monthly child support was increased to $338. Louis appealed.

Louis argues he is the better parent. Louis points to Ryan's testimony indicating his desire to live with his father. Louis additionally argues that because he and Jana operated on what was basically a split custody arrangement, the district court erred in requiring him to meet the usual burden of proof in modification actions.

Our standard of review is de novo. Iowa R. App. P. 4. We accord weight to the findings and observations of the trial court, especially in considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Louis initially argues that the usual burden to prove a modification of primary care should not rest with him because he actually shared primary care of Ryan under the expansive visitation arrangement. We disagree. Louis seeks to change what the district court previously established. When a change in the custodial provisions of a decree is sought, our law places the burden on the party seeking the change to "establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the child['s] best interests make it expedient to make the requested change." In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The current visitation schedule followed by Louis may assist him in meeting his burden, but it does not relieve him of it. See In re Marriage of Leyda, 355 N.W.2d 862, 864-65 (Iowa 1984). Jana had the burden of proof to

modify visitation and Louis has the burden of proof on the issue of primary physical care. In re Marriage of Frederici, 338 N.W.2d at 159.

We apply the same principles applicable to a modification of primary care involving unwed parents as we do for parents separated by divorce. See Heyer v Peterson, 307 N.W.2d 1, 7(Iowa 1981). Our paramount consideration in deciding whether the circumstances support a modification of primary care is the interest of the child. In re Marriage of Gravatt, 371 N.W.2d 836, 838 (Iowa App. 1985).

The preference expressed by the child is a relevant consideration but not controlling. Id. at 840. Moreover, a child's preference carries less weight in proceedings for modification than in original custody decisions. In re Marriage of Jahnel, 506 N.W.2d 473, 475 (Iowa App. 1993). In determining the weight to give a child's expressed preference, it is important to consider the child's age, educational level, maturity, relationship with family members, strength of preference and reasons for the preference. In re Marriage of Ellerbroek, 377 N.W.2d 257, 258-59 (Iowa App. 1985).

In considering the evidence to determine if a change of primary care is warranted, we give special recognition to the trial court's observation that Louis was manipulative and less credible than Jana. This type of assessment is a useful tool in reaching a sound decision and is entitled to our careful attention since we are denied the ability to

see and hear the witnesses during the presentation of the evidence. In re Marriage of Zabecki, 389 N.W.2d 396, 400 (Iowa 1986). The trial court's assessment of Louis is also significant in weighing the importance of Ryan's testimony. Ryan was at a young and impressionable age. Furthermore, there was ample evidence to support the trial court's impression that Louis orchestrated Ryan's testimony. Even the custody reports noted that Louis was a very manipulative person.

Notwithstanding, Louis argues the custody report independently verified his claims and supports his requested change in primary care. The recommendations of an independent custodial investigator are considered in modification actions, but are not controlling. In re Marriage of Dawson, 214 N.W.2d 131, 133 (Iowa 1974). The report reveals Louis maintained a greater interest in Ryan's second grade education and was more accessible to school personnel during the school year, but it does not establish a material and substantial change in circumstances or an ability to minister more effectively to Ryan's well-being. Louis must show a superior claim based on his ability to minister more effectively to the well being of Ryan, not an equal ability. See In re Marriage of Dethrow, 357 N.W.2d 44, 45 (Iowa App. 1984). Furthermore, the trial court's assessment of Louis as a manipulator is a factor to consider in weighing the report and its recommendations.

On the whole, the evidence in the case failed to show a change in circumstances sufficient to support modification of primary care, and failed to demonstrate that Louis was better able to minister to Ryan's well-being. Louis may show positive signs of parenting in some areas, but the evidence also revealed many deficiencies.

In conclusion, we affirm the trial court's refusal to modify primary care. We do not address the changes made to the visitation since the issue was not raised on appeal. We decline to award attorney fees. Costs to Louis.

AFFIRMED.