IN THE COURT OF APPEALS OF IOWA

FILED
JAN 29 1997
CLERK SUPREME COURT

No. 6-741 / 96-1059

000233

IN RE THE MARRIAGE OF MICHAEL J. MARSHALL AND LISA L. MARSHALL

Upon the Petition of
MICHAEL J. MARSHALL,

Petitioner-Appellant,

And Concerning
LISA L. MARSHALL,

Respondent-Appellee.

Appeal from the Iowa District Court for Marion County, Dale B. Hagen, Judge.

A father appeals from a district court ruling denying his request for a modification of custody. **AFFIRMED.**

Martha L. Mertz of Mick & Mertz, Knoxville, for appellant.

Chris Shepperd, Pella, for appellee.

Considered by Habhab, C.J., and Cady and Huitink, JJ. Sackett, J., takes no part.

HUITINK, J.

Petitioner Michael J. Marshall appeals the order of the district court denying his application for modification of the decree dissolving his marriage to the Respondent Lisa L. Marshall. His application sought to have primary physical custody of the parties' son awarded to him. We affirm.

Michael and Lisa were divorced on September 21, 1990. The decree awarded the parties joint custody and awarded Lisa primary physical custody of the parties' only child, Kaleb, born December 18, 1989. The parties' agreement adopted by the court directed Michael to pay Lisa $40 a week in child support.

Since the divorce, Lisa had a relationship with Steve Weldon. Lisa and Steve have two children, Kevin, who was four at the time of the modification proceeding, and Kyle, who was almost three. Lisa and Steve never married and were no longer living together at the time of trial. Kaleb currently lives with his mother and his two half-brothers in a three-to-four bedroom home. Michael married his wife Lori in April 1992. They have one child and were expecting another at the time of trial. Lori's three other children from a previous marriage also live in their five-bedroom home.

In June 1995, Lisa sought a modification of the visitation and child support provisions of the original decree. In July, Michael filed an answer along with his own

petition for modification alleging a change of circumstances that warranted a change of custody.

At trial, Michael alleged Lisa failed to adequately supervise Kaleb. There is evidence Michael repeatedly contacted the Department of Human Services (DHS) regarding Kaleb's care. He offered evidence of four child abuse reports, one of which was founded by DHS. In that incident, Kaleb was injured by an oscillating fan that did not have a protective cover on it. Michael testified that Kaleb was injured in a fall at Lisa's home and that Kaleb ingested medication requiring hospitalization. Michael also cited Lisa's relationships with known drug users. Kaleb's alleged excessive absences from school and discipline problems were also cited as circumstances necessitating modification.

At the conclusion of the evidence, the court found there had not been a material and substantial change of circumstances necessitating modification of custody. The court concluded Michael's claims of inadequate supervision of Kaleb by Lisa "had not been proven by a preponderance of the evidence." The court opined that even if the allegations were true, the incidents were not unusual for a child Kaleb's age. The court noted evidence of similar injuries Kaleb sustained while in Michael's care. Michael also failed to convince the court that Lisa's choice of friends was harmful to Kaleb. Based on these findings, the trial court denied Michael's petition.

Michael appeals arguing that "almost everything" in the parties' circumstances had changed since the entry of the decree. He asserts the trial court issuing the original decree could not have anticipated the instability Lisa has experienced since that time. He contends that while his life has become more stable, Lisa's has been marked by frequent moves, multiple relationships, reliance on extended family members, lack of employment, and a need for public assistance. Michael cites the testimony of a custody evaluator that characterized Michael's home as a positive environment for Kaleb and recommended placement with Michael.

Our review in a modification proceeding is de novo. *In re Marriage of Hubbard,* 315 N.W.2d 75, 80 (Iowa 1982). Because the trial court was present to hear and observe the witnesses, we give weight to its findings but we are not bound by them. *Id.*; *see also* Iowa R. App. P.14(f)(7).

A party seeking to change a custodial provision of a dissolution decree must establish by a preponderance of the evidence that there has been a material and substantial change in circumstances not contemplated by the court at the time of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983), *quoting In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). Additionally, the party seeking custody must prove an ability to minister more effectively to the children's well-being. *Id.* This burden is premised on the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re*

Marriage of Mikelson, 299 N.W.2d at 671. Moreover, our first consideration in custody modifications is the best interest of the child. *In re Marriage of Junkins,* 240 N.W.2d 667, 668 (Iowa 1976).

Upon review of the record, we find Michael has failed to meet his heavy burden of proof. We also find the evidence of Lisa's poor supervision of Kaleb inconclusive. Kaleb's history of accidental injuries is not unusual for a child his age. Furthermore, we find Lisa's willingness to share responsibility for Kaleb's medical care to be a positive rather than a negative reflection on her custodial history.

Although Lisa's selection of friends has not always been desirable, there is no evidence that her relationships have been harmful to Kaleb. Moreover, future relationships and more children are common experiences within the court's contemplation at the time of the decree. Accordingly, we affirm the district court's decision to deny modification of Kaleb's custody.

Michael also resists Lisa's request for appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the court's discretion and the parties' financial position. *In re Marriage of Gilliam,* 525 N.W.2d 436, 439 (Iowa App. 1994). We order Michael to pay Lisa $500 of Lisa's appellate attorney fees. Costs are taxed to Michael.

The order of the district court is affirmed in its entirety.

AFFIRMED.