IN THE COURT OF APPEALS OF IOWA

No. 7-435 / 97-222

000019

IN RE THE MARRIAGE OF TODD D. BOATWRIGHT AND CATHIE J. BOATWRIGHT

FILED
DEC 29 1997
CLERK SUPREME COURT

Upon the Petition of
TODD D. BOATWRIGHT,

Petitioner-Appellee\Cross Appellant,

And Concerning
CATHIE J. BOATWRIGHT,

Respondent-Appellant\Cross Appellee.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Respondent appeals from the modification of the dissolution decree awarding petitioner primary physical care of the parties' two daughters. **REVERSED.**

Karen A. Volz of Ackley, Kopecky & Kingery, Cedar Rapids, for appellant.

Vernon P. Squires, of Bradley & Riley P.C., Cedar Rapids, for appellee.

Heard by Cady, C.J., and Sackett, and Huitink, JJ.

CADY, C.J.

Cathie Overhulser, formerly Cathie Boatwright, appeals the district court's modification of the dissolution decree. The modification transferred primary physical care of the parties' two daughters to Todd Boatwright. Cathie also appeals the district court's denial of attorney fees, and requests appellate attorney fees. Todd cross-appeals, claiming the trial court erred by failing to terminate his child support obligation and failing to order Cathie to pay child support. He also requests appellate attorney fees. We reverse.

Cathie and Todd divorced in February 1989, after slightly more than four years of marriage. They had two children, Elizabeth, born May 8, 1985, and Erin, born April 13, 1986. Pursuant to the dissolution decree, Cathie received primary physical care of the children and Todd paid $80.00 per week in child support. The decree also awarded Todd visitation.

Following the dissolution, Cathie married her current husband, Bryan Overhulser. She has also held numerous jobs. Currently, Cathie works as a self-employed day care provider in her home. Her income varies with the number of children under her care. Bryan works full-time for a steel construction company, earning $8.25 per hour. The Overhulsers moved at least four times since 1989. Although they moved frequently, the children were not forced to change schools with every move. They currently live in St. Francisville, Missouri.

000021

Todd also remarried after the dissolution. He currently resides in Cedar Rapids with his wife, Marnie Boatwright. Todd works as a journeyman lineman, earning approximately $20 per hour. Following the dissolution, he also changed residences numerous times before taking his current job.

Erin has psoriasis, a genetic skin disorder which requires continuous treatment. This generally involves either light treatment or the application of topical creams. While the creams are readily available in Missouri, Erin must travel to Iowa City to obtain the light treatments. Cathie has failed to take Erin to several doctors' appointments since the divorce. Additionally, Erin has occasionally been out of her medicine for periods of time long enough to worsen her condition. Cathie has expressly indicated an unwillingness to travel to Iowa City for light treatments, despite its improvements to Erin's condition.

While the children were in Cathie's care, Todd reported several incidences of child abuse to authorities. Social workers investigated these allegations, but determined them unfounded. Todd maintains Bryan Overhulser beats the children and on one occasion forced Erin to eat soap. He additionally asserts the children are neglected and lack appropriate clothing.

In February 1995, Cathie initiated an action to modify Todd's child support obligation. Shortly after an order increasing child support to $170 per week was entered, Todd filed an application to modify the dissolution decree to obtain primary

physical care of the children. The district court modified the decree and awarded Todd primary physical care of the children.

On appeal Cathie claims the district court erred in modifying the dissolution decree to award Todd primary physical care of the children. She also appeals the district court's denial of attorney fees and requests appellate attorney fees. Todd cross-appeals, asserting the trial court erred by failing to terminate his child support obligation and by failing to order Cathie to pay child support. He also requests appellate attorney fees.

I. Primary Physical Care

We review a district court's modification of a dissolution decree de novo. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but are not bound by them. *Id.*; Iowa R. App. P. 14(f)(7).

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. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996).

The parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Frederici*, 338 N.W.2d at 158; *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. *Petition of Anderson*, 530 N.W.2d 741, 742 (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.

Cathie asserts the trial court erred in determining a substantial change not contemplated by the trial court occurred. Specifically, she claims her changes in residences and jobs are not a substantial change. She also maintains her ability to care for Erin's psoriasis is adequate and does not amount to a substantial change not contemplated by the trial court. She further claims she has provided a stable home for her children and no physical abuse or neglect has occurred.

A. Residence and Job Changes

The parent with primary physical care has primary control over where the children's home will be, which may include moving the children away from the non-primary physical care parent. *Frederici*, 338 N.W.2d at 159. A change in residence by the custodial parent following the original decree, even out-of-state, does not itself justify a change in custody.[1] *See Dale* 555 N.W.2d at 245. We live in a

---

[1] Iowa Code section 598.41 governing child custody was amended by House File 612. *See* Iowa Legis. Serv. No. 182 (West). Section 598.8A provides we may consider relocation of a child's residence to a location 150 miles or more from the residence of the child at the time of the custody award to be a substantial change in circumstances. In this case, the distances are less than 150 miles and section 598.8A is inapplicable.

highly mobile society, and a move by one of the parties is not so unusual or substantial as to support a change in custody. *Id.* We generally focus on the motivation behind the move, as well as the overall impact of the move on the children. *See Frederici*, 338 N.W.2d at 160.

In this case, the Overhulsers moved at least four times since the dissolution. Although they moved frequently, their motivation was in seeking employment. In fact, all of the moves were within one hour of their original location of Ft. Madison. Cathie clearly did not move in order to keep Todd from seeing the children. The children were not required to change schools during some of these moves. Additionally, at the time of Cathie's moves, Todd also changed residences frequently. There is no guarantee that either of the parties will remain in their present locations. We therefore find Cathie's moves do not establish a substantial change not contemplated by the trial court.

In addition to asserting Cathie's moves were a substantial change in circumstances, Todd cites Cathie's numerous job changes as a factor in her ability to care for her children. Although Cathie has changed jobs frequently over a short period of time, nothing in the record indicates this has interfered with her ability to care for her children or presented a substantial circumstance not contemplated by the trial court at the time of dissolution.

B. Erin's Psoriasis

Todd further claims Erin's medical condition and Cathie's lack of care constitutes a substantial change in circumstances not contemplated by the trial court. Todd points to instances where Cathie missed doctor's appointments and failed to provide Erin with the medication she needs. Additionally, he expresses concern regarding Erin's inability to obtain light treatments for her condition in Missouri.

Although failure to properly treat a medical condition and bring a child to medical appointments can constitute a substantial change in circumstances meriting a modification of child custody, Cathie's care of Erin does not rise to this level. *See In re Marriage of Hubbard*, 315 N.W.2d 75, 81 (Iowa 1982). While Cathie may have missed isolated doctor's appointments, and Erin occasionally ran out of medicine, the medical testimony indicated Erin received adequate treatment for her condition. In the interest of Erin, we do, however, encourage both parents to more closely follow the doctors' instructions with her medication and care.

C. Abuse and Neglect

Todd contends the children have been physically abused and neglected in the Overhulser home. He claims the children have been beaten, and Bryan forced Erin to consume soap. He also claims after the children are with Cathie, they are in dirty, inappropriate clothing.

While some evidence in the record confirms that Bryan and Cathie spanked the children on several occasions, and rough play occurred, there was no indication it rose to the level of abuse. Todd's allegations have been investigated by several social

workers and reports of abuse were determined unfounded. The soap incident was also investigated and determined unfounded. We rely on the parties testimony and the social workers' reports in concluding Bryan and Cathie did not abuse or neglect the children.

We have considered all of Todd and Cathie's claims regarding primary physical care of the children. We reverse the trial court's modification findings and award primary physical care to Cathie.

II. Child Support

Todd claims the trial court erred by failing to terminate his child support obligations and by failing to order Cathie to pay child support. The trial court determined it lacked jurisdiction over the child support issue and child support was not an issue at trial. Because we decline to modify primary care, it is unnecessary to address Todd's claim.

III. Attorney Fees

We have considerable discretion in awarding attorney fees. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa App.1997). To overturn an award of attorney fees, the complainant must show the trial court abused its discretion. *Id.* We find the trial court did not abuse its discretion in awarding attorney fees and we decline to disturb the trial court's findings.

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 Cathie's need and both parties' ability to pay, we find Todd should contribute $1000 for Cathie's appellate attorney fees.

REVERSED.

Huitink, J., concurs; Sackett, J. dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court.