IN THE COURT OF APPEALS OF IOWA

No. 0-436 / 99-2023
Filed October 25, 2000

IN RE THE MARRIAGE OF TIMOTHY F. DEUTMEYER AND LISA A. DEUTMEYER

Upon the Petition of
TIMOTHY F. DEUTMEYER,
Petitioner-Appellee,

And Concerning
LISA A. DEUTMEYER,
Respondent-Appellant.

FILED
OCT 2 5 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Delaware County, R.J. Curnan, Judge.

Respondent appeals from the district court's judgment modifying the dissolution decree and changing physical care of the parties' daughter from her to the petitioner. She contends the trial court erred by transferring physical care of the child, ordering her to pay child support, and denying her request to modify the existing visitation schedule, adjust child support and award attorney fees.

AFFIRMED.

Ronald J. Pepples, Parkersburg, for appellant.

Dale L. Putnam of Putnam Law Office, Decorah, for appellee.

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

MILLER, J.

Respondent Lisa A. Deutmeyer appeals from the district court's judgment modifying the previous dissolution decree and changing physical care of the parties' daughter, Victoria, from her to Petitioner Timothy F. Deutmeyer. Lisa contends the trial court erred: (1) in transferring physical care of the child to Timothy; (2) by ordering her to pay child support; and (3) in denying her request to modify the existing visitation schedule, adjust child support and award attorney fees. Lisa and Timothy both request appellate attorney fees. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

Lisa and Timothy Deutmeyer were married on January 18, 1989 and had one child, Victoria, born July 14, 1989. The marriage ended by dissolution decree entered November 8, 1994. The parties were awarded joint custody with physical care to Lisa subject to visitation by Timothy. Timothy was required to pay child support to Lisa. On August 17, 1997 this court affirmed the district court's award of physical care to Lisa. Timothy filed a petition to modify physical care on March 9, 1999. The district court granted the request and changed the physical care of Victoria to Timothy on November 3, 1999. In doing so the court ordered Lisa to pay child support and denied her counterclaim requesting modification of the visitation schedule, adjustment of child support, and award of attorney fees.

Lisa claims the trial court erred by granting Timothy's petition to modify, thereby transferring physical care of Victoria, and ordering her to pay child support. She argues Timothy did not meet his burden to show his ability to care for Victoria was superior to hers, and that there has been no material change of

circumstances since the entry of the dissolution decree. Lisa further alleges Timothy only filed the petition because she wanted to move with Victoria to California to be closer to her family and friends.

Timothy married Karen Deutmeyer on August 22, 1998. Timothy and Karen currently live on a farm in Greeley, Iowa with Karen's daughter Samantha. Timothy began running this dairy and hog farm in February of 1999. Lisa currently lives in Waterloo, Iowa. It appears from the record Lisa was to begin work at APAC Telemarketing on November 8, 1999, working forty hours a week. She was to receive eight dollars an hour, as a hiring bonus, the first three months, and then somewhere between $7.00 and $7.50 an hour. As there is nothing in her brief to indicate otherwise, we assume this job started as planned and Lisa continues to work for APAC.

Victoria was diagnosed with attention deficit disorder (ADD) in second grade. Upon diagnosis she was treated with Ritalin and assigned a special education teacher. Victoria attended Saint Edwards school in Waterloo through second grade, and transferred to Kittrell Elementary in Waterloo at the start of third grade, in the fall of 1997. At trial two of Victoria's teachers from Kittrell, Mary Huffman and Andrea DeGroote, testified on behalf of Timothy. Ms. Huffman is a special needs teacher who began working with Victoria in third grade and continued through the time of trial. Ms. DeGroote was Victoria's fourth grade teacher.

Both teachers testified that Victoria had an absenteeism problem, missing twenty-five days during third grade and over thirty-five days during fourth grade. In addition, both testified that Victoria was either sad or showed no emotion most

of the time, but on Fridays before Timothy and Karen were to pick her up for weekend visitation she was happy and excited. Ms. Huffman and Ms. DeGroote both confirmed that Timothy and Karen help Victoria with her homework and Ms. DeGroote stated that the homework was not getting done with her mother, Lisa. Finally, both teachers testified that in their opinions it would be in Victoria's best interest, both educationally and emotionally, to be placed with Timothy.

II. STANDARD OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). The trial court has the auspicious perspective of hearing the evidence and observing the witnesses. Thus, we recognize the reasonable discretion of the trial court to modify custody and visitation rights and will not disturb its decision unless the record fairly shows it has failed to do equity. *In re Marriage of Salmon*, 519 N.W.2d 94, 95 (Iowa App. 1994) (citing *Norenberg v. Norenberg*, 168 N.W.2d 794, 797 (Iowa 1969). 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. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa App. 1995).

III. MERITS

The legal principles governing modification actions are well established.

> 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, 741-742 (Iowa App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Here, unlike in an original custody determination, the question is not which home is better, but whether the parent seeking the change has demonstrated he or she can offer the child superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa App. 1994). If both parents are found to be equally competent to minister to the child, custody should not be changed. *Id.* The burden upon the parent seeking to change custody is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children." *Id* at 214. We find Timothy has met this heavy burden.

Both Ms. DeGroote and Ms. Huffman testified to the similar problems they had witnessed in Victoria's behavior and school work. As noted above, both teachers testified Victoria had an extreme problem with absenteeism in both third and fourth grade, she was having trouble getting her homework done while with Lisa, and she seemed sad or emotionless most of the time. Ms. Huffman testified she spoke directly with Lisa about these problems on at least four occasions and once even had the principal of Kittrell go pick Victoria up for

school when she had missed the bus. Yet even after these incidents in third grade, Lisa allowed the absenteeism problem to get worse in fourth grade. Ms. Huffman testified it is even more important for a child with special needs such as Victoria to have regular attendance at school than it is for a child without such needs. This opinion appears to be well founded.

Timothy's allegation that Victoria's homework was not getting done when she was with Lisa is fully supported by the record. There were notes on Victoria's report card about this problem as well as notes sent home with Victoria by Ms. DeGroote to get specific things done. Thus, it appears reasonably clear that Lisa knew of these problems yet apparently did little to remedy them, and allowed Victoria to routinely be delinquent in her homework, and to frequently wholly fail to complete it.

There was further testimony by both of Victoria's teachers that she gets her homework done when she is with Timothy and Karen, and that she is happy and excited on the Fridays before she goes to stay with them. In addition, it was confirmed by both of the parties and the teachers that Victoria has a close relationship with Karen and Karen's daughter Samantha, and that this close relationship between Victoria and Samantha is beneficial to Victoria.

Lisa denies that Victoria's homework did not get done and states that the absences were either because she missed the bus or was sick. Further, Lisa asserts that the time period when all of these absences occurred was very emotionally difficult for her and it was hard for her to go to school, raise Victoria, and make a living. We conclude the evidence in the record does not support Lisa's version of the facts.

The testimony of both teachers is clear and unambiguous that Victoria had problems getting her assigned homework done and had excessive absences. The record shows that Victoria in fact had these problems while in Lisa's care. We therefore look to Lisa to provide any reasonable explanation for these problems and for assurance they have been remedied. The record provides neither.

First, Lisa worked only minimally in 1995 and 1996, earning $2,935.00 and $503.00 in those two years respectively. She did not work at all in 1997. Secondly, Lisa has attended college in three different degree programs since the dissolution, but as of the time of trial had not completed any one of these programs. If Lisa was barley working and attending school only sporadically there does not appear to be any good reason for her to have been unable to get Victoria on the bus in time and to assure that her homework was done.

Additionally, Lisa's lifestyle has involved numerous changes of residence. While all of these moves were in the Waterloo-Cedar Falls area, such continual movement does not allow Victoria the type of stability all children need in their home lives. Finally, based on the uniform testimony of Ms. DeGroote, Ms. Huffman, and Timothy, we believe Victoria is often left to her own resources to do her homework, get ready for school, and get on the bus on time. These are inappropriate responsibilities for a third or fourth grade child with special needs. Perhaps this explains in part her significant number of absences for two years.

It does appear, as Lisa points out, that by the time of trial Victoria's absences had decreased somewhat in fifth grade. However, it is significant that Lisa allowed this problem to continue for two full school years and in fact allowed

it to worsen during the second year. We note that even after Timothy filed the application for modification, alleging as one of the grounds that Lisa failed to get Victoria to school, Lisa allowed Victoria to miss another eighteen or more days of school in the fourth quarter of the 1998/1999 school year. Lisa's acts and omissions demonstrate an inadequate concern for Victoria's needs and an inadequate willingness on Lisa's part to change her lifestyle in order to ensure that Victoria's interests are given reasonable priority.

We agree with Lisa that a change in geographic location alone will not form the basis for modification of physical care absent other circumstances. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998). Relocation is, however, a consideration when determining if there has been a substantial change in circumstances. *Id* at 874; *See also Rierson*, 537 N.W.2d at 808; Iowa Code section 598.21(8)(f) 1999. In fact, a major move such as this must be a consideration in determining if there has been a significant change in circumstances. *Id.*

Lisa contends the trial court did not consider any of Timothy's "shortcomings" in making its determination to physical care. This argument is based solely on the fact that they were not mentioned in the trial court's ruling. Among the facts which Lisa asserts show Timothy's bad character and why he does not have superior ability to minister to Victoria's needs are a prior founded child abuse report and his prior relationships with his other children.

There is evidence in the record to support the allegations made by Lisa concerning Timothy's past. There was a founded child abuse report against Timothy for an incident in which he slapped Victoria in 1996. He did give up his

daughter from a prior marriage so her stepfather could legally adopt her. He does have a son from a previous relationship, he did contest paternity of his son, and he has never seen that son but does pay child support for him. However, it is equally clear that all of this evidence was before the trial judge for his consideration in making his decision concerning change of physical care.

The fact the trial court did not set forth in its ruling each fact presented in evidence does not mean that it did not take them into consideration. There was also testimony at trial that Victoria slept in the same bed as Lisa and her boyfriend, that Victoria told a child abuse investigator in 1999 that her mother yells at her more than her father does, and that Lisa is facing a pending forgery charge. The trial judge did not mention any of these matters either, even though the yelling and forgery charge appear to be well supported by the evidence. The trial judge no doubt considered all relevant facts proved by the evidence. The trial judge apparently felt that the matters not mentioned in his ruling were somewhat removed in time, offset each other, or otherwise would not change the outcome of the case.

We agree with the trial court that both parties love Victoria and want what is best for her. However, based on the present circumstances of both parties, as well as the problems that have been proven during the time Victoria has been with Lisa, the trial court concluded Victoria's interests would be best met by placing her with Timothy. We agree.

IV. APPELLATE ATTORNEY FEES

Both Lisa and Timothy have requested appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Dieger*, 584 N.W.2d 567, 570

(Iowa App. 1998). 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 trial court's decision on appeal. *Id.* We conclude each party should be responsible for their own appellate attorney fees.

V. CONCLUSION

We conclude the trial court was correct in finding there have been substantial changes in circumstances, that Timothy has shown an ability to minister more effectively to Victoria's well-being, and that it is in Victoria's best interest to be placed with Timothy, and affirm its order modifying the decree to change physical care. We therefore also affirm the trial court's order that Lisa pay child support for Victoria. Lisa's remaining claims of trial court error are moot. Each party shall be responsible for their own appellate attorney fees.

AFFIRMED.