IN THE COURT OF APPEALS OF IOWA

No. 0-546 / 00-313
Filed October 13, 2000

MARCUS LAMONT POPE,
Petitioner-Appellant,

vs.

RACHELLE CRAIG, N/K/A RACHELLE SUTTON,
Respondent-Appellee.

FILED
OCT 13 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Pope appeals a district court ruling denying his petition to modify the child custody provisions of the parties' paternity and custody decree. **AFFIRMED.**

John C. Wagner and Jeffrey S. Ritchie of John C. Wagner Law Office, P.C., Amana, for appellant.

Diane L. Dornburg, Des Moines, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

STREIT, J.

Marcus Pope believes he, not Rachelle Craig (now known as Rachelle Sutton), is the better primary caregiver for their daughter. Because he has not proven we should modify the district court's custody decree to reflect this belief, we affirm its dismissal of his custody modification petition.

I. Background Facts and Proceedings.

Pope and Sutton are the parents of LaKiesha Pope, born May 1990. They never married, but did live together for one year after LaKiesha's birth. Since their separation, LaKiesha has lived with Sutton.

In November of 1997 Pope and Sutton entered into a stipulation that provided they would have joint legal custody of LaKiesha. The stipulation also provided Sutton would be responsible for LaKiesha's primary physical care and Pope would be entitled to reasonable visitation. The district court adopted the stipulation as its custody decree.

In December of 1998 Pope filed a petition to modify the custody decree. Pope sought primary physical care of LaKiesha based on two alleged circumstances: Sutton's failure to address LaKiesha's healthcare concerns and LaKiesha's expressed desire to live with Pope. The district court dismissed the petition.

Pope appeals, claiming the aforementioned circumstances warrant a modification of the custody decree.

II. Standard of Review.

We review equity cases de novo. Iowa R. App. P. 4.

III. The Merits.

A modification of the custody decree is only appropriate if Pope shows, by a preponderance of the evidence, a substantial change in circumstances since the court entered the decree. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *cf. In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App. 1988) ("The moving party in a modification action carries a heavy burden when seeking a change in custodial provisions of a dissolution decree."). Such change must not have been contemplated by the court when it entered the decree, must be more or less permanent, and must relate to the LaKiesha's welfare. *See Frederici*, 338 N.W.2d at 158. Pope must also have proven an ability to minister more effectively to his daughter's well-being. His heavy burden stems from the principle that once custody is fixed, it should be disturbed only for the most cogent reasons. *See id.*

A. Healthcare Concerns.

Pope claims Sutton has failed to properly address LaKiesha's healthcare concerns. Specifically, he claims Sutton has not addressed LaKiesha's chronic head lice problem and her dental problems. Pope has not proven these circumstances warrant a modification of the custody decree.

LaKiesha has had head lice on multiple occasions. Pope acknowledges LaKiesha had head lice as early as 1993. He claims, however, head lice did not present a "chronic" problem for LaKiesha until *after* the district court entered the custody decree.

We believe Pope may have overemphasized the extent of LaKiesha's head lice problem. Pope took LaKiesha to the doctor over a dozen times during a twelve-month span to have the problem evaluated. Given the timing and number of these visits, we agree with the district court's assessment "that most of these visits have been for the purpose of documenting head lice for this legal action." Pope denies having such ulterior motives. However, because the district court was present to observe and listen to the parties and witnesses at trial, we give weight to its findings of fact. *See In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992); *see also* Iowa R. App. P. 14(f)(7).

The record does not show Sutton failed to adequately respond to this purported problem. Sutton testified she repeatedly treated LaKiesha for head lice. On two separate occasions the Iowa Department of Human Services thoroughly investigated allegations that LaKiesha was being denied critical care because of her head lice problem.[1] After each investigation the department concluded Sutton was providing adequate care for LaKiesha and the allegations were unfounded. We also conclude Sutton properly addressed LaKiesha's head lice problem.

LaKiesha has had a few minor dental problems necessitating professional attention. In 1998 a doctor wrote a letter to Sutton recommending that LaKiesha be taken to a dentist because she had some cavities.[2] Sutton did take LaKiesha

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[1] The investigations included visits to LaKiesha's home and school; interviews with Sutton, Pope, LaKiesha's stepmother, and school nurses; and examinations of LaKiesha.

[2] Pope had taken LaKiesha to the doctor to be evaluated for head lice. The letter included the doctor's recommendations regarding head lice treatment.

to a dentist roughly a year later and then made an appointment to finish the necessary dental care. Whether Sutton ever took LaKiesha to the second appointment is unclear. Even if she did not, Pope has not proven the custody decree should be modified to name him as LaKiesha's primary caregiver. Although untreated dental problems can lead to more serious problems, it has not been shown that LaKiesha's cavities amounted to the requisite substantial change in circumstances.

B. LaKiesha's Preference.

Pope also claims LaKiesha's expressed desire to live with him warrants a modification of the custody decree. LaKiesha's preference regarding the custody arrangement is one factor applicable to determining what arrangement is in her best interests. *See* Iowa Code § 598.41(3)(f) (1999); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). However, we give less weight to her preference in this modification action than we would if this were the original custody decision. *See In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa App. 1993). In assessing her preference, we look at, among other things, her age and educational level, the strength of her preference, her relationship with family members, and the reasons she gives for her decision. *See id.*

Having reviewed the record de novo, we see no reason for modifying the custody decree. LaKiesha was nine years old when this action went to trial; the district court did not permit her to testify. Pope did testify LaKiesha had told him she wanted to live with him. He also offered into evidence the following statement recorded by a social worker: "[LaKiesha] stays with her dad and his

new family every other weekend in Williamsburg, Iowa. She states she likes it there." Finally, two of Pope's witnesses testified LaKiesha becomes withdrawn when her weekend visits with her father end. This evidence may show LaKiesha loves her father and enjoys spending time with him—but it does not prove he should be responsible for her primary physical care.

Pope has not met his heavy burden of proving a substantial change in circumstances since the district court entered the custody decree. Nor has he proven he can minister more effectively to LaKiesha's well-being than Sutton. We affirm the district court's dismissal of Pope's custody modification petition.

AFFIRMED.