IN THE COURT OF APPEALS OF IOWA

No. 6-421 / 95-2072

FILED
SEP 30 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MELODIE GLADE AND ROBERT F. GLADE

Upon the Petition of
MELODIE GLADE n/k/a MELODIE WHITEHURST,
Appellant,

And Concerning
ROBERT F. GLADE,
Appellee.

Appeal from the Iowa District Court for Jefferson County, James P. Rielly, Judge.

Petitioner appeals a district court order refusing to modify the decree dissolving her marriage to respondent. **AFFIRMED.**

R. T. Starken of Alexander & Starken, Ottumwa, for appellant.

Allan C. Orsborn of Orsborn, Baurle & Milani, Ottumwa, for appellee.

Heard by Habhab, P.J., and Cady and Vogel, JJ.

VOGEL, J.

Petitioner appeals an order by the district court denying modification of a dissolution decree. We affirm.

On February 2, 1987, the district court entered a decree dissolving the marriage of Melodie and Robert Glade. The decree awarded joint legal custody but gave primary care of the parties' children, Hannah, born January 22, 1981, and Bethany, born June 21, 1982, to Melodie. Both parties remarried.

On August 31, 1994, the parties filed a stipulation indicating a substantial change of circumstances had occurred which would make it appropriate to transfer primary care of the children to Robert with reasonable visitation for Melodie. The stipulation also provided Melodie would pay child support in accordance with the child support guidelines. The district court entered an order that same day modifying the dissolution decree in accordance with the stipulation provisions.

On February 13, 1995, Melodie, n/k/a Melodie Whitehurst, filed a petition for modification seeking transfer of primary physical care of the children back to her. She alleged the reason for the stipulation and modification of the decree in 1994 was her move to Colorado where her husband, Jason Whitehurst, was transferred while in the military. At the time the petition for modification was filed, Melodie had returned to Fairfield, Iowa and sought the return of the children. Melodie's petition also alleged the children had been abused, they wanted to live with her, and Robert had refused to grant her reasonable visitation.

Following trial, the district court entered a ruling denying Melodie's application for modification. The court found the children had done well in Robert's care. The court noted Bethany wanted to live with her mother. The court concluded Melodie had failed to show a substantial change of circumstances warranting a transfer of primary physical care.

Melodie appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value when considering custody issues, except to provide a framework for analysis, and we must, therefore, base our ruling on the particular facts and circumstances before us. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

Melodie bears a heavy burden in attempting to obtain a modification of primary physical care. This is due to the principle that once primary physical care is fixed, it should only be disturbed for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980); *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994).

> 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 only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)).

One of Melodie's primary arguments is Bethany has stated a preference for living with her mother. In assessing Bethany's 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. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa App. 1993). Her preference is given less weight in a modification action than it would be given in an original custody decision. *Id.*

At the time Bethany expressed her preference to Nina Wendt, a psychotherapist who met all the family members, Bethany was thirteen years old.

This preference was stated immediately following a long weekend which Bethany spent with Melodie. This was the only time Dr. Wendt met with Bethany. Dr. Wendt also noted that if Bethany stayed with her father and stepmother, she would probably need long-term psychotherapy to deal with the situation. Bethany is a good student who shows no significant difficulties with her peers or teachers. The specific reason for Bethany's preference is not clear in the record, although she has had a difficult relationship with her stepmother, Lee Ann Glade. Bethany did not testify at trial. While Bethany's preference will receive some consideration in our determination of whether there should be a modification, we note that it is only one factor in that determination.

Since the most recent modification, very little has changed except that Melodie has returned to Iowa after spending approximately four months in Colorado. The children are doing well in school and in their other activities. The only problem in the home has been between Bethany and Lee Ann. Robert is in a stable marriage with Lee Ann. Furthermore, Melodie has not proven she is able to minister more effectively to the children's well being. Upon our de novo review of the record, we are unable to find there has been a substantial change in circumstances warranting a modification of the primary physical care arrangement. Accordingly, we affirm the district court's ruling.

Melodie contends the district court erred in not ordering Robert to pay trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney

fees. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). To overturn an award, the complaining party must show that the trial court abused its discretion. *Id.* We find no abuse of discretion by the district court in failing to order Robert to pay trial attorney fees.

Melodie also requests appellate attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to 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. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We conclude each party should pay his or her own appellate attorney fees.

AFFIRMED.