FILED
MAY 26 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-170 / 93-1278

IN RE THE MARRIAGE OF DONNA M. BOYD AND ROD B. BOYD

Upon the Petition of
DONNA M. BOYD,

Appellee,

And Concerning
ROD B. BOYD,

Appellant.

Appeal from the Iowa District Court for Polk County, Theodore H. Miller, Senior Judge.

Rod Boyd appeals a denial of his petition to modify the custodial provisions of the parties' dissolution decree. **AFFIRMED.**

Michael E. Marshall and Brent A. Cashatt of Smith, Schneider, Stiles, Wimer, Hudson, Serangeli, Robinson, Mallaney, Shindler & Scalise, P.C., Des Moines, for appellant.

John S. Harding of Harding, Thomas, Harding & Griffin, Des Moines, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Rod Boyd appeals the judgment of the district court denying his application to modify the custodial provisions of a dissolution decree. We affirm.

The December 12, 1991, decree dissolving the Boyds' marriage awarded Rod and Donna joint custody and shared physical care of their four children. All of the children suffer from a rare liver disorder called von Gierke's disease. Each child is on a complex and rigidly-scheduled regime of food and medication.

The decree was specifically designed to accommodate the children's special medical needs. Although the children were to reside with Donna, Rod was allowed liberal access to her home and daily contact with the children. He has accordingly remained active in the management of the children's care since the decree.

Donna's household now includes her boyfriend, Sam Reeves, and their child, Joshua. Joshua has Down's syndrome and suffers from a heart ailment. Donna has relied on Sam to assist in the care of the children since he began living with her in March of 1992.

In May 1992 the Iowa Department of Human Services commenced a child abuse investigation in response to Rod's allegation that Donna and Sam were not providing adequate medical care for the children. The investigator filed a founded abuse report naming Rod, Donna, and Sam as the perpetrators. The department's conclusions regarding Rod were later changed from founded abuse to undetermined.

The department's July 27, 1992, report included a finding there was an obvious pattern of denial of medical care for Rod and Donna's four children. The department recommended public health services to assist with the care of the children and to closely monitor their progress.

Donna was employed outside of the home at the time these concerns were expressed. She has since left her employment to devote more time to the care of the children. A public health nurse has provided weekly services as recommended, and Donna has applied for an in-home health aide to assist her with household duties. The public health nurse will continue to monitor the family's progress. No other changes have been recommended by the department. Dr. Schwenk's, the children's physician, September 1992 letter notes significant improvement in the children's condition since Donna left her employment and services were commenced.

Rod initiated these proceedings in June 1992. He seeks an award of sole custody based primarily on Donna's failure to provide required medical care for the children. Rod cites Donna's cohabitation with Sam and Joshua's special needs as factors which have adversely affected Donna's ability to care for the children. Rod also claims the children would prefer to live with him.

The district court denied Rod's application. On appeal he argues the court erred by failing to place the children in his physical care and that the district court erred by

awarding Donna trial attorney's fees. Our review is therefore de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

The party who wishes to change the custodial provisions of a dissolution decree must establish by a preponderance of the evidence that conditions since the decree was entered have changed, both materially and substantially, so that it is in the best interests of the children to make the requested change immediately. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citation omitted). The changed circumstances must not have been considered by the district court at the time the decree was entered. Id. They must be more or less permanent and must relate to the welfare of the children. Id. The parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id. 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. Id.

Our de novo review leads us to conclude Rod has not met his heavy burden. Any decline in the children's condition was temporary, and we are not convinced this decline is entirely attributable to Donna. Donna has nevertheless made the changes in her circumstances required to address the concerns of the department of human services. Both the

department and the children's physician are clearly satisfied with the children's present physical condition.

The district court in reaching its decision rejected the recommendation of a court-appointed custody investigator. The recommendation of the investigator is not controlling. In re Marriage of Riddle, 500 N.W.2d 718, 720 (Iowa App. 1993). We agree with the district court's conclusion that the recommendation for sole custody is not feasible in view of Dr. Schwenk's observation that one individual would not be able to manage the rigors of the children's complex care regime. Although Rod's intentions are noble, we are not convinced he, as sole custodian, has the resources or greater ability to minister more effectively to the special medical needs of these children.

The custody investigator's recommendation was also based in part on the children's preference to reside with Rod. The children's preferences are entitled to consideration but are not controlling. In re Marriage of Hunt, 476 N.W.2d 99, 101 (Iowa App. 1991). The preferences of the children in this case are clearly outweighed by the need to provide a custodial environment best suited to address their special medical needs. Moreover, awarding sole custody to Rod would result in the children's separation from their half brother, Joshua. There is nothing in the record that supports the requested departure from our preference to avoid separating siblings. See In re Marriage of Blume, 473 N.W.2d 629, 631 (Iowa App. 1991).

The custodial provisions of the decree have allowed the children to remain in the only home they have known since 1984. These same provisions have facilitated the essential participation of both parents in the children's medical care. We do not believe it is in the best interest of the children to modify the decree as requested.

The trial court has considerable discretion in awarding attorney's fees. In re Marriage of Steele, 502 N.W.2d 18, 22 (Iowa App. 1993). Attorney's fees are not awarded as a matter of right but are based on the parties' respective abilities to pay. Hunt, 476 N.W.2d at 103. The award made by the district court was within its discretion, and it will not be disturbed on appeal.

Donna requests attorney fees on appeal. 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Rob is ordered to pay $2915.26 for Donna's attorney fees and expenses. Costs are assessed to Rob.

AFFIRMED.