IN THE COURT OF APPEALS OF IOWA

No. 5-241 / 94-1629

FILED
AUG 17 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF BARBARA ANN WALLINGA AND WAYNE M. WALLINGA

Upon the Petition of
BARBARA ANN WALLINGA,

Petitioner-Appellee,

And Concerning
WAYNE M. WALLINGA,

Respondent-Appellant.

Appeal from the Iowa District Court for Sioux County, Phillip S. Dandos, Judge.

Wayne appeals the district court's order denying his petition to modify the dissolution of marriage decree to place primary physical care of his minor children with him. **AFFIRMED AS MODIFIED.**

Mark Schouten of Oostra, Bierma & Schouten, Sioux Center, for appellant.

Bradley K. De Jong of Klay, Veldhuizen, Bindner, De Jong & Pals, Orange City, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ., Huitink, J., takes no part.

CADY, J.

Wayne Wallinga appeals from the district court decision denying his petition to modify the dissolution of marriage decree to place primary physical care of the parties' minor children with him. We affirm the district court's decision with modification.

Barbara Tiedeman and Wayne Wallinga were married in 1978 and divorced in 1986. They have two children from the marriage, Katie, born September 1, 1980, and Robbie, born December 20, 1983. The dissolution of marriage decree awarded the parties joint legal custody of the children and Barbara primary physical care. The decree provided that Wayne be awarded visitation including but not limited to every other weekend, half days on birthdays and holidays, and extended summer visitation.

Barbara married LeRoy Tiedeman in 1986. She has one child from this marriage, Mitchell, born in 1989. LeRoy was abusive to Barbara and they divorced in 1994. Barbara received primary physical care of Mitchell.

Barbara met her current fiance, Bradley, and moved from Hull, Iowa to Sibley in February 1994. She works as a machinist at Zevenbergen Machine. In June 1994 Barbara and the children began living with Bradley in his trailer home in Ocheyedan. Barbara and Bradley planned to marry in September 1994.

Wayne was remarried in 1988 to Sandy, and continues to live in Hull. Wayne is a self-employed carpet layer. Sandy has known the children since Katie was three

and Robbie was six months old and babysat for them before the parties were divorced. Sandy is available to be with the children when they get home from school.

On February 25, 1994 Wayne filed a petition for modification of the decree requesting that he be awarded primary physical care of the children. In the alternative Wayne requested more liberal visitation. Barbara answered and requested an increase in the amount of child support Wayne paid.

At trial the children's teachers testified that they considered Katie and Robbie "at risk" (in danger of dropping out of school) students. Katie's teacher, Eileen Gengler, testified that Katie was tired at school, her attendance was poor, she often came unprepared, and was not performing up to her abilities. Katie's basketball coach testified that she worried that Katie was getting involved with older boys. Robbie's teacher, Mildred Vos, testified that he had poor concentration, low self-esteem, frequently did not complete homework assignments, and was lacking many academic skills. Robbie's school counselor stated that Barbara had asked the school to terminate her counseling sessions with Robbie.

Katie testified that she was close to both her parents but that she preferred to live with Barbara. Robbie also stated that he would rather live with his mother.

The district court found that the children should remain with Barbara. However, the court modified the dissolution decree to provide Wayne one month summer visitation with the children. Barbara's request for an increase in child support was denied.

Wayne appeals. He argues that the court erred in denying his petition for modification because (1) Barbara has an unstable home life which has effected the children's well-being, (2) Barbara has not cooperated with visitation or maintained satisfactory communication with him, (3) Barbara has prevented Robbie from receiving counseling at school, and (4) Wayne can provide a more stable home environment for the children. Wayne further argues that the court should have granted him more extensive visitation rights. Barbara requests appellate attorney fees.

Our review of this equity action is de novo. *In re Marriage of Clifford*, 515 N.W.2d 559, 561 (Iowa App. 1994). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented for review. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the factual 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). Having never seen the parties or heard their voices, we recognize the favorable perspective of the trial court. *See In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974).

I. Custody

To alter the custodial provision of a dissolution decree, the applying party must demonstrate by a preponderance of the 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. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The changed circumstances must not have been

contemplated by the court at the time the decree was entered, and they must be more or less permanent, not temporary. *Id.* They must also relate to the welfare of the child. *Id.*

The parent seeking to gain custody from the other must prove an ability to minister more effectively to the children's well being. *Id.* The heavy burden placed upon a party seeking to modify custody stems from the principle that once custody of children is fixed it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

We recognize Wayne's greater stability since the dissolution of the parties' marriage in 1986. We are also cognizant of and concerned about the children's performance in school. Their success in this arena will help chart their course for later life, and we encourage both parents to take an active role in the children's education. It is important that they stay in-touch with the children's teachers and administrators and insure they have time for their homework and extracurricular activities. However, no evidence was presented that living with Wayne would improve the children's classroom performance.

Moreover, we believe Barbara can fulfill the children's need for stability. The evidence indicated there are strong bonds between Barbara and the children. Barbara has been their primary caretaker since their birth. Although she has struggled with issues of domestic abuse and stability since the parties' dissolution, she has always been an adequate provider for the children's physical and emotional needs.

Furthermore, Barbara appears to have achieved stability since her move to Sibley. She has a secure job with Zevenbergen Machine. Her relationship with her fiance, Bradley, is strong and the children like and respect him. The children have also adjusted to the new school district. We conclude removing them from Barbara's care presents a greater risk for destabilization than leaving them in her care, and Wayne has not demonstrated he can minister more effectively to the children's needs.

Furthermore, the trial testimony indicated the children have a very close emotional relationship with their half-brother Mitchell. In attempting to foster the children's best interests, the court ordinarily attempts to keep children of broken homes together. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 260 (Iowa App. 1985). The underlying rationale is that split custody deprives the children of the benefit of constant association with each other. *Id.* This rationale applies equally to half-siblings. *In re Marriage of Riddle*, 500 N.W.2d 718, 719 (Iowa App. 1993) (citing *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986)). There has been no showing that separation would better promote Katie's and Robbie's long-term interests.

Our decision also recognizes the children's preference. At trial both children indicated they desire to remain with their mother. While not controlling, the children's preference regarding custody is relevant and cannot be ignored. *In re Marriage of Blume*, 473 N.W.2d 629, 631 (Iowa 1991). We find their preference to live with Barbara is one of several factors weighing in her favor. As previously

indicated, Barbara has met the children's daily needs most of their lives and is capable of continuing to meet those needs. We affirm the trial court decision retaining the children's primary physical care with Barbara.

II. Visitation

In his petition to modify the dissolution decree Wayne requested the trial court to liberalize the visitation provisions and make them more explicit. The trial court responded by granting Wayne one month of summer visitation. On appeal, Wayne asserts the court should have granted him six weeks of summer visitation divided into three two-week periods, and granted the parties visitation on alternating holidays rather than sharing the holidays. Barbara argues that four weeks constitutes liberal visitation and additional time may interfere with the children's extracurricular activities.

A party seeking to modify visitation must demonstrate a material change in circumstances since the entry of the dissolution decree and that the requested change in circumstances is in the best interests of the children. *In re Marriage of Salmon*, 519 N.W.2d 94, 95-96 (Iowa App. 1994). This standard follows the criteria for modification of custody; however, a much less extensive change in circumstances is required. *Id.* at 96.

We, like the trial court, conclude Wayne has shown a sufficient change in circumstances to warrant alteration of the visitation schedule. Barbara has moved approximately forty-five miles away, and dividing holidays and birthdays is no longer

as feasible. The parties have also demonstrated an inability to work within the loose parameters of the previous visitation schedule. Until last year, the children's extended summer visitation with Wayne lasted only seven to ten days. We conclude a more explicit visitation agreement is necessary to assure the children maximum continuing physical and emotional contact with both parents. *See In re Marriage of Toedter*, 473 N.W.2d 233, 234 (Iowa App. 1991).

Wayne shall have visitation on alternate weekends from Friday at 6:30 p.m. to Sunday at 6:30 p.m. One party shall transport the children on Fridays and the other party shall transport them on Sundays, unless prior arrangements have been agreed upon.

The holidays of President's Day, Easter, Memorial Day, Fourth of July, Labor Day, Thanksgiving, Christmas Eve, Christmas Day, and New Year's Day shall be shared on an alternate basis with Wayne having visitation on Easter, Fourth of July, Thanksgiving, Christmas Day, and New Year's Day in even-numbered years, and Wayne having visitation on President's Day, Memorial Day, Labor Day, and Christmas Eve in odd-numbered years. The Christmas visitation in odd-numbered years shall begin the day school is out and extend until Christmas Eve at 10:00 p.m. The Christmas visitation in even-numbered years shall begin at 10:00 p.m. on Christmas Eve and terminate at 8:00 p.m. on New Year's Day. The Thanksgiving visitation shall include the Friday and the weekend following Thanksgiving. The

provisions for holiday visitation will take precedence over the regular weekend visitation.

Wayne shall have an additional visitation during the months of June, July, and August for up to four weeks which need not be consecutive. By May 1 of each year, Wayne shall notify Barbara of when he wishes to exercise this extra period of visitation. In addition, Wayne shall be entitled to visitation on Katie's birthday in even-numbered years and Robbie's birthday in odd-numbered years. This right of visitation includes the right to have the other child present when the birthday of the sibling is celebrated. Wayne shall enjoy the right of visitation on Father's Day, and Barbara shall have the right of visitation on Mother's Day. The parties shall provide each other with their current addresses and telephone numbers at all times in order to facilitate visitation.

III. Attorney Fees

Barbara requests appellate attorney fees. She urges that Wayne is in a stronger financial position. After reviewing the parties' respective financial affidavits, and considering Barbara's position as custodial parent of three minor children, we award her $500 in attorney fees. *See In re Marriage of Hunt*, 476 N.W.2d 99, 103-04 (Iowa App. 1991). Costs of this appeal are assessed to Wayne.

AFFIRMED AS MODIFIED.