IN THE COURT OF APPEALS OF IOWA

No. 1-907 / 11-1170
Filed December 21, 2011

IN RE THE MARRIAGE OF LOREN DUANE LONG AND DANIELLE LEA LONG

Upon the Petition of

LOREN DUANE LONG,
Petitioner-Appellant,

And Concerning

DANIELLE LEA LONG,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge.

Loren Long appeals from the district court's ruling modifying the physical care provisions of the decree dissolving his marriage to Danielle Long. **AFFIRMED AS MODIFIED.**

Maria K. Pauly of Wehr, Berger, Lane & Stevens, Davenport, for appellant.

Joshua J. Reicks of Schoenthaler, Roberg, Bartelt & Kahler, Maquoketa, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Loren Long appeals from the district court's ruling modifying the physical care provisions of the decree dissolving his marriage to Danielle Long. He objects to Danielle taking physical care of the couple's five-year-old daughter. Loren urges us to restore joint physical care or place physical care with him. He also challenges three other aspects of the modification ruling: medical support, application of the child support guidelines, and the income tax exemption.

We note at the outset that it was Loren who asked the district court to modify the dissolution decree, asserting the existence of a substantial change in circumstances. We find no error in the court's acceptance of that argument and do not entertain Loren's about-face on appeal. On the question of what physical care arrangement is preferable, in our de novo review, we find Loren has not carried his burden to show he would better minister to their daughter's needs or that joint physical care remains in the child's best interest. We modify the child support order to reflect the accurate guideline amount. Because the parties did not request any further changes in their original decree, we also modify the district court's order on the issues of medical support and the income tax exemption.

I. Background Facts and Proceedings

Loren and Danielle Long met through work and married in December 2003. Their daughter, T.L., was born in November 2005. During the marriage the family lived in Andrew. Both Loren and Danielle hold jobs at Alcoa's Davenport Works plant in Riverdale.

The couple divorced in March 2007. Their stipulated decree provided for "joint physical custody" of T.L. The parents crafted a Tuesday-to-Wednesday, Wednesday-to-Friday, and Friday-to-Monday care-giving schedule, alternating weekly and coordinated with their work shifts. The parents also agreed that T.L. would enroll in preschool in the Andrew school district and "both shall cooperate to ensure the child attends on a regular basis." At the time of the decree, the Andrew district offered preschool three days per week for children in T.L.'s age group. The decision as to where their daughter would attend elementary school was not resolved in the decree, but the parties stipulated that they would "live in that same district."

At the time of the divorce, Loren rented a house owned by his mother in LeClaire; he purchased that home in July 2007. He remarried in January 2011 and lives with his new wife and her nine-year-old son in the LeClaire home.[1]

Danielle remained in Andrew, living in the same house she owned before her marriage to Loren. Danielle has three children from a previous marriage: a nineteen-year-old daughter, and sons who are twenty-two and twenty-three years old. The sons live with her in Andrew. She also opened her home to a cousin and her husband who were relocating to Iowa from Texas.

Pursuant to the stipulated decree, Danielle enrolled T.L. in the Andrew preschool class. The child attended preschool in Andrew for three days each week during the 2009-2010 school year. In the summer of 2010, the Andrew

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[1] The distance between LeClaire and Andrew is approximately fifty-five miles; the parties estimate that the drive time is about one hour and five minutes.

district changed its preschool program for four-year-olds from three to five days per week. Danielle re-enrolled their daughter for the 2010-2011 school year.

On August 3, 2010, Loren filed an application to modify the decree, stating that the parents resided in different school districts and alleging that T.L. was "now school age and the parties cannot agree on where the child should attend school." Loren asserted that the school situation constituted a "substantial change in circumstances necessitating" the court's review. On August 17, 2010, Danielle filed an answer, noting the following: (1) the parties agreed T.L. would attend preschool in Andrew, (2) Loren voluntarily moved out of the Andrew district, (3) T.L. was not yet five years old and was eligible to be enrolled in preschool for the 2010-2011 school year, and (4) that there was not a substantial change in circumstances since the decree. Danielle alternatively asserted that if the court found a substantial change in circumstances, it should modify the decree to provide for T.L's attendance at the Andrew preschool for the 2011-2012 school year and grant physical care to her, subject to Loren's right to visitation.

On August 23, 2010, T.L. attended the first day of preschool in Andrew. On August 24, 2010, Loren enrolled the child at the Kiddie Karrasel Academy Preschool in LeClaire, where she attended that day. Loren informed Danielle he planned to have T.L. attend the LeClaire preschool on the days she was in his care.

On August 30, 2010, Danielle applied for a rule to show cause, alleging Loren was in contempt of the decree by refusing to take T.L. to the Andrew

preschool. After hearing arguments of the parties, the district court found that Loren was not in contempt and denied the rule to show cause on November 19, 2010. During the 2010-2011 school year, T.L. continued to attend preschool part-time in LeClaire and part-time in Andrew.

On July 6, 2011, the court held a hearing on Loren's application to modify the decree. Fifteen witnesses testified. Loren told the court he would like his daughter to attend school in Pleasant Valley, touting the greater opportunities offered by a larger district and expressing concern about the viability of the Andrew school district. Danielle testified to the advantages of the small classes in the Andrew district.

On July 20, 2011, the court issued its ruling on the application to modify. The court decided: "The parties' inability to communicate and to agree constitutes a material and substantial change in circumstances requiring that the divorce decree be modified." The district court declined to express an opinion on which school district was superior, noting that based on exhibits offered by Loren, both districts exceeded the state average in many performance measures.

The court awarded physical custody of T.L. to Danielle. The court ordered Loren to pay child support to Danielle in the amount of $581.77 per month, though the court appears to have inadvertently attached a guideline worksheet for individuals who were not parties to this action. The court also ordered both parties to provide, as medical support, a health benefit plan for T.L. Finally, the court allocated the income tax exemption for T.L. to Danielle for all odd-

numbered years and to Loren for all even-numbered years. Loren filed a timely notice of appeal on July 22, 2011.

II. Standard of Review

The district court tried this modification action in equity, and our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Neff,* 675 N.W.2d 573, 577 (Iowa 2004). In equity cases, we give weight to the district court's fact findings, especially those assessing the credibility of witnesses, but we are not bound by those findings. Iowa R. App. P. 6.904(3)(*g*).

III. Analysis

A. Modification of Physical Care Arrangement

1. Loren Cannot Challenge Court's Finding of a Material and Substantial Change in Circumstances For the First Time on Appeal.

Loren initially argues the district court should have limited its modification order to the question of where T.L. should attend school. He objects to the court's determination that "[t]he parties' inability to communicate and to agree constitutes a material and substantial change of circumstances requiring that the divorce decree be modified." Danielle responds that Loren's argument "wholly disregards his own pleadings, which state that the parties no longer reside in the same district, cannot agree where the child shall attend school, and that the foregoing amounts to a substantial change in circumstances."

We share Danielle's concern about error preservation. "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court." *State v. Rutledge,* 600 N.W.2d

324, 325 (Iowa 1999). Because Loren did not contest, and indeed affirmatively alleged, the existence of a material and substantial change in circumstances in the district court, we do not consider his contrary claim on appeal.

Even if Loren had preserved error on the question of a substantial change in circumstances, we would agree with the district court that the parents' "inability to communicate and agree" on the issue of T.L.'s schooling qualified as a basis to revisit the physical care arrangement. *See Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002) ("Discord between parents that has a disruptive effect on children's lives has been held to be a substantial change of circumstance that warrants a modification of the decree to designate a primary physical caregiver if it appears that the children, by having a primary physical caregiver, will have superior care."). The district court found that Loren's "unilateral" decision to enroll T.L. in a second preschool was "disruptive" to the four-year-old child. We give weight to that fact finding.

A material change in circumstances must be one that is not contemplated by the decree and must be "more or less permanent." *See In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983). In this case, the decree contemplated that the parties would agree on where the child was to attend "regular school" and both parties would "live in that same district." When these contemplated agreements did not come to pass, the district court was correct in finding a substantial and material change in circumstances.

2. Loren Does Not Meet His Burden to Show He Would Better Minister to His Daughter's Needs or that Shared Care Remains in Her Best Interests.

We next turn to the question whether Loren has proven he is able to provide better care and minister more effectively to T.L.'s well-being. *See Melchiori,* 644 N.W.2d at 368-69 (noting that where parents share equally in physical care, both are considered to be suitable "primary care parents"). In addition to assessing the parties' respective parenting abilities, we also consider whether the joint physical care arrangement remains in the child's best interests. *See id.* at 369.

When making physical care determinations, we seek to place children in the environment most likely to advance their mental and physical health and social maturity. *In re Marriage of Hansen,* 733 N.W.2d 683, 695 (Iowa 2007). Our top priority is the best interests of the child. *In re Marriage of Weidener*, 338 N.W.2d 351, 356 (Iowa 1983). To determine the child's best interests, we weigh all relevant conditions affecting physical care. *In re Marriage of Thielges,* 623 N.W.2d 232, 238 (Iowa Ct. App. 2000).

Loren suggests that he offers a more stable and wholesome environment for T.L. He notes that his home in LeClaire is less than ten minutes away from both parents' workplace in Riverdale and that his mother lives in the same neighborhood as his family, providing a strong support system for T.L. Loren points out that T.L. has her own room at his house. He contrasts the situation he offers his daughter with that provided by her mother. He questions the continuity

of the sleeping arrangements at Danielle's home in Andrew, given the additional relatives that Danielle invited to stay in her home. He also charges that Danielle exposes T.L. to inappropriate caregivers. Finally, he criticizes Danielle's parenting skills based on the substance abuse problems faced by one of her older sons and the lackluster academic performance of all three of her grown children.

Loren's contentions are inconsistent with the district court's fact findings. The court found no evidence in the record that Danielle's adult children posed any danger to T.L. "Instead, these children are fully capable of assisting in [her] care." The court also rejected Loren's criticism of Danielle's "lax" approach to raising her son, finding her to be "an attentive parent [who] took the actions necessary and appropriate to try to address the eldest child's difficulties." The court found Danielle to be "gracious" in her willingness to let a cousin and her husband reside with her until they could find permanent housing, and concluded these temporary houseguests were "able and willing" to assist Danielle in the care of T.L.

We defer to the district court's findings of fact, and especially to its assessment of witness credibility. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989). As a first-hand observer of witness demeanor, the trial judge has a distinct advantage over our appellate reliance on a cold transcript. *Id.* The district court in this case heard testimony from both Loren and Danielle, as well as two of Danielle's grown children and her cousin's husband. Given the trial judge's exposure to these witnesses, we accept his view that Danielle's

extended family will be a positive influence on T.L. and can safely assist in providing her care.

Loren also asserts he is the parent who is more likely to assure maximum contact with the parent who does not have physical care of T.L. On appeal, he cites several examples of how Danielle and her family have "manipulated" T.L. and undermined her relationship with him.

In our de novo review of the record, we do not find strong support for Loren's concern that Danielle will fail to share information about T.L. with him. Danielle testified she would welcome Loren to spend even more time with T.L. in the summer and on school holidays than provided by a normal visitation schedule. We agree with the district court's determination that both parties have encouraged their daughter's relationship with the other parent.

As noted above, the district court found it significant that Loren "unilaterally decided" to enroll T.L. in a second preschool despite the stipulation in the decree that she would attend preschool in Andrew. Loren's failure to communicate with Danielle in advance about this issue undergirded the court's decision to award physical care to Danielle. The court noted Loren's decision to enroll his daughter in the LeClaire program was "disruptive" to her preparation for kindergarten. The record supports the district court's finding that Danielle's extra-curricular efforts allowed T.L. to maintain her early academic progress. We agree that the parents' conduct regarding T.L.'s preschool experience supports the award of physical care to Danielle.

We also examine whether the stipulated shared care arrangement, crafted when T.L. was a preschooler, remained in her best interest as she entered elementary school. The district court found "in light of the requirement that T.L. will commence fulltime education, it is impractical to continue with the current parenting schedule." Because the parents have settled in different school districts, more than an hour drive apart, we agree with the district court's assessment that the rotating schedule based on the parents' work shifts, does not translate into a workable routine for a school child. When the physical distance is coupled with the parents' impasse on the issue of which school district T.L. should attend, we find that modification of the decree to designate a primary caregiver was appropriate. We affirm the district court's grant of physical care to Danielle with liberal visitation for Loren.

B. Child Support, Medical Support and Tax Exemptions

In the modification ruling, the district court ordered Loren to pay $581.77 per month in child support. This amount appears to be based on a worksheet prepared for individuals who were not parties to this appeal, but which was inadvertently attached to the Longs' modification order. Both parties agree that the child support calculation should be amended and point to respondent's exhibit E as an accurate application of the child support guidelines. Accordingly, we modify the order to require Loren pay child support in the amount of $615.66 per month.

On the issue of medical support, the district court ordered both parties to provide a health benefit plan "as provided in Iowa Code Chapter 252E." The

original decree ordered Danielle to provide medical insurance coverage for T.L. and further provided that Loren "shall also attempt to insure the child so as to have double health care/medical insurance coverage on the child, if available through employment." Both parties agree on appeal that they did not request a change in this aspect of the original decree. Accordingly, we find the modification ruling should be amended to reinstate the medical support provision from the original decree.

The original decree allowed Danielle to claim an income tax exemption for T.L. in even-numbered years and permitted Loren the exemption in odd-numbered years. The modification order, issued in July 2011, switched the alternating pattern, allowing Danielle the exemption for 2011 and all odd-numbered years and assigning Loren the exemption for 2012 and all even-numbered years. Loren argues this change was not requested by the parties and should be stricken from the modification order. We agree. The modification ruling should be amended to reinstate the original provision for Loren to claim the tax exemption for odd-numbered years, including 2011.

B. Appellate Attorney Fees

In considering an award of appellate attorney fees, 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. *In re Marriage of Roerig*, 503 N.W.2d 620, 623 (Iowa Ct. App. 1993). Only Loren asks for appellate attorney fees. Because he and Danielle have roughly equivalent abilities to pay and he was not obligated to defend the

modification order, we decline to award fees. Costs are taxed equally to each party.

AFFIRMED AS MODIFIED.