IN THE COURT OF APPEALS OF IOWA

No. 2-864 / 11-1931
Filed January 9, 2013

IN RE THE MARRIAGE OF KERRY LYNN KEUTER n/k/a KERRY LYNN REEG AND THEODORE JOHN KUETER

Upon the Petition of
KERRY LYNN KUETER,
Petitioner-Appellee,

And Concerning
THEODORE JOHN KUETER,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

A father contends that the district court erred in modifying a dissolution decree to transfer physical care of his two children to their mother; he also contends the visitation schedule is insufficient and that he should not have been required to pay a portion of the mother's attorney fees. **AFFIRMED AS MODIFIED.**

Garth M. Carlson of Gomez May L.L.P., Davenport, for appellant.

Wendy S. Meyer of Lane & Waterman L.L.P., Davenport, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

When Ted and Kerry Kueter (n/k/a Kerry Reeg) divorced in 2004, the district court granted Kerry physical care of their two children, born in 1995 and 1999. On appeal, this court modified the decree to provide for joint physical care on an alternating two-week basis, or as the parties agreed. *In re Marriage of Kueter*, No. 04-1352, 2005 WL 1630585, at *5 (Iowa Ct. App. July 13, 2005).

The parents elected not to go forward with a two-week schedule. Instead, they moved the children from home to home every other weekday. After seven years, Kerry applied to modify the decree to afford her physical care. Following trial, the district court granted the application. The court also granted Ted visitation every other weekend. This appeal followed.

I. Modification of Physical Care

Ted contends Kerry failed to establish a material and substantial change of circumstances justifying a modification of the decree. *See In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004)(setting forth the standard for modification). Ted's argument holds some sway, given the length of time the parents operated under the joint physical care arrangement. On our de novo review, the primary factor that weighs against a continuation of that arrangement is the older child's wishes. *See* Iowa Code § 598.41(3)(f) (2011); *see also Malloy*, 687 N.W.2d at 113 (setting forth the standard of review).

In determining the weight to be given a child's preference, a court considers (1) the child's age and educational level, (2) the strength of the child's preference, (3) the child's relationship with his or her family members, and (4) the reasons the child gives for his or her decision. *In re Marriage of Behn*, 416

N.W.2d 100, 102 (Iowa Ct. App. 1987). A child's preference may be a factor for consideration but is given less weight in a modification proceeding than in an initial custody determination. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993).

The older child—a mature, fifteen-year-old tenth-grader—compellingly testified that the every-other-day transfers were becoming unworkable as she progressed through high school. She explained that, in addition to maintaining a grade point average of 4.0 or above, she was a drama "techie," participated in tennis, and hoped to get a job. She said, "It's hard to switch with everything going on." Poignantly summarizing her experience with joint physical care, she stated, "I feel like I'm living out of a suitcase, and I have houses that I go to, but I don't have a home."

Not surprisingly, there is also evidence that this teenager began butting heads with her father during her freshman year of high school. She stated this was one of the reasons she wished to switch to a primary physical care arrangement with her mother. Had this been the only reason for her expressed preference, we are not convinced it would have amounted to a material and substantial change of circumstances. As the Iowa Supreme Court has stated, "We are not unmindful of the fact, even in the happiest of marriages, children tend where possible to play the love of either parent against the discipline of the other." *In re Marriage of Woodward*, 228 N.W.2d 74, 76 (Iowa 1975). We view the child's altercation with her father as a reflection of this tendency rather than a signal that the father-daughter relationship was irretrievably damaged. *Cf*. *id.* at 76 (noting "the mother-daughter relationship was dangerously strained").

Notably, the father contacted a therapist to schedule joint counseling sessions with his daughter, but she declined to attend. The therapist testified by deposition that the father came across as caring and receptive to advice. His willingness to seek outside help reveals his commitment to addressing the underlying causes of friction with his daughter and undermines the child's reliance on this ground.

This brings us to the younger child's circumstances. Shortly after she began elementary school, she was diagnosed with attention deficit disorder. In the ensuing years, she continued to have difficulty completing her homework on a timely basis. Both parents, but particularly Ted, expressed frustration with her inability to follow through with tasks.

Two years before the modification proceeding, the child began seeing a counselor to address several issues, including stress and tension with her father. By the time of the modification hearing, the counselor testified that the child's issues with her father had essentially resolved themselves and the child seemed "open in communicating with her dad." Nonetheless, she asserted "it's hard for any children of any age to have" the kind of joint physical care schedule these children had.

While the showing of a substantial change of circumstances is weaker with respect to this child, the district court noted that she too was entering her teen years and would likely benefit from a schedule that did not require frequent transitions from home to home. We concur in this assessment.

We conclude Kerry proved a substantial change of circumstances. *See Malloy*, 687 N.W.2d at 113 ("We have considered as evidence showing changed

circumstances the fact the shared custody provisions agreed to by the parties and incorporated into their decree did not evolve as envisioned by either of the parties or the court.").

Kerry also was required to show that she provided "better" parenting. *See Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App 2002). On our de novo review, we are not convinced Ted's parental failings are as intractable as Kerry makes out, but we agree that Ted fell short in one respect: his refusal to respond to or send e-mails concerning the children's welfare. Because the parents restricted their verbal communication with each other, it was incumbent upon them to proactively use other means to keep each other apprised of the children's day-to-day circumstances. Kerry followed through with this obligation; Ted did not. For this reason, we conclude she was the parent better able to minister to the children's daily needs.

We conclude Kerry proved her entitlement to a modification of the physical care provision of the dissolution decree.

II. Visitation Schedule

Ted next contends the court-ordered visitation schedule of every-other-weekend is not sufficient. We agree.

Where possible, a court is to allow liberal visitation rights. Iowa Code § 598.41(1)(a). At the modification hearing, Kerry agreed to a visitation schedule that would afford Ted time with his children one night a week in addition to every other weekend. This schedule is entirely workable, as the parents live five minutes apart from one another. It is the more equitable schedule.

We modify the district court's visitation schedule to provide for one weeknight visit in addition to the every-other-weekend visits.

III. Attorney Fees

A. Trial Attorney Fees

The district court ordered Ted to pay $2000 towards Kerry's trial attorney fees. *See id.* § 598.36 (authorizing award of fees to prevailing party). Although the record does not reveal a large disparity in the parents' incomes, Kerry prevailed at trial and the district court only ordered Ted to pay a portion of her outstanding balance. For these reasons, we conclude the district court did not abuse its discretion in awarding trial attorney fees.

B. Appellate Attorney Fees

Kerry seeks an award of appellate attorney fees. Because Kerry's income is not significantly lower than Ted's, and because Ted prevailed on the visitation issue, we conclude each party shall bear his or her own fees.

We divide costs equally between the parties.

AFFIRMED AS MODIFIED.