IN THE COURT OF APPEALS OF IOWA

No. 3-785 / 13-0413
Filed September 18, 2013

IN RE THE MARRIAGE OF EVA JEAN KELLEY AND RONALD DEAN KELLEY

Upon the Petition of
EVA JEAN KELLY,
Petitioner-Appellant,

And Concerning
RONALD DEAN KELLY,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

A mother appeals a district court's modification order granting physical care of the parties' child to the father. **AFFIRMED.**

Daniel M. Northfield, Urbandale, for appellant.

Christopher R. Kemp of Kemp & Sease, Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Eva Kelly appeals the district court's order modifying the parties' child custody order and granting Ronald "Dean" Kelly physical care of the parties' child. Eva contends the district court should have denied Dean's petition to modify. Dean requests appellate attorney fees. We affirm.

***I. Background Facts and Proceedings*.**

Eva and Dean were divorced in 2000 pursuant to a stipulated dissolution decree. At the time the decree was entered, Dean was in the custody of the Iowa Department of Corrections at a correctional facility. Nevertheless, Eva and Dean agreed to share joint legal custody of their minor child, born in 1999, with physical care and placement of the child with Eva. Dean was granted reasonable visitation rights.

In March 2012, Dean filed his petition to modify the decree, requesting he be granted physical care of the child. He asserted that, since the entry of the decree, Eva repeatedly denied him reasonable visitation with the child, and Eva failed to provide him with her current address and other contact information. He also stated that Eva had enrolled their child in at least four different schools without consulting him or even "merely informing him," and, on February 9, 2012, he received a letter informing him that the child had not been attending school on a regular basis. Dean noted he had stable employment and had remarried, and he argued modification was in the child's best interests. The mother resisted.

A bench trial was held in February 2013. Thereafter, the court entered its order granting Dean's request the decree be modified and that he be awarded physical care of the child. Eva appeals.

II. Scope and Standards of Review.

We engage in de novo review of an action to modify a dissolution decree. Iowa R. App. P. 6.907; *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). Nevertheless, the district court had the advantage of listening to and observing the parties and witnesses first hand. *See In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) ("A trial court deciding dissolution cases 'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.' In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented." (internal citations omitted)). Thus, the trial judge is in the best position to assess witnesses' interest in the trial, their motive, candor, bias, and prejudice. Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Discussion.

A. Physical Care.

Courts may modify the custody or care provisions of a decree only where the record reveals "a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child." *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The burden is on the party

seeking modification to show by a preponderance of the evidence a substantial change that the children's best interests make a modification expedient. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). In addition, the party seeking modification must demonstrate that he or she possesses a superior ability to minister to the needs of the child. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). This heavy burden results from the principle that once a custodial arrangement is established, "it should be disturbed only for the most cogent reasons." *Frederici*, 338 N.W .2d at 158. As in any custody or care determination, our paramount concern is the best interests of the child. *See* Iowa R. App. P. 6.904(3)(o); *In re Marriage of Bergman*, 466 N.W.2d 274, 275 (Iowa Ct. App. 1990).

On appeal, Eva contends physical care of the child should not have been changed. She does not challenge the court's finding there was a substantial change in circumstances. Rather, she asserts Dean failed to show he could offer the child superior care. She points out that Dean has a history of criminal activities and substance abuse issues. She argues Dean has an unstable personal life, as well as an unstable job, and she maintains Dean lacks availability and time to care for the child. Eva asserts Dean did not spend much time with the child in the past, and she notes the child wishes to remain in Eva's care. Finally, Eva takes issue with the child being separated from her step-siblings. For these reasons, Eva claims it was in the child's best interests to remain with her.

In its ruling, the district court discussed Eva's claims that Dean was an inferior caregiver for the child. The court noted that it was true that Dean had a

criminal history, but it further noted that since his release from the Department of Corrections in 2000, Dean had not had any criminal involvement. Additionally, the court remarked that both Dean and his wife admitted to having legal and substance abuse issues when they were younger. Nevertheless, after observing Dean and his wife during their testimony, the court found they had matured and accepted responsibility for their past acts, they had learned from those experiences, and both Dean and his wife appeared to be both capable of providing for and dealing with the now thirteen-year-old child.

The district court could not say the same about Eva's care of the child, finding the evidence in the case for modification was "quite compelling." It explained:

> The child's poor performance in school, including high levels of unexcused absences and tardies, Eva's multiple moves and multiple ongoing relationships [are] not permanent or stable in nature . . . , Eva's tendency to sleep-in and not tend to [her children] or ensure that they get ready for school, [Eva's] own mental issues and inability to cope, her many changes of residence which has resulted in [the child at issue] changing schools at least six times, with no stable home life or environment, when considered all together, constitute a substantial change in the circumstances regarding [the child at issue] from the date of the original decree in 2000 when [the child] was less than a year old.

Upon our de novo review of the record, we agree with the district court's findings and conclusions. The district court clearly found Dean and his wife to be more credible than Eva, and the evidence demonstrated positive changes in the child's behavior and life when Eva left the child in Dean's care from August 2009 to January 2010. The court acknowledged the child's preference to continue living with Eva, but, under the unique circumstances of this case, including the child's numerous tardies and absences from school, we agree that her

preference should not be controlling. *See In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981) ("Children's expressed preferences are entitled to consideration but are not controlling; deciding custody issues is more complicated than merely asking the children which parent they wish to live with."). Additionally, although there is a preference that siblings, including half-siblings and step-siblings, *see In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993), should not be separated, that rule is not ironclad. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). "[C]ircumstances may arise which demonstrate that separation may better promote the long-range interests of children." *Id.* Here, neither home nor parent is perfect; however, based upon our de novo review of the record, we agree with the district court that Dean met his heavy burden in establishing both that modification of the physical care provisions of the decree was in the child's best interests and that he possessed the superior ability to minister to the needs of the child. We therefore affirm the district court's order modifying the physical care provisions of the parties' dissolution decree.

B. Appellate Attorney Fees.

Dean requests an award of appellate attorney fees. "Appellate attorney fees are not a matter of right, but rather rest in this court's discretion." *In re Marriage of McDermott*, 827 N.W.2d 671, 686-87 (Iowa 2013) (citation omitted). We consider the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal, in determining whether to award appellate attorney fees. *Id.* at 687. After carefully considering each of these factors, we decline to award Dean appellate attorney fees.

IV. Conclusion.

Upon our de novo review of the record, we agree with the district court that Dean met his heavy burden in establishing both that modification of the physical care provisions of the decree was in the child's best interests and that he possessed the superior ability to minister to the needs of the child. We therefore affirm the district court's order modifying the physical care provisions of the parties' dissolution decree. We decline to award appellate attorney fees. Costs on appeal are assessed to Eva.

AFFIRMED.