IN THE COURT OF APPEALS OF IOWA

No. 3-897 / 12-2202
Filed November 20, 2013

IN RE THE MARRIAGE OF MICHAEL DAVID SCHMIDT AND LISA GAIL SCHMIDT

Upon the Petition of
MICHAEL DAVID SCHMIDT,
Petitioner-Appellee,

And Concerning
LISA GAIL SCHMIDT,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Lisa Schmidt appeals the district court's denial of her application to modify the physical care provisions of a dissolution decree. **AFFIRMED.**

Bruce H. Stoltze of Stoltze & Updegraff, P.C., Des Moines, for appellant.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Doyle, JJ.

VAITHESWARAN, J.

We must decide whether the district court acted equitably in declining to modify a physical care arrangement.

I. Background Facts and Proceedings

Lisa and Michael Schmidt married in 1984. They had four children, the youngest of whom sustained a brain injury that resulted in developmental delays. An individualized education program (IEP)[1] was implemented to govern his schooling in the Des Moines public school system.

After twenty-one years of marriage, Lisa moved to New England, leaving the three children who were still minors with Michael. The couple divorced in 2007. They stipulated that Michael would have physical care of the children.

One month after the decree was filed, Lisa applied to modify the physical care provision. The district court denied the modification request. The court observed that the children's guardian ad litem and psychologist "both appear to be of the opinion that a change in custody at this time would be difficult for the children[,] that the children would be hesitant to make the change, and that such a change in residence to New Hampshire may actually damage the children's relationship with [Lisa]."

The parents continued to disagree on a variety of issues and the court enlisted a parenting coordinator to assist them. The coordinator submitted recommendations on several issues, including the youngest child's IEP. She explained that the child would be changing schools and had the option of

[1] *See* 20 U.S.C. § 1414(d)(1)(A)(i) (defining term as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes [a number of specified requirements]").

attending a traditional middle school or Ruby Van Meter (RVM), a school with an alternative learning environment. She stated that Michael was supportive of RVM, whereas Lisa believed the child should be "mainstreamed" in a traditional classroom. The parenting coordinator opined that

> [I]t is in [the child's] best interest to complete the transition as proposed by the school and then to attend RVM . . . . [T]he RVM program would provide [the child] with a positive learning environment and will best prepare him for long-term success. Michael should make the necessary arrangements for [the child] to transition to RVM immediately.

Meanwhile, Lisa raised a due process challenge to the child's IEP, which was considered by the Iowa Department of Education. In that proceeding, Lisa proffered reports from New Hampshire professionals on the purported value of leaving the child at a traditional school. An administrative law judge found the recommendations in those reports "strikingly similar to the educational program that the IEP team had proposed for [the child]." The ALJ further found that the "nature and extent of [the child]'s disabilities and social skill deficits make it difficult for him to have meaningful interaction with nondisabled peers in his current elementary school setting. It is unlikely that he would be more successful with peer interaction at the middle school level." The ALJ concluded that the decision of the IEP team to place the child at RVM rather than a traditional school was "reasonably calculated to allow [the child] to receive educational benefits in the least restrictive appropriate environment."

Before the department's decision was issued, Lisa filed a second application to modify the dissolution decree. She alleged a material and substantial change of circumstances that warranted "modification of the custody,

visitation, physical care and child support provisions of the Decree." By the time of a hearing on the modification application, the Department of Education had issued its decision, which the district court considered, together with additional evidence on a variety of topics. The district court denied the modification application.

Lisa filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) to amend and enlarge, which the court denied. This appeal followed.

II. Modification of Physical Care

Our modification standards are well-established:

> A party seeking modification of a dissolution decree must establish by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since the entry of the decree or of any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief.

In re Marriage of Maher, 596 N.W.2d 561, 564-65 (Iowa 1999). The change of circumstances "must not have been within the contemplation of the district court when the original decree was entered." *Id.* at 565.

Lisa cites two primary factors that, in her view, establish a material and substantial change of circumstances: (1) the existence of a "two parent" household in New Hamphsire and (2) "greater educational opportunities in New Hampshire." The first factor is premised on Lisa's relationship with a man she met in 2006. That relationship was discussed in the first modification ruling. It was evidently "contemplated" in a prior proceeding and cannot now serve as a predicate for a finding of a substantial change. *See id.*

We are left with Lisa's assertion that the youngest child does not have the educational opportunities here that he would have in New Hampshire. As the parent coordinator's recommendation reflects, the type of schooling the youngest child would receive in Iowa was "contemplated" in prior district court proceedings. *See id.* The question of whether New Hampshire's school system is better than Iowa's was not. Accordingly, we will address the question of whether Lisa established a substantial change of circumstances based on the claimed advantages of New Hampshire schools. We agree with the district court that "because this matter is before the Court on a petition to modify the previous decree, the Court focuses its findings on evidence presented since the last modification was entered."

To advance her argument, Lisa proffered the recommendations and testimony of Dr. Nina Sand-Loud, who serves as a consultant on individualized education programs in the New England area. Her testimony was, at best, equivocal. She agreed that if a concerned parent and a team put their minds to it, the child could get an adequate education in Iowa. While she faulted Iowa for not affording the child daily contact with nondisabled students, she acknowledged the child's abilities made "it difficult" to accomplish this goal. She continued,

> I think that it would be difficult for him to be within a regular classroom, a mainstream classroom for the entire day, both in terms of meeting his educational needs and also him having behavioral difficulties that would interfere with the educational needs of those around him, but I do think for parts of the day he would be able to do it.

The child's Iowa psychologist confirmed that daily interaction with non-disabled peers would not be meaningful for the child. He stated, "[Y]ou have to understand, he does not tune in to things in terms of social status . . . . He enjoys some people and doesn't enjoy others. And so simply having access to nondisabled peers, it probably doesn't make much of a difference." A teacher at the child's traditional elementary school essentially agreed. When asked if the child would do well in a traditional setting, she stated,

> I don't think so. He became very anxious in larger groups. He had a hard time relating to students his own age. His skill level was so different and his interests were different, so I think if he was placed in a seventh grade math class with 30 kids, I think that would be very stressful for him.

The teacher finally noted that, toward the end of his time at that school, she "felt that we were not meeting his needs as well as the programming, the teachers, the peer group could have met them at [RVM]." The child's case manager concurred, stating that she had not seen the behavior problems at RVM that she had seen when the child attended the traditional school.

The case manager's testimony belies Lisa's assertion that RVM was not addressing the child's behavioral development. Lisa advocated for "access to intensive trial and error training methods," which as we understand it refers to individual behavior modification sessions targeted at particular conduct. The child's Iowa psychologist testified that this method was not as effective as simply "incorporat[ing] behavior modification principles in a way that generalizes better to real life."

Dr. Sand-Loud only made a feeble attempt to explain how New Hampshire schools would handle the documented problems associated with the child's

education at a traditional school. She generically stated, "There are often separate classrooms within the school where they get taken out during times, so that they can have more individual directed instruction in a smaller group section, and then they're brought back in the regular homeroom setting for other classes."

Significantly, many of Dr. Sand-Loud's recommendations were incorporated into the child's educational plan at RVM. For example, the child's special education teacher at RVM testified that the child left her classroom for reading and math so that he could interact with "higher functioning" students. She also noted that, during the seven months that the child had been attending RVM, he had "18 different opportunities to connect" with nondisabled students. As for Dr. Sand-Loud's suggestion that the child would benefit from one-on-one assistance, the special education teacher testified that the child was presently receiving "direct instruction one-on-one, two hours a day."

Even Lisa was hard-pressed to articulate any significant benefits of a New Hampshire education over an Iowa education. When asked if the traditional school in Iowa was different than what one would expect in New Hampshire, she responded "I would say it's similar."[2]

At the end of the day, Dr. Sand-Loud did little if anything to undermine the testimony of the child's Iowa psychologist who did not see any advantage in relocating the child to New Hampshire and perceived some disadvantages. He cited the child's difficulty with "adaptability and flexibility and changing and getting

[2] Lisa went on to state that the traditional elementary school did not implement the program as well as she would have liked. That is water under the bridge, given the department's approval of the IEP team's recommendation to transition the child to an alternative school.

used to new things" and the fact that "it would pull him out of all of his familiar contacts and associations with people here, including his siblings and his dad." He explained that "these are the key people in his life" and nothing "that any of them are doing . . . are to his detriment. In fact, they're spot on and stellar performers."

On our de novo review, we conclude Dr. Sand-Loud and other witnesses failed to establish that the New Hampshire schools were better equipped to handle the child than Iowa schools. Based on that conclusion and our review of the remaining evidence of record, we conclude Lisa did not establish a material and substantial change of circumstances. As the district court observed:

> Through the persistence and patience of Michael Schmidt, the Des Moines IEP Team, and [the child's] other Iowa caregivers, substantial positive gains have been achieved by and for [the child] since 2009. He continues to be a happy and loving child, thriving in his current home, education and therapy environments. He is making great progress in school, in emotional and behavioral maturation, and in physical activities through Special Olympics, hunting, baseball, fishing and other activities with Michael, his sisters and brother, and other members of the extended Schmidt family.
>
> Lisa Schmidt has failed to show that she could provide better day-to-day care than Michael and the team of family members and professionals Michael has assembled and tested over the years in Iowa. All of the education techniques and therapies recommended by Lisa and the Dartmouth Hitchcock Team can be provided in Iowa without destroying the family, education, therapy and activity environments in which the child is currently flourishing.

We fully concur in this assessment.

III. Modification of Other Provisions

Lisa takes issue with visitation, transportation, child support and other portions of the district court's modification decree. On the issues that the court addressed, we find the court's thorough ruling equitable. Certain issues were not

addressed and accordingly, were not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). We affirm all aspects of the district court's modification decree.

IV. Attorney Fees

The district court ordered Lisa to pay a substantial portion toward Michael's trial attorney fees. We discern no abuse of discretion in this aspect of the court's ruling. *See In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997).

Michael seeks an award of $17,850 in appellate attorney fees. We order Lisa to pay Michael $5000 toward his appellate attorney fee obligation.

AFFIRMED.