IN THE COURT OF APPEALS OF IOWA

No. 6-882 / 06-1162
Filed December 28, 2006

IN RE THE MARRIAGE OF SALLIE M. RUSSO-MONTES AND EFRAIN MONTES

Upon the Petition of
SALLIE M. RUSSO-MONTES n/k/a/
MICHELLE RUSSO,
Petitioner-Appellant,

And Concerning
EFRAIN MONTES,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Gary D. McKendrick, Judge.

Sallie M. Russo-Montes, n/k/a/ Michelle Russo, appeals from a district court order modifying the physical care provisions of the decree dissolving her marriage to Efrain Montes. **AFFIRMED.**

Esther J. Dean, Muscatine, for appellant.

Thomas G. Reidel of Conway & Reidel, P.C., and Mark J. Neary of Neary Law Office, Muscatine, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Sallie M. Russo-Montes, n/k/a/ Michelle Russo, appeals from the district court's order granting Efrain Montes's application for modification of the physical care provisions of the decree dissolving her marriage to Efrain. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Michelle and Efrain have a child, Tyler, born in November 1996. They were married in February 1999. The parties lived in the Muscatine area throughout their marriage and Tyler has lived in that area his entire life. Michelle filed a petition for dissolution of marriage on May 9, 2000, and the court entered a decree of dissolution on November 7, 2000. In the decree the court awarded the parties joint legal custody and placed physical care of Tyler with Michelle, subject to such reasonable visitation rights in Efrain as the parties mutually agreed, with a specified minimum visitation schedule. In early 2003 the parties agreed to a modification of the minimum visitation schedule, which the court then ordered. On February 24, 2006, Efrain filed an application for rule to show cause alleging Michelle refused to allow him visitation with Tyler. On April 12, 2006, Efrain filed an "application for modification" requesting the court place physical care of Tyler with him. The basis for the application was that Michelle had informed Efrain she was moving from Muscatine to New Jersey. He also alleged Michelle had taken actions to restrict his visitation with Tyler.

At the time of the modification hearing Michelle was forty-four years of age and unemployed. She had lived at the same residence for approximately four years. She is originally from New Jersey and wanted to move back there to be

near her mother, step-father, father and siblings, and to obtain a well-paying job with benefits, if possible. However, neither she nor Tyler has seen any of her New Jersey family in nearly five years. Michelle also has a nineteen-year old son, Tony, from a previous relationship. Tony lived in Muscatine at the time of the modification hearing. Tony apparently had lived with Michelle and Tyler in Muscatine in the past and was going to be staying in the Muscatine area after Michelle moved to New Jersey. It appears Tyler has a close relationship with his half-brother.

Efrain was forty-nine years old at the time of the hearing and was employed at H.J. Heinz where he had worked for the past ten years. He had resided at the same residence for approximately eight years. Efrain has a brother and other extended family in and around the Muscatine area.

Tyler was nine years old at the time of the modification hearing. He had been diagnosed with ulcerative colitis with primary sclerosing cholangitis in 2004. This condition requires he maintain a low sodium, low fat diet. Each party agreed the other had acted responsibly in providing for the child's medical needs and an appropriate diet. Tyler is treated by a pediatric specialist in Peoria, Illinois, and has a physician in Muscatine. Both parties testified at the hearing that Tyler receives good care from his current physicians and he is comfortable with them.

Tyler began having difficulty in school in third grade with math, reading, and spelling. The staff at his school in Muscatine prepared an individualized education program for Tyler in order to address his educational and medical

needs. Both Michelle and Efrain approved of this plan and both agreed at the hearing that they were happy with Tyler's education.

On July 3, 2006, the district court entered a written order on both Efrain's application to show cause and his application for modification. The court concluded that although Michelle had not allowed a scheduled visitation to occur it could not conclude Efrain had proved beyond a reasonable doubt Michelle was in contempt of the previous court orders. With regard to the modification issue, the court concluded Efrain appeared to be much more attuned to Tyler's educational and medical needs than Michelle, Efrain could minister more effectively to Tyler's daily needs than Michelle, and Tyler's long-range best interest required a change in physical care. Thus, the court modified the decree to change responsibility for Tyler's physical care from Michelle to Efrain.

Michelle appeals the court's order changing physical care of Tyler from her to Efrain. She contends the court erred in finding Efrain is more attuned to Tyler's educational and medical needs than she is. She alleges that at best Efrain was able to show he could parent Tyler as well as she can, and notes that such a showing is not sufficient to warrant a change in physical care. Michelle argues she has been Tyler's primary caregiver his entire life and it is in his best interests to remain in her physical care and move with her to New Jersey to be with her family.

II. SCOPE AND STANDARDS OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly

presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value with respect to custodial issues, and the court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

III. MERITS.

The legal principles governing modification actions are well established.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

In re Petition of Anderson, 530 N.W.2d 741, 741-42 (Iowa Ct. App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Here, unlike in an original physical care determination, the question is not which home is better, but whether the parent seeking the change has demonstrated he or she can offer the child superior care. *In re Marriage of*

Rosenfeld, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). If both parents are found to be equally competent to minister to the child, physical care should not be changed. *Id*. The burden on the parent seeking to change physical care is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children." *Id.* at 214.

The court may consider the relocation of the child's residence to more than one hundred and fifty miles from his or her current residence a substantial change in circumstances for purposes of modification of physical care. Iowa Code § 598.21(8A) (2005). We conclude moving Tyler to New Jersey, approximately 1100 miles away from where he currently resides, would be a significant and material change in circumstances. However, in order to warrant a modification of physical care Efrain must also prove that the change relates to Tyler's welfare and that he is better able to minister to Tyler's well-being.

Fortunately for Tyler, this appears to be a case in which both parents have been and are actively involved in their son's life. Each party agrees the other has been active and responsible in assisting Tyler with his medical and educational needs. Both parents have provided Tyler with the appropriate diet for his medical condition, attended medical appointments, and in general met all of his medical needs. In addition, they both were involved in the preparation and approval of Tyler's individualized education program prepared by his school and both have assisted him with his school work. Thus, we do not agree with the district court's finding that Efrain "appears to be much more attuned to [Tyler's]

educational and medical needs than" Michelle. We also believe the court misinterpreted some of Michelle's testimony as stating that Tyler's only educational deficiency related to spelling. It appears from our review of the record that Michelle's testimony in question addressed only how in one specific instance she persuaded Tyler to do his spelling homework. The testimony did not indicate she was unaware of the other areas in which he was having difficulty, and in fact the record shows she recognized all of Tyler's educational deficiencies. We conclude the record shows both parents are equally "attuned" to all of Tyler's medical and educational needs, and in fact both parties generally agreed at the hearing that this was the case.

However, having said that, we do agree with the district court that it is in Tyler's long-term best interest to stay in Muscatine with Efrain and Efrain has established he can minister more effectively to Tyler's interests than Michelle can. Tyler has spent his entire life in Muscatine. The only extended family Tyler is familiar with consists of Efrain's extended family in and around the Muscatine area. In addition, his half-brother Tony, with whom Michelle testified Tyler had a close relationship, remains in the Muscatine area. Although Michelle has been Tyler's primary caretaker Tyler has had only limited contact with her family and has not seen any of them for the last five years.

Furthermore, Tyler has good physicians in Muscatine and the surrounding area who are familiar with his specific medical needs, with whom he is comfortable, and who have discussed and are ready to proceed with surgery which may be necessary in the near future. Efrain provides Tyler's medical

insurance through his employer in Muscatine. Tyler attends a good school in Muscatine, a school whose staff is familiar with his educational and medical needs and has structured an individualized program to address those specific needs.

In addition, Efrain provides substantially more stability for Tyler than Michelle has. Efrain has been employed with the same employer for ten years and lived in the same residence for approximately eight years, the same residence he lived in when the parties' marriage was dissolved. In contrast Michelle changed residences several times when Tyler was young, including a period when she left the state for a short time and a period when she lived at a homeless shelter. It appears she has never had stable employment while living in Muscatine and at the time of the modification hearing had been unemployed for approximately a year and a half. Although Michelle testified she believed she would be able to get a stable, well-paying job in New Jersey and she would have good schools and medical care for Tyler there, this appeared to be more hope than certainty as she had only a somewhat indefinite offer of a job, and had no identifiable arrangement or plan for Tyler's special medical needs or his significantly above-average educational needs.

IV. CONCLUSION.

We conclude there would be a material and substantial change in circumstances if Michelle were to move Tyler from Muscatine to New Jersey. We further conclude Efrain has met his burden to prove that he can minister more effectively than Michelle to Tyler's well-being and that it is in Tyler's long-range

best interests to remain in Muscatine with him. The district court was correct in granting Efrain's application for modification and changing responsibility for physical care of Tyler from Michelle to Efrain.

AFFIRMED.