IN THE COURT OF APPEALS OF IOWA

No. 8-020 / 07-0728
Filed March 14, 2008

IN RE THE MARRIAGE OF MELANIE FAYE LICHT AND MICHAEL TODD LICHT, JR.

Upon the Petition of
MELANIE FAYE LICHT,
Petitioner-Appellee,

And Concerning
MICHAEL TODD LICHT, JR.,
Respondent-Appellant.

Appeal from the Iowa District Court for Webster County, Gary L. McMinimee, Judge.

Michael Licht appeals a district court order denying his petition to modify the custody provision of a dissolution decree. **AFFIRMED.**

Monty L. Fisher, Fort Dodge, for appellant.

Marcy Lundberg of Blake Parker Law Office, Fort Dodge, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Michael Licht appeals a district court order denying his petition to modify the custody provision of a dissolution decree.

I. Background Facts and Proceedings

Michael and Melanie Licht married and had one child, Triston, in 2000. Shortly thereafter, Melanie petitioned for a dissolution of the marriage. The district court approved a stipulated dissolution decree under which Melanie assumed Triston's physical care. The decree set forth a visitation schedule that was to take effect if the parents could not agree on a schedule. The parents agreed on several visitation schedules that, at times, afforded Michael significantly more contact with Triston than the decree provided.

In 2006, Michael applied to modify the decree. He sought joint physical care of Triston. Following a hearing, the district court dismissed the application. This appeal followed.

II. Analysis

To obtain a modification of custody, Michael had to show a substantial change of circumstances since the time of the decree, not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). He also had to show the change was more or less permanent and related to the welfare of the child. *Id*. Finally, Michael had to show he was the superior caretaker. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). In applying these standards, we review the record de novo. Iowa R. App. P. 6.4.

On the first prong, Michael contends "the amount of extra visitation in this case is so great in and of itself to show that the extra visitation was a material and substantial change in circumstances." As to this issue, the record reveals the following facts. In 2003, Melanie's work shift changed to four ten-hour weekdays per week. At that time, Michael agreed to care for Triston on those four days. In 2005, Melanie changed to a weekend shift. She asked Michael if he would like to have Triston every weekend so that the child would not have to go to daycare. Michael agreed. He also exercised mid-week visitation for a period of time. Before the modification hearing, Melanie curtailed the mid-week visitation because Triston was having behavioral problems at school that she attributed to those visits. She left the every-weekend visitation in place. This was the visitation schedule in effect at the time of the modification hearing. The schedule gave Michael approximately 124 overnight visits with Triston.

The record supports Michael's assertion that his visitation was extensive. The record also supports his assertion that, at times, his visitation effectively became a de facto joint physical care arrangement. Nonetheless, the record does not establish a substantial change of circumstances not contemplated at the time of the decree. The decree clearly provided that the minimum visitation schedule would apply only if the parents did not agree to another schedule. The parents agreed to several other schedules. This give and take is precisely what the dissolution decree contemplated and what our statute and case law sanction. *See* Iowa Code § 598.41(1) (Supp. 2005) (stating child should be assured opportunity for maximum continuing physical and emotional contact with both parents); *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991)

(stating reasonable and ordinary changes and natural occurrences that could be foreseen by court not sufficient to justify modification); *In re Marriage of Drury*, 475 N.W.2d 668, 670 (Iowa Ct. App. 1991) ("Liberal visitation rights are in the best interest of the child.").

We also are not convinced the changes in visitation after the decree was entered were more or less permanent. *Walton*, 577 N.W.2d at 870. At the time of the modification hearing, Michael was essentially exercising the amount of visitation set forth in the decree, albeit on different days. Melanie testified that, if her work shift changed again, she would return to the decree's visitation schedule.

Finally, we are not persuaded that a modification would have served Triston's best interests. *Id.* at 871 (stating best interests of child are the "first and governing consideration"). Those best interests were being met by the parents' willingness to facilitate a flexible visitation schedule. A social worker and pastor who counseled the parents honed in on this point, noting that Triston benefited by spending so much time with both parents. He commended the parents for working well together, stating Melanie was "very open" about giving Michael more visitation and Michael was very willing to take advantage of this opportunity. He also explained that the current arrangement gave Melanie some control in dealing with Michael, a person she found "somewhat intimidat[ing]." He said, "to take that control away from her . . . might be a mistake at this point in time." He concluded, "[t]his arrangement that they've currently worked out seems to be working. I don't like to mess with things that are working."

Like the district court, we conclude Michael did not establish a substantial change of circumstances not contemplated at the time of the decree that was more or less permanent and related to the welfare of the child. In light of our conclusion, we find it unnecessary to decide whether Michael was the superior caretaker.

III. Appellate Attorney Fees

Melanie asks that we order Michael to pay $2000 of her appellate attorney fees. An award of appellate attorney fees is discretionary. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). As there is not a great disparity in the parties' earnings, we decline this request.

AFFIRMED.