IN THE COURT OF APPEALS OF IOWA

No. 8-036 / 07-1317
Filed March 26, 2008

IN RE THE MARRIAGE OF EMMA J. LAMOUREUX AND PETER LAMOUREUX

Upon the Petition of
EMMA J. LAMOUREUX, n/k/a EMMA J. RAINEY,
Petitioner-Appellant,

And Concerning
PETER LAMOUREUX,
Respondent-Appellee.

Appeal from the Iowa District Court for Jefferson County, Michael R. Mullins, Judge.

The petitioner appeals from the district court's order denying her petition to modify the child custody provision of a dissolution decree. **AFFIRMED.**

Steven Gardner of Kiple, Denefe, Beaver, Gardner & Zingg, L.L.P., Ottumwa, for appellant.

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

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

VOGEL, J.

Emma Lamoureux appeals from the district court's order denying her petition to modify the child custody provision of her and Peter Lamoureux's dissolution decree, as modified in December 2003. Because we agree with the district court that Emma failed to carry her burden of proof to establish a substantial change in circumstances, we affirm.

Background Facts and Proceedings

Emma Lamoureux and Peter Lamoureux's marriage was dissolved in October 1997. They have two daughters: Gabrielle (born 1992) and Paris (born 1993). Pursuant to the dissolution decree, Emma and Peter were granted joint legal custody, with Emma having physical care of the children and Peter liberal visitation. Additionally, the parties stipulated to the following:

> [I]n the event a parent moves away from Jefferson County, Iowa . . . said parent agrees to leave the minor children in the physical possession of the parent that remains in Jefferson County, Iowa. The parent who remains in Jefferson County, Iowa, will be the parent of primary care. If the parent moving away from Jefferson County, Iowa, shall then move back, the pre-existing visitation and primary care situation will resume as before they left.

Prior to 2002, there were numerous court filings regarding a variety of conflicts with visitation. Then in 2002, when Emma wanted to move to California, she unsuccessfully sought to modify the decree to strike the relocation provision. In 2003, Emma again filed a petition requesting a modification as she had relocated to Iowa City in order to attend the University of Iowa, but still wanted the girls to live with her. Peter responded by seeking physical care of the girls. After a lengthy trial, the district court denied Emma's petition and granted Peter's request for physical care. Additionally, the district court struck the provision of

the dissolution decree that provided for a change in physical care upon one party's move from or return to Jefferson County. The district court found that the children's best interests were served by Peter having physical care as Emma had discouraged the children's relationship with their father, while Peter promoted the children's close relationship with their mother. The court also found Peter to offer the girls more stability in their lives.

In June 2006, Emma again sought modification of physical care after she returned to Fairfield upon completing her Bachelor's degree in English. Emma contended that there was a substantial change in circumstances regarding "placement of custody of the minor children due to their age, their current educational desires and the current residential arrangements." At the modification hearing, both children testified they would prefer to live with their mother for a variety of reasons. The district court denied Emma's request to modify physical care of the children, finding that she had not carried her burden of proof and the best interests of the children were better served by having continuity and consistency of environment by staying in their father's care. Emma appeals from the denial of her petition.

Standard of Review

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *Zebecki*, 389 N.W.2d at 398. 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. 6.14(6)(*g*). Our

overriding consideration is the best interests of the children. Iowa R. App. P. 6.14(6)(*o*).

Physical Care

A party who seeks a modification of a dissolution decree must establish by a preponderance of the evidence that there has been a material and substantial change in circumstances since the entry of the decree or its last modification. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Additionally, the party seeking a change in custody must prove an ability to render superior care. *Id*. This heavy burden "stems from the principle that once custody of a child has been fixed it should be disturbed only for the most cogent reasons." *Id*.

Emma contends the district court erred in not finding a substantial change in circumstances because both the children testified of their preference to live with her. While we give some weight to the girls' preference for which parent they want to live with, that stated preference is not determinative. *See In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985). In determining what weight to give the children's preference, we consider (1) their age and educational level, (2) the strength of their preference, (3) their intellectual and emotional makeup, (4) their relationships with family members, and (5) the reasons for their decision. *Id.* at 258-60. Further, the children's preference is given less weight in a modification proceeding than it is given in an original custody determination. *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987). "Deciding custody is far more complicated than asking children with which parent they want to live." *Id*. at 101.

One of the primary reasons Gabrielle and Paris want to live with their mother is their desire to stop attending the Maharishi School for the Age of Enlightenment. Gabrielle, who was in ninth grade at the time of the hearing, wanted to attend Fairfield Public High School and Paris, who was in seventh grade, wanted to be home schooled.[1] However, in a relatively small community, the desire to change schools does not require a change in physical care. Even though the children live with Peter, Emma has equal participation in decisions regarding the children's education. *See* Iowa Code § 598.41(5)(b) (Supp. 2005) ("Physical care awarded to one parent does not affect the other parent's rights and responsibilities as a joint legal custodian of the child[,]" which includes "equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction."). Incorporated into the 1997 dissolution decree was the parties' stipulation that "the children will attend the Maharishi School for the Age of Enlightenment until such time as the parties agree to change to another school." The 2003 modification ruling noted "the parties' ongoing joint legal custody of the girls will preserve for each parent, equal participation in decisions affecting their legal status, medical care, *education*, extracurricular activities and religious instruction." (Emphasis added). As the district noted in the current ruling on appeal, "Emma and Peter have apparently not communicated effectively concerning such a [school] change." The desire to change schools in Fairfield does not rise to a substantial change in circumstances to support a change in physical care.

[1] Emma testified that there is a home schooling office located in Fairfield, which provides a curriculum and a library.

The girls each testified to various complaints about living in the home with their father, stepmother, and stepsister. In light of the girls' concerns, Peter and his wife, Mary, both agreed to be more sensitive to their needs. Gabrielle also indicated that Peter had restricted her contact with Emma, but the record demonstrates that Peter, for the most part, allows flexible visitation and liberal phone and email contact with Emma. Emma claims that there are "concerns regarding violence in Peter's home." Like the district court, we put little weight on that testimony. We agree with the district court that many of the children's complaints are rather "typical complaints of teenagers that have been or are in the middle of custody disputes."

Gabrielle and Paris are intelligent, talented girls, and involved in numerous extracurricular activities. Both parents have provided the girls with excellent creative and life-enriching opportunities but unfortunately have also subjected them to ongoing discord. In spite of that discord, the girls each have a good relationship with their mother and father, but expressed, at the time of the hearing, a strong preference to live with Emma. It is clear that the girls love both of their parents and enjoy their relationship with both of them. As the district court found, Peter has had physical care of the girls since 2003, and they have done well academically and socially and have had a nurturing and stable home environment.

It appears that in this modification action Emma has attempted to relitigate some of the issues raised in the 2003 modification hearing. At that time, she chose to move from Fairfield to pursue her own education fully aware of the agreement she made, that such a move would trigger the loss of physical care of

the girls. Now that she has moved back to Fairfield, she wants to return to being the physical care parent. The district court concluded nothing in this record rose to the level necessary "to upset the status quo." We agree that Emma failed to carry her burden to establish a substantial change in circumstances. Therefore, we affirm the district court.

Attorney Fees

Peter requests attorney fees on appeal. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Peter argues that Emma has petitioned for numerous modifications but has refused to mediate their disagreements. He was also forced to defend this appeal. While his points are well taken, we also find the difference in the parties' income does not support the request for fees. We therefore deny Peter's request. Costs on appeal assessed to Emma.

AFFIRMED.

Vogel, J., and Vaitheswaran, J. concur. Sackett, C.J., concurs specially.

SACKETT, C.J. (concurring specially)

I concur in all respects except I would award the father a $500 appellate attorney fee.