IN THE COURT OF APPEALS OF IOWA

No. 8-579 / 08-0002
Filed September 17, 2008

IN RE THE MARRIAGE OF AMBER K. WHITESIDE AND HARRY L. WHITESIDE JR.

Upon the Petition of
AMER K. WHITESIDE
n/k/a AMBER K. DEWITT,
Petitioner-Appellee,

And Concerning
HARRY L. WHITESIDE JR.,
Respondent-Appellant.

Appeal from the Iowa District Court for Bremer County, Colleen D. Weiland, Judge.

Harry Whiteside appeals from the trial court's ruling dismissing his application to modify the visitation provisions of the parties' dissolution decree. **AFFIRMED AND REMANDED.**

Harry Whiteside Jr., Ionia, pro se.

Karla Shea, Waterloo, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

HUITINK, P.J.

Harry Whiteside appeals from the trial court's ruling dismissing his application to modify the visitation provisions of the parties' dissolution decree. We affirm.

I. Background Facts and Proceedings

Harry and Amber Whiteside (n/k/a/ Dewitt) were married on November 1, 1997. They have two children: Olivia, born in April 1999, and Darin, born in December 2000. The decree dissolving their marriage was entered on October 14, 2002. The decree granted physical care of both children to Amber. Harry was granted visitation every other weekend, from Friday evening to Sunday evening, two weeks in the summer and alternating holidays.

On October 4, 2006, Harry filed a petition seeking modification of the current visitation schedule. He requested the court extend his weekend visitation from Thursday evening to Monday morning, one mid-week overnight visitation, six weeks summer visitation and visitation on Father's Day. Harry's stated reasons for requesting extended visits were: (1) Amber willfully, intentionally, deliberately, and systematically has denied Harry visitation with the children; (2) Amber failed, neglected, and refused to keep Harry apprised of the children's scholastic progress, athletic endeavors, extracurricular activities, medical appointments, and the general state of their health and welfare; (3) Amber has subjected the children to an environment of isolation, separation, and alienation from the respondent, their natural and biological father; and (4) Amber has subjected the children to an environment of inappropriate behavior lacking proper discipline and poorly chosen radio and television programs.

The trial court's December 3, 2007 ruling states:

> The law of Iowa is clear that to succeed in an action for modification of dissolution terms, Harry must show a substantial change in circumstances. The record here shows that the parties continue to have difficulty with communication which affects their ability to arrange visitation acceptable to both. However, as elaborated upon by the court on the record at the time of trial, Harry has not proven a substantial change in circumstances since the entry of the decree or the prior modification action which was denied on December 6, 2005. The court therefore concludes that the petition for modification filed by Harry should be dismissed.

On appeal, Harry claims there has been a change in circumstances warranting modification of the visitation schedule. In addition, Harry asks that we find the district court failed to hold Amber accountable for the court ordered "Children in the Middle" class. He additionally contends the trial judge abused her discretion by awarding Amber trial attorney fees.

II. Standard of Review

Our review of these equitable proceedings is de novo. Iowa R. App. P. 6.4. 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*).

III. Merits

As the parent awarded physical care, Amy has the responsibility to maintain a residence for the children and has the *sole* right to make decisions concerning the children's routine care. *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007). As a noncaretaker parent, Harry is relegated to the role of hosting the children for visits on a schedule determined by the court to be in the children's best interests. *Id.*

Liberal visitation rights are generally regarded as in the children's best interests. *In re Marriage of Muell*, 408 N.W.2d 774, 777 (Iowa Ct. App. 1987). It is the quality and not the quantity of contacts with the noncustodial parent that are the key to the well-being of the children. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). The children's best interests do not require the court to apportion any specific percentage of the available visitation time to the noncustodial parent. *In re Marriage of Bunch*, 460 N.W.2d 890, 892 (Iowa Ct. App. 1990). There is a need to balance the statutory goals of maximum parental contact and the avoidance of unnecessary disruption for the children. *See, e.g., In re Marriage of Guyer*, 238 N.W.2d 794, 796 (Iowa 1976). As always, our primary concern is the best interests of the children and not an equitable arrangement between the parents. *Bunch*, 460 N.W.2d at 892.

A parent seeking to modify child visitation provisions of a dissolution decree must establish by a preponderance of evidence that there has been a material change in circumstances since the decree warranting modification and that the requested change is in the best interest of the child. *In re Marriage of Salmon,* 519 N.W.2d 94, 95-96 (Iowa Ct. App. 1994). This burden is substantially less than required to modify custody. *In re Marriage of Wersinger,* 577 N.W.2d 866, 868 (Iowa Ct. App. 1998).

Based on our de novo review of the record, we find Harry's earlier-recited allegations are overstated and lack significant evidentiary support. Contrary to Harry's claims, the record indicates Amber has not denied or otherwise interfered with his visitation rights under the decree. The record also indicates that Amber has generally accommodated Harry's demands for extraordinary visitation.

Although the parties' communication on issues of mutual concern could use improvement, Harry's requested modification is a disproportionate remedy. Moreover, Harry has failed to show how circumstances have changed since the decree was entered or that his existing visitation is insufficient to accomplish the goals of maximum continuing contact with the children. Lastly, we note that Harry has also failed in his burden to show how modification of the decree in the particulars requested is in the best interests of the children.

IV. Trial Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Scheppele,* 524 N.W.2d 678, 680 (Iowa 1994); *In re Marriage of Kurtt,* 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). The award should be reasonable and fair and based on the parties' respective abilities to pay. *Scheppele*, 524 N.W.2d at 680. We find no abuse of discretion and affirm the trial judge's award of trial attorney fees to Amber.

V. Appellate Attorney Fees.

An award of appellate attorney fees is discretionary and not a matter of right. *In re Marriage of Sprague*, 545 N.W.2d 325, 328 (Iowa Ct. App. 1996). We must 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 trial court's decision on appeal." *Id.* All of these factors weigh in favor of awarding Amber appellate attorney fees. We remand this issue to the trial court to determine the amount of attorney fees Amber incurred on appeal and to award Amber the full amount so determined.

VI. Conclusion

We have carefully considered the remaining issues raised on appeal and find they were either not preserved for our review or are controlled by the foregoing. The trial court's ruling dismissing Harry's application to modify the parties' dissolution decree is affirmed and remanded for further proceedings in conformity with our opinion.

AFFIRMED AND REMANDED.