IN THE COURT OF APPEALS OF IOWA

No. 8-796 / 08-0572
Filed October 15, 2008

IN RE THE MARRIAGE OF G.J. AND K.J.

Upon the Petition of
G.J.,
Petitioner-Appellant,

And Concerning
K.J.,
Respondent-Appellee.

Appeal from the Iowa District Court for Cedar County, Mark J. Smith, Judge.

Petitioner appeals from the district court's refusal to modify part of his dissolution decree. **AFFIRMED.**

Bradley L. Norton of Bradley L. Norton, P.L.C., Clarence, for appellant.

Allison M. Heffern and Kerry A. Finley of Simmons Perrine, P.L.C., Cedar Rapids, for appellee.

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

MAHAN, P.J.

G.J. appeals the district court's refusal to modify part of his dissolution decree. He argues the district court erred when it determined he failed to show a material and substantial change in circumstances to modify the parties' joint physical care of their children. He claims the court also (1) erred in modifying the joint physical care schedule; (2) erred in increasing his child support obligation; and (3) abused its discretion in ordering him to pay $1500 in attorney fees. K.J. requests appellate attorney fees. We affirm.

I. Background Facts and Proceedings.

G.J. and K.J. were married in July 1998 and have two children, born in December 1996 and December 1998. At the time the parties' marriage was dissolved in December 2002, G.J. was forty-two years old and K.J. was twenty-nine years old. G.J. was a principal of two elementary schools within the North Cedar school district and was earning a gross monthly income of $4833. He was continuing to rent the home in rural Stanwood that had served as the parties' marital residence. At the time of the decree, K.J. was employed by Centennial Mortgage and Funding and was earning a gross monthly income of $2844. She also resided in Stanwood.

The marriage was dissolved by an uncontested stipulated decree. G.J. was ordered to pay child support to K.J. in the amount of $329.74 per month. No alimony was awarded. The parties agreed to joint legal custody and joint physical care of the children. The schedule alternated between one parent having the children Monday and Tuesday, delivering the children to school the

following Wednesday morning, and the other parent having the children Wednesday and Thursday, delivering the children to school the following Friday morning. The parent having the children Monday and Tuesday would then have the children from Friday to Monday morning. The care arrangement was then reversed the following week. The district court noted the parties' intention to reside in Stanwood. According to the decree:

> [I]f either parent moves residence so as to require the children to attend school outside the North Cedar school district that shall constitute a material and substantial change in circumstances and subject the custody, visitation and child support provisions of this decree to modification by either party.

Subsequent to the dissolution, the court found that the care arrangement "appeared to be working relatively well, with a few instances of uncooperative behavior." The children continued to attend North Cedar schools. G.J.'s girlfriend and her two daughters moved in with G.J. in 2005. G.J.'s girlfriend had an amicable relationship with K.J. and got along well with the children. Her daughters also got along well with the children. G.J. was still employed as principal of two North Cedar elementary schools; however, at the time of modification he was earning $5792 per month.

K.J. remarried in 2007 and moved to Cedar Rapids. She and her husband had a baby in late 2007. In September 2007 the job K.J. held at Wells Fargo was eliminated and she began collecting $612 in unemployment benefits every two weeks.[1] Since that time, K.J. has been a stay-at-home mother and has not sought other employment.

[1] Since the time the decree was entered in 2002, K.J. had stopped working at Centennial Mortgage and Funding and had begun working at Wells Fargo.

G.J. filed a petition to modify the dissolution decree in July 2007, the day after K.J. informed him that she was engaged and relocating to Cedar Rapids. He alleged (1) there had been a material and substantial change in circumstances due to K.J.'s move to Cedar Rapids; (2) it was in the best interests of the children that he be awarded primary physical care; and (3) child support should be recalculated in accordance with child support guidelines with G.J. receiving primary physical care of the children.

In her answer, K.J. alleged (1) that G.J. should not be granted primary physical care of the children; (2) the parties should continue joint physical care or, in the alternative, that she be awarded primary physical care; and (3) child support should be recalculated in accordance with the terms of the modification and under the child support guidelines. K.J. also requested that G.J. pay attorney fees and costs.

In its order modifying a portion of the dissolution decree, the district court determined that "a substantial and material change in circumstance has not occurred in that K.J. has shouldered most of the burden on transportation for the [children] and a 30- to 35-minute drive is not in and of itself enough to change the current custodial arrangement." However, the court did modify the physical care arrangement to allow K.J. to have the children on Wednesdays and Thursdays, G.J. to have the children on Mondays and Tuesdays, and the parties to have the children on alternating weekends. The court determined this minor change was in the best interests of the children because it minimized transportation time. The court further modified G.J.'s child support obligations, ordering him to pay

$674.48 per month.[2] Finally, the court awarded K.J. $1500 in attorney fees. G.J. now appeals.

II. Scope and Standard of Review.

We review the modification of a dissolution decree de novo. Iowa R. App. P. 6.4; *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We give weight to the district court's fact findings, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(*g*); *McCurnin*, 681 N.W.2d at 327. The district court has reasonable discretion in determining whether modification is warranted, and we will not disturb that discretion on appeal unless there is a failure to do equity. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). Prior cases have little precedential value, and we must base our decision on the facts and circumstances unique to the parties before us. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). Our primary concern is the best interests of the children. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

III. Issues on Appeal.

A. Physical Care.

G.J. argues the district court erred in determining there was no material and substantial change in circumstances to support a modification in physical care of the parties' children. He argues that, according to the decree, physical

[2] The original decree ordered G.J. to pay $329.74 per month in child support. The court modified the child support payment to reflect G.J.'s higher yearly earnings. At the time of modification, G.J. was earning approximately $5792 per month, as opposed to the $4833 per month he was earning at the time the decree was entered. The modified child support obligation also included an imputed annual income of $25,000 for K.J., which she stipulated to at the modification hearing even though she was unemployed and not seeking employment at that time.

care should be modified because K.J. moved out of the North Cedar school district. He also alleges that he has a superior ability to care for the children and that it is in the children's best interests that he be awarded primary physical care. K.J. continues to argue, however, that it is in the children's best interests to maintain joint physical care. She also maintains that minor changes to the physical care arrangement decreasing the amount of travel are in the children's best interests.

Courts are empowered to modify the custodial terms of a dissolution decree "if it has been established that conditions since the decree have so materially and substantially changed that the children's best interests make it expedient to make the requested change." *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005); *see In re Marriage of Hocker*, 752 N.W.2d 447, 450 (Iowa Ct. App. 2008). The change must be more or less permanent and relate to the welfare of the children. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The parent seeking modification of physical care must show an ability to administer more effectively the children's needs. *Grantham*, 698 N.W.2d at 146.

We agree with the district court that G.J. has not met his burden of proof in this case. According to the parties' decree:

> [I]f either parent moves residence so as to require the children to attend school outside the North Cedar school district that shall constitute a material and substantial change in circumstances and subject the custody, visitation and child support provisions of this decree to modification by either party.

Although K.J. moved outside the North Cedar school district to Cedar Rapids, the court determined G.J. could not prove that a material and substantial change in circumstances had occurred because K.J. continued to enroll the children in North Cedar schools; K.J. testified she intended to keep the children in North Cedar schools as long as they wish to attend; K.J. shouldered most of the burden on transportation for the boys; and a thirty to thirty-five minute drive was not itself enough to change the current custodial arrangement.

We have carefully reviewed the record and do not find a material and substantial change in circumstances to support a modification from the joint physical care arrangement that has been in place and working well for these parties for several years. Furthermore, the court noted that the children were "aware of the modification proceedings" and appeared "concerned that they may have their lives disrupted by a change in custody to either parent." We also agree with the court's minor change to the care schedule to decrease the children's travel from parent to parent. We therefore agree with the court that it is in the children's best interests to maintain the current care arrangement with these minor changes, and we affirm as to this issue.

B. Child Support.

G.J. next contends the district court erred in increasing his child support obligation. He argues child support should be recalculated in accordance with child support guidelines only if he receives primary physical care of the children. G.J. alternatively argues that if the joint physical care arrangement is continued, the amount of support ordered should be reduced by deviation from child support

guidelines. K.J., on the other hand, alleges that child support should be calculated in accordance with the terms of the modification and under the child support guidelines with the parties continuing joint physical care of the children.

The court continued the joint physical care arrangement for the children. The court, however, modified G.J.'s child support obligations. The parties' decree ordered G.J. to pay $329.74 per month in child support. In its modification order, the court ordered G.J. to pay $674.48 per month, to reflect G.J.'s higher earnings.[3] At the time of modification, G.J. was earning approximately $5792 per month, as opposed to the $4833 per month he was earning at the time the decree was entered. In determining G.J.'s modified child support obligation, the court also imputed an annual income of $25,000 for K.J. although she was unemployed and not seeking employment at that time.

We have already affirmed the district court's minor modification of the joint physical care arrangement. Upon our de novo review of the record, we also find the court's modification of G.J.'s child support obligation to be fair and reasonable. Given the disparity of G.J.'s increased salary and K.J.'s imputed salary despite her unemployment, we agree with the court's determination with regard to the parties' child support obligations. We find no reason to deviate from the child support guidelines and we affirm as to this issue.

---

[3] The court determined the amount of child support under child support guidelines. According to the court,

> [I]f joint physical care were not granted, G.J. would be paying the sum of $1,160.41 to K.J. as child support, and K.J. would be paying to G.J. the sum of $485.93 as child support. This leaves the sum of $674.48 to be paid by G.J. to K.J. effective August 1, 2007.

C. Trial Attorney Fees.

G.J. argues the district court erroneously awarded K.J. attorney fees in the amount of $1500. An award of attorney fees is not a matter of right, but rather rests within the court's discretion. *Hocker*, 752 N.W.2d at 451. We review the district court's award of attorney fees for abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). An award of attorney fees is based upon the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). G.J. filed his application for modification without communicating to K.J. about her intentions as to the schools the children would attend. He further filed a request for injunctive relief even after K.J. had enrolled the children in North Cedar schools. We conclude the district court did not abuse its discretion when it awarded K.J. attorney fees.

D. Appellate Attorney Fees.

K.J. requests attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id*.; *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Due to the parties' disparate earning capacities and K.J.'s need to defend the appeal, we award $1000 in appellate attorney fees to K.J. Costs on appeal are assessed to G.J.

AFFIRMED.