IN THE COURT OF APPEALS OF IOWA

No. 3-274 / 12-1978
Filed May 15, 2013

IN RE THE MARRIAGE OF KEITH A. FRIEDMANN AND JOLENE E. FRIEDMANN

Upon the Petition of
KEITH A. FRIEDMANN,
Petitioner-Appellant,

And Concerning
JOLENE E. FRIEDMANN,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Keith Friedmann challenges a district court's modification order. **AFFIRMED.**

Jamie A. Splinter of Splinter Law Office, Dubuque, for appellant.

Les M. Blair III of Blair & Fitzsimmons, P.C., Dubuque, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Keith and Jolene Friedmann were divorced in August 2010. The decree awarded Jolene physical care of their two children. Thirteen months later, Keith asked the court to place the children in his care. Jolene countered with a request to modify child support. The court declined to modify the care arrangement, finding no material and substantial change in circumstances. But the court did increase Keith's child support obligation and added a cash medical support requirement. Keith appeals the physical care and support rulings.

Like the district court, we do not see enough variance in the children's situation to justify changing the physical care arrangement. They relocated with their mother to her hometown in Illinois, ninety-three miles away from Keith's residence. But in the district court's words: "Other than the fact that Jolene moved to Mount Carroll, little appears to have changed since the first trial." Accordingly, we affirm the custody order. We also agree with the district court's handling of the cash medical support issue.

I. Background facts and proceedings

At the time of the dissolution in 2010, the parties' son, C.F., was seven and their daughter, I.F., was five years old. C.F. has disabilities due to exposure to drugs and alcohol during Jolene's pregnancy. He also suffered from shaken baby syndrome at the hands of an unknown perpetrator. The ability to administer to C.F.'s medical and therapeutic needs is a point of contention between the parties.

Keith is a self-employed chiropractor, averaging approximately $70,000 in annual earnings. He lives in Guttenberg. Jolene obtained an Iowa license as a Certified Nursing Assistant, but did not seek employment in that capacity in Mount Carroll, Illinois, where she now lives with the children. She most recently worked in a factory, and is now attending night school to earn her nursing degree.

The original dissolution decree ordered joint custody and placed physical care of the children with Jolene. The district court found both parents had been active in the care of the children. The court also noted a "great deal of animosity" between the parents and "substantial problems communicating regarding the welfare of the children." The court ultimately concluded: "Jolene is the parent best able to provide for the care and needs of the children, and the parent best able to support the other parent's relationship with the children." The decree ordered Keith to pay $638 per month in child support and cash medical support in the amount of $224 per month.

Keith filed a motion under Iowa Rule of Civil Procedure 1.904(2), asking the court to remove the cash medical support order and replace it with a directive to provide medical insurance if it was available at a reasonable cost. The motion asserted that because the children were covered by Title 19, Jolene would not receive the cash medical support and that the Iowa Child Support Recovery Unit approved the proposed change in medical support. On November 5, 2010, the court granted Keith's request, deleting the cash medical support order and substituting the health insurance language.

Keith did not appeal the original decree. Instead, he filed a petition to modify the decree on September 15, 2011. He alleged the following as substantial changes in circumstances: (1) Jolene's move to Mount Carroll; (2) her failure to provide the children with a healthy diet and exercise, resulting in their "significant weight gain"; and (3) Jolene's "continue[d]" interference with his relationship with the children.

After hearing four days of testimony on the modification issues, the court concluded: "There has been no material and substantial change in circumstances since the entry of the decree." The court increased Keith's visitation. The court also refigured Keith's child support obligation, concluding he should pay $1117 in child support each month and ordered cash medical support of $313 per month. Keith challenged the cash medical support payment in a post-trial filing. The court rejected Keith's challenge, finding cash medical support was mandated by statute. Keith now contests the district court's physical care and support decisions.

II. Scope and Standards of Review.

Because an action to modify a dissolution decree is an equitable proceeding, we review the ruling de novo. *In re Marriage of Brown,* 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). Although we are not bound by them, we accord weight to the factual findings, and give special deference to the trial court's view of witness credibility. *Id.*

III. Discussion

A. Physical Care

In custody modification cases, stability is the trump card. Because of the disruption to the children's lives caused by switching physical care, courts will only do so if the noncustodial parent proves conditions have changed so materially and substantially since the decree was entered that "the children's best interests make it expedient to make the requested change." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). "The changed circumstances must not have been contemplated by the court when the decree was entered." *Id*.

On appeal, Keith identifies the following as substantially changed circumstances: (1) Jolene's move from Guttenberg, Iowa, to Mount Carroll, Illinois; (2) Jolene's failure to communicate with him regarding the children; and (3) her lack of appropriate care for the children, especially considering C.F.'s disabilities. The district court was not convinced any of these claims amounted to a material and substantial change not contemplated at the time of the decree. After independently reviewing the record, we reach the same conclusion as the district court.

Jolene's move of ninety-three miles did not require the court to revisit the physical care determination. *See* Iowa Code § 598.21D (2011) ("court may consider the relocation [of one hundred fifty miles or more] a substantial change in circumstances"). In fact, the original decree contemplated Jolene might leave Guttenberg, ordering visitation exchanges be conducted at a public place halfway between the parents' homes if they lived more than thirty miles apart. The

modification court was not surprised by her move: "She was born and raised in Mount Carroll and is much more at home there than in Guttenberg. She now lives in a 4-bedroom house as opposed to the small apartment she rented in Guttenberg."

We find Keith's focus on Jolene's move to be unavailing. Iowa courts historically have not changed custody based solely on a parent's move from the town where both parties lived. *See In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). When we consider the stability of the children's situation, we place greater emphasis on their relationship with the primary caregiver than on the physical setting. *See In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000). We agree with the district court's findings that the children's educational, health, and recreational opportunities with their mother in Mount Carroll are comparable to those they enjoyed in Guttenberg.

Keith also fails to prove the parties' difficulty in communicating constitutes a substantial and material change in circumstances. Unfortunately for the children, the relationship between the parents has been and continues to be hostile. The district court, which assessed the parties in person, found Keith bore much of the responsibility for the tension:

> Keith remains distraught over the outcome of the dissolution trial. This angst, together with Keith's desire to wrest custody from Jolene, manifested itself visibly during his testimony . . . . In this Court's view, the present modification action is not based on a legitimate change in circumstances but rather on Keith's desire to retry the case and obtain a different outcome.

Furthermore, we agree with the district court's determination Keith presented no convincing evidence Jolene was neglecting the children's care. Both parents have been worried about the children's weight gain. The modification record does not support Keith's assertion that Jolene has failed to provide C.F. and I.F. with a healthy diet or sufficient physical activity. The district court also expressed its confidence in Jolene's ability to monitor C.F.'s medical care. We see nothing in the record to undermine that confidence.

Keith has not satisfied his heavy burden to show a material and substantial change in circumstances sufficient to modify the physical care arrangement. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

B. Child Support and Cash Medical Support

In a counterclaim, Jolene asked the district court to adjust the amount of child support due to "substantial changes" in the amount of income earned by each of the parents. In its modification order, the court increased Keith's child support obligation by $479 per month and directed him to pay cash medical support in the amount of $313 per month.

Keith contends in the heading of his second assignment of error that the district court miscalculated child support, including cash medical support. But the body of the argument only addresses medical support under section 252E.1A, not the recalculated amount of child support. Accordingly, we will only consider his contention regarding medical support.

When issuing an order that provides for permanent support for a child, the district court is obliged to include a provision for medical support. Iowa Code §

252E.1A(1). The preferred form of medical support is a health benefit plan, if available to either parent at the time the court's order is entered or modified. *Id*. at 252E.1A(2). Availability depends on access and the reasonableness of the plan's cost. *Id*. If a health benefit plan is not available when the court enters its order, the court is required to order a reasonable monetary amount in lieu of a health benefit plan, and to state that amount in its order. *Id*. at § 252E.1A(3).

Keith argues his situation falls under the section 252E.1A(7)(d) exception to the medical support payment requirement noted in section 252E.1A(3)(b). That subsection addresses the situation when the child support recovery unit is providing services under chapter 252B, and the following facts exist:

> If a health benefit plan is not available, and the noncustodial parent does not have income which may be subject to income withholding for collection of a reasonable monetary amount in lieu of a health benefit plan at the time of the entry of the order, the unit shall seek an order that the noncustodial parent provide a health benefit plan when a plan becomes available at reasonable cost, and the order shall specify the amount of reasonable cost as defined in subsection 2.

Iowa Code § 252E.1A(7)(d).

In his motion to reconsider filed in the district court, Keith asserted it was "inherently unjust to require [him] to provide cash medical support for the children, when [he] is unable to secure health insurance coverage due to [C.W's] disabilities." He also argued Jolene was "unjustly enriched" by the cash medical support payment as C.W. is provided health insurance at no cost to her. On appeal, Keith contends because he is self employed and his wages are not subject to income withholding, the court's cash medical support order is "inappropriate under Iowa law."

In her response to Keith's motion to reconsider, Jolene argued: "The fact that [C.W.] is not insurable is an argument for cash medical support, not an argument against." She also noted: "the State of Iowa and/or the State of Illinois have been providing [C.W.'s] medical coverage. They are the ones that will receive the cash medical support—this does not unjustly enrich [Jolene]." On appeal, Jolene takes no position on the appropriateness of the court's decision to order Keith to pay cash medical support, asserting it "does not directly affect [her] or the kids," who now receive health insurance coverage through the State of Illinois.

In its ruling on post-trial motions, the district court rebuffed Keith's suggestion that the cash medical support order be amended:

> Petitioner also requests that the Court not order him to pay cash medical support, as [C.F.] is uninsurable and receives insurance through Medicaid. Contrary to Petitioner's assertion, cash medical support was ordered by the Court in its July 30, 2010[1] decree. The obligation is not 'manifestly unjust' as Petitioner asserts, but rather is statutorily required. See Iowa Code § 252E.1A. The children both receive Medicaid through the State of Illinois. The fact that cash medical support paid by Petitioner may be assigned to the State of Illinois by operation of law is irrelevant. The record lacks sufficient evidence for a conclusion that 'extreme circumstances' exist. § 252E.1A(5). Accordingly, an alternative provision addressing the children's health care needs is unwarranted under said section.

In noting the original 2010 decree included a cash medical support order, the district court overlooked the reconsideration order removing that obligation. But otherwise, we agree with the district court's decision. Section 252E.1A(7)(d) addresses the circumstance where the child support recovery unit is providing

[1] The dissolution decree was dated July 30, 2010, and file stamped August 3, 2010.

services and requires that unit to seek an order concerning the noncustodial parent. Keith does not contend the unit sought such an order as part of these modification proceedings. In the absence of the unit's participation, section 252E.1A(7)(d) does not apply. We affirm the district court's order regarding cash medical support.

C. Appellate Attorney Fees

Jolene asks for $4000 in appellate attorney fees. We have discretion to award attorney fees to the prevailing party in a modification action. *In re Marriage of Johnson*, 781 N.W.2d 553, 559–60 (Iowa 2010) (citing Iowa Code section 598.36). Because of Keith's greater earning capacity and because Jolene was required to defend against his meritless effort to modify the physical care assignment, we grant her request for $4000 in attorney fees for the appeal. Costs on appeal are assessed to Keith.

AFFIRMED.