IN THE COURT OF APPEALS OF IOWA

No. 3-512 / 12-1461
Filed July 10, 2013

Upon the Petition of
CRYSTAL B. RICHARDSON,
n/k/a CRYSTAL MILBERT,
Petitioner-Appellee,

And Concerning
JAMIE D. MCKEEHAN,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica Ackley, Judge.

Jamie McKeehan appeals from the district court's modification of visitation, transportation, and child support provisions following petition by Crystal Richardson. **AFFIRMED.**

Christopher R. Kemp, Des Moines, for appellant.

Daniel J. McClean, Dyersville, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Jamie McKeehan appeals from the district court's modification of visitation, transportation, and child support provisions of a previously modified foreign decree. Jamie asserts that Crystal failed to prove there has been a substantial change in the material circumstances that warrant modification. He asks that we overturn the modification order and reinstate the previously modified terms of the decree. After review, we affirm the modification and award appellate attorney fees.

I. Background Facts and Proceedings.

Jamie and Crystal were never married but are the parents of a son, born August 1999. Both parties resided in Missouri at the time of their son's birth. Per the "joint stipulation and parenting plan" adopted by a Missouri court in February 2002, the parties shared legal and physical custody of their son. In December 2007, Crystal sent Jamie a relocation notice alerting him that she planned to move to Iowa with their son. Jamie initially resisted but the two parties entered into a stipulated, modified agreement in August 2008 approved by a Missouri court. The agreement provided weekend, holiday, and summer visitation schedules. Crystal was responsible for all transportation necessary for the visits. It also set Jamie's child support obligation at $262.50 per month, an amount less than provided by the child support guidelines. Crystal then moved to Dyersville with the parties' minor child.

After moving to Dyersville Crystal was married, had two more children, and took on full-time employment. The parties' relationship became increasingly

antagonistic as Crystal struggled to balance her new responsibilities with those outlined in the modification—specifically transporting their son to Kansas City for visits.

Crystal initiated this action by filing a petition for modification of custody, visitation, and child support in June 2011. She also filed an affidavit and request for temporary sole legal and physical custody based upon allegations of domestic abuse and other criminal charges against Jamie. Crystal's request was granted. The court appointed a guardian ad litem and received her report before trial began on May 15, 2012. At trial, the district court found that Crystal had met her burden and modified the visitation, transportation, and child support as requested. Both parties retain joint legal custody of their son. After trial, Jamie filed a motion to enlarge or amend; Crystal answered. In response, the district court entered an order in July 2012 that denied the motion except striking the requirement that Jamie pay a cash medical support obligation. Jamie appeals.

II. Standard of Review.

We review equity cases de novo. Iowa R. App. P. 6.907. We give weight to the district court's findings, especially regarding the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). "Precedent is of little value as our determination must depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). As always, our "first and governing consideration" is the long-term best interest of the child. *See In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984).

III. Discussion.

Generally, a party who seeks modification of a decree "must establish by a preponderance of the evidence that there has been a substantial change in circumstances since the entry of the decree or its last modification." *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995).

A. Visitation Provisions: Schedule and Transportation.

Appellate courts of this state have long held that the petitioner has a lesser burden to justify a modification of visitation provisions than a modification of custody. *Nicolou v. Clements*, 516 N.W.2d 905, 906 (Iowa Ct. App. 1994). In this case, Crystal need only show there had been a change in circumstances since the filing of the 2008 modification judgment, not a substantial change in circumstances. *See id*. She also bears the burden of showing 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). The trial court has reasonable discretion to modify visitation rights and its decision will not be disturbed on appeal unless the record fairly shows that it has failed to do equity. *Norenberg v. Norenberg*, 168 N.W.2d 794, 797 (Iowa 1969).

1. Visitation Schedule

In this case, Jamie contends that Crystal failed to show change in circumstances warranting a modification of his visitation schedule. Jamie's own testimony belied this assertion. At trial, he testified there had been frequent issues for the previous two years surrounding his and Crystal's communication, especially in regard to which weekend of the month their son would be able to

visit. Jamie told the court he believed changing the terms to have a set weekend would "save the argument" and "be in the best interest." Jamie cannot now deny the facts because the visitation schedule was not modified in the manner he wished.

Regarding the best interests of the child in question, the court noted the guardian ad litem's finding that the previous schedule had become unworkable in light of the amount of time spent traveling and their son's desire to become more involved in extracurricular activities in his home community. The district court's modification addressed both of these issues. Jamie's school-year visitation is now scheduled around three-day weekends set by the school calendar. In doing so, the court set a visitation schedule which decreased the amount of necessary negotiating between the parties and also increased the amount of visitation time provided to Jamie without any additional travel time. Although partitioning the summer break visitation did increase travel time, their son gets to spend considerable time in one location with one of his families before having to travel again. Furthermore, as it becomes increasingly important to him to do so, it allows him to spend sufficient time in Dyersville each summer to participate in school and community activities with his classmates and friends. We agree with the district court that modification was warranted and in the best interest of the child.

2. Transportation for Visitation

Similarly, the less strenuous standard is applied when determining if a change in circumstances warranting modification of transportation for visitation

has occurred. *See Petition of Holub*, 584 N.W.2d 731, 733 (Iowa Ct. App. 1998) (considering a modification of transportation as a modification of visitation in determining the burden on the petitioning party). In this case Crystal has gotten married, had more children, and taken on full-time employment outside of the home since the last decree was entered. All of these changes in circumstance have made it increasingly difficult for her to shoulder all of the responsibility for transporting their son for scheduled visits. Furthermore, the previously modified decree required Crystal to have their son in Kansas City by 9 p.m. on Fridays and to pick him up again in the same location at 1 p.m. on Sunday afternoons. Because the drive from Dyersville to Kansas City took approximately six hours, she was often unable to make the designated time on Fridays after picking their son up at school when it released around 3 p.m. This often led to fights between Jamie and Crystal, witnessed by their son, when they met for the visitation exchange. In response to the late exchange, Jamie often refused to return their son until any missed time had been made up on Sunday. This was disruptive to their son's schedule and further embroiled him in the conflict between his parents.

The district court's modification requires the parties to meet in Des Moines, Iowa, the halfway point, at 8:30 p.m. on Thursdays and again at 5:00 p.m. on Sundays.[1] The new meeting location makes it easier for Crystal to arrive

[1] This schedule presumes the three-day weekend is Friday through Sunday. When the three-day weekend is Saturday through Monday, the parties are to meet at 8:30 p.m. on Friday and 5 p.m. on Monday for the exchange.

on time for the exchange and removes the impetus for many of the parents' fights. Furthermore, it ultimately provides Jamie more time with his son.

The parties need to accept the fact that there may still be an occasional untimely exchange but a history of constant untimely exchanges may be cause to change these arrangements. On the other hand, antagonistic behavior, particularly in the presence of the child, may also give cause to change in these arrangements.

B. Child Support.

The power of the court to modify child support exists only when there has been material and substantial change in circumstances since the date of the most recent decree "which considered the situation and the rights of the parties upon application for the same relief." *Mears v. Mears*, 213 N.W.2d 511, 514–15 (Iowa 1973). In this case, Jamie contends that the district court wrongly modified his child support responsibility since Crystal did not establish that a substantial change in circumstances had taken place. He further argues the district court's finding that his annual income was $99,996, instead of the $60,000-$65,000 he estimated at trial, was "not supported by evidence and should be overturned." Jamie testified he earns $7.25 per hour plus commissions, with most of his income earned through commissions.

In order for the court to properly determine whether a substantial change in circumstances has occurred, the court must first determine the parties' gross income. *See Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). The child support guidelines do not define gross income, but our case law has included

overtime income, incentive pay, bonuses, and extra income in the form of commission in the definition. *Id*. Furthermore, "once evidence of extra income has been introduced . . . the burden is on the recipient of the income to establish that it should be excluded from gross income as uncertain and speculative." *Id*. "The recipient of extra income is in the best position to present the underlying circumstances to the court, which makes it fair to place the burden on the recipient to show the extra income should be excluded or considered in some other manner." *Id*. at 20.

In this case Crystal offered evidence that Jamie earned $218,434 in 2009, $96,183 in 2010, and had stated his income as $99,996 in 2011. In turn, Jamie testified that his commissions are "dictated by the market," that he was in the "prime of his year" and was on pace to earn less than previous years, and that he was "hoping to hit sixty, sixty-five [thousand dollars]" for the year. Jamie had the burden to establish any commission that was "an anomaly or speculative" in order to have it removed from the calculation of gross income. *See id*. The district court did not find his testimony regarding his diminished income credible and thus found his annual income to be $99,996. Even though we are not bound by them, we give weight to the trial court's findings, especially regarding witness credibility, Iowa R. App. P. 6.14(6)(g), and agree with the district court's finding.

To determine whether there has been a substantial change warranting modification of a child support order, the court relies on Iowa Code section 598.21C (2011). Section 598.21C(2)(a) states, "A substantial change of circumstances exists when the court order for child support varies by ten percent

or more from the amount which would be due pursuant to the most current child support guidelines." Per the 2008 modification, Jamie's monthly child support obligation was $262.50. After establishing Jamie's income as $99,996 annually and applying the Iowa Uniform Child Support Guidelines, the district court calculated Jamie's child support obligation to be $817.71 per month. Because the variance exceeds ten percent, a per se substantial change in circumstances exists and modification was proper.

C. Appellate Attorney Fees.

On appeal, Crystal requests we award her appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of the party seeking an award, the ability of the other to pay, and the relative merits of the appeal. *Id*. Because Jamie makes substantially more than Crystal and because Crystal was obligated to defend the district court's decision, we award her $1500 in appellate attorney fees.

We affirm the district court's modification and award appellate attorney fees.

AFFIRMED.