IN THE COURT OF APPEALS OF IOWA

No. 3-521 / 12-1995
Filed July 10, 2013

IN RE THE MARRIAGE OF JASON LYNN RICKELS AND TONIA MARIE RICKELS

Upon the Petition of
JASON LYNN RICKELS,
Petitioner-Appellant,

And Concerning
TONIA MARIE RICKELS, n/k/a,
TONIA MARIE MOELLER,
Respondent-Appellee.

Appeal from the Iowa District Court for Jones County, Stephen B. Jackson Jr., Judge.

A father appeals the district court's refusal to modify the physical placement provisions of the dissolution decree. **AFFIRMED.**

Joseph G. Bertroche of Bertroche Law Office and Ronald L. Ricklefs, Cedar Rapids, for appellant.

Tonia M. Moeller, Anamosa, appellee pro se.

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

MULLINS, J.

Jason Rickels appeals the district court's denial of his petition to modify the physical care provisions of the decree dissolving his marriage to Tonia Rickels (now known as Tonia Moeller). Jason contends the court erred in finding he had not shown a substantial change in circumstances warranting a modification of the care provisions. He also asserts the court erred in concluding he had not established himself as the superior parent. For the reasons stated below, we affirm the decision of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Jason and Tonia were divorced in 2002. The dissolution decree, which incorporated the parties' stipulation of agreement, provided for joint legal custody of their two children, Logan (born 1997) and Mitchelle (born 1999). The decree also designated Tonia as the primary physical caretaker of the children and provided Jason with liberal co-parenting time.

Jason has continued to live in Scotch Grove. Since the dissolution, Jason has married Stephania Rickels. Jason and Stephania have one child together, Ayden, who is now eight years old. Stephania's sixteen-year-old son from a prior relationship, Colton, also resides with her and Jason.

Tonia has resided in Anamosa the last seven years, but after the dissolution she had moved to the towns of Monticello and Olin, before moving to Anamosa. Tonia testified that each of the moves was occasioned by the fact that she was dating a new person at the time. These moves have resulted in Logan

and Mitchelle attending three different schools early in their education, though they have remained in the Anamosa school district for the past seven years.

At the time of the dissolution Jason worked second shift from 3:30 p.m. until 2:00 a.m., while Tonia had a more regular and accommodating schedule. For this reason he stipulated to Tonia being the children's primary physical caretaker. Since then Jason has been diagnosed with restrictive lung disease, which renders him unable to do physical labor and for which he receives social security disability insurance benefits. Jason testified that this condition does not impede his ability to care for the children or to engage in limited physical activity. Tonia currently works the first shift at Whirlpool Corporation in Amana, which requires her to be gone from the home from around 5:30 a.m. until around 5:00 p.m. This schedule requires Logan and Mitchelle to gets themselves up and to school each morning.

Tonia was married to Anthony Moeller in 2010, but she no longer resides him, and her petition for dissolution of that marriage was pending at the time of the modification trial. Moeller has a history of sexually abusing his own children, as evidenced in part by several founded abuse reports by the Iowa Department of Human Services. The extent of Tonia's knowledge of Moeller's history will be discussed in further detail below.

Jason filed a modification petition in February 2011. This matter proceeded to trial in August 2012. The trial court ruled that Jason had failed to meet his burden to show he can provide superior care so as to justify a physical care modification. The court, however, found that Tonia's marriage to Moeller

constituted a change in circumstances sufficient to justify additional provisions restricting the children's contact with Moeller, and it modified the dissolution decree to forbid either party to allow the children to have unsupervised contact with Moeller or to allow Moeller to spend the night in a residence where the children are present. Jason now appeals from that ruling insofar as it leaves Tonia as the children's primary physical caregiver.

II. SCOPE AND STANDARD OF REVIEW.

Because an action to modify a dissolution decree is heard in equity, our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). We give weight to the district court's findings of fact, especially with regard to witness credibility, but we are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, as we must base our decision on the particular circumstances of the case before us. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987).

In this case Tonia has failed to file an appellee brief. Although this failure does not entitle the appellant to a reversal as a matter of right, we "handle the matter in a manner most consonant with justice and [our] own convenience." *Bowen v. Kaplan*, 237 N.W.2d 799, 801 (Iowa 1976). Our analysis is confined to the controverted rulings of the district court, and we will not comb the record for

an alternative ground upon which to affirm the judgment. *See State ex rel. Buechler v. Vinsand*, 318 N.W.2d 208, 209 (Iowa 1982).

III. MODIFICATION OF PHYSICAL CARE.

Courts may modify the custody or care provisions of a dissolution decree only where the record reveals "a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child." *Melchiori*, 644 N.W.2d at 368. The burden is on the party seeking modification to show a substantial change by a preponderance of the evidence. *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991). In addition, the party seeking modification must demonstrate that he or she possesses a superior ability to minister to the needs of the children. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). Once a custodial arrangement is established, "it should be disturbed only for the most cogent reasons." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). As in any custody or care determination, our paramount concern is the best interests of the child. *See In re Marriage of Bergman*, 466 N.W.2d 274, 275 (Iowa Ct. App. 1990).

On appeal, Jason claims the district court erred in concluding there had been no substantial change in circumstances to warrant a physical care modification and in finding he had not met his burden to establish he can provide superior care. Specifically, he contends Tonia's exposing the children to Moeller, her frequent moves among different towns, and her cohabitation with several different individuals without first consulting the children constitute a substantial

change in circumstances. He also contends his more open schedule and his greater ability to help Logan with school demonstrates his superior ability to care for the children.

A. Relocations.

To prove a change in circumstances, Jason points to the many times Tonia has moved residences while pursuing a new relationship and the emotional and academic effects the moves have had on the children. A change in residence by the primary caretaker, without more, does not constitute a substantial change, but "if the reasons for moving the children and the quality of the new environment do not outweigh the adverse impact of the move on the children," a custody modification may be justified. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). Tonia testified she made each move as a result of dating a new person. She also testified the children have had to move among three different schools, which took an emotional toll on both children and contributed to Logan's being held back a year in school. Although these moves likely were not in the children's best interests, the significance of these changes in circumstance is tempered by the fact that each move was within a relatively small geographic area. Most of the moves, moreover, were early on after the dissolution; Tonia has resided in Anamosa for the past seven years, which has added some stability to the children's academic and emotional lives. That stability is of greater relevance than moves which occurred several years before the modification action was filed. We find the several-year-old moves, albeit not

without an effect on the children, insufficient to constitute a substantial change in circumstances at the time of the trial of this case.

B. Marriage to Moeller.

Much of Jason's brief on appeal focuses on Tonia' relationship with Moeller. Although a parent's remarriage itself does not constitute a substantial change in circumstances, *In re Marriage of Downing*, 432 N.W.2d 692, 695 (Iowa Ct App. 1988), if a parent seeks to establish a home with another adult, that adult's background and relationship with the children is a significant factor in a custody dispute. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). It is not altogether clear at what point Tonia found out about Moeller's history of sexual abuse. Tonia testified to having some indication that Moeller's past might include problems with sexual abuse, and she acknowledged that she should have undertaken a more diligent investigation when these red flags began to appear. In April 2012, Tonia became fully aware that Moeller had sexually abused his own children in the past and that he was limited to supervised visitation with them. At this point Tonia separated from Moeller and soon filed for divorce, although she continued to see him occasionally and the two would ride to work together.

In April and May of 2012, the Department of Human Services investigated an allegation that Tonia had left the children in Moeller's care with knowledge of his abusive past. The assessment worker found Tonia's relationship with Moeller placed the children at a risk of harm but noted neither Logan nor Mitchelle reported any inappropriate behavior by Moeller. The report concluded the

circumstances did not warrant a finding of denial of critical care but found Tonia had failed to provide reasonable supervision and recommended Moeller not be their sole caretaker at any time.

Upon our de novo review of the record, we agree with the district court that Tonia's marriage to Moeller constituted a change in circumstances sufficient to justify a modification of the decree as it related to contact with Moeller. However, Tonia had filed for divorce from Moeller at the time of the modification trial, though the district court was concerned about Tonia's willingness to follow through with keeping Moeller away from the children. In order to provide this protection, the district court ordered neither party to allow the children to have unsupervised contact with Moeller and prohibited Moeller from spending the night in a resident where the children were present. Like the district court, our primary concern is with the best interests of Logan and Mitchelle. By modifying the decree to prohibit unsupervised or overnight contact between Moeller and the children, the district court afforded the children additional protection from the threat of abuse. The custodial arrangement, once established, should only be disturbed for the most cogent reasons. *Frederici*, 338 N.W.2d at 158. The burden of proof for changing custody is higher than that required for simply modifying the contact provisions. We agree with the district court that Jason did not carry his burden to prove the substantial change of circumstances on this issue.

C. Superior Ability to Care for Children.

Since the time of the dissolution, Mitchelle has done very well in school, but Logan has had some learning and behavioral issues and has been diagnosed with ADHD for which he is taking medication. The record reveals that Logan is getting help through a guided study program at school and from medication as a result of both parent's efforts, and Tonia has taken care to ensure Logan regularly takes his medication.

While Jason's disability makes him more available to care for the children, he has not demonstrated Tonia's work schedule renders her unable to do so. The children have not had trouble getting up and ready for school by themselves, and Tonia's job allows her to be home throughout the evening to care for them.

Lastly, the record indicates the children do not wish to move schools, as would be required if there was a change in physical care. The preference of a child is a relevant but non-conclusive factor in custody determinations. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985); *see also* Iowa Code § 598.41(3)(f) (2011) (permitting consideration of a child's wishes regarding a custodial arrangement, taking into account the child's age and maturity). At the time of the decree, Logan and Mitchelle were fifteen and thirteen years old, respectively. Given the relative stability they enjoy at their current school, their desire to remain in Anamosa with their mother is entitled to significant weight, and it further undercuts Jason's claim that he can provide superior care or that a modification of physical custody would be in their best interest.

The district court had the benefit of hearing the parties testify and of observing their demeanor. We defer to its findings that each party was supportive of the other parent and that they were cooperative for the benefit of the children. Because we find Jason has not met his burden to establish both a substantial change in circumstances and his superior ability to minister to the children's needs, we are unable to find cogent reasons to modify the custodial arrangement. Accordingly, we affirm the decree of the district court.

AFFIRMED.