IN THE COURT OF APPEALS OF IOWA

No. 7-038 / 06-1369
Filed March 28, 2007

IN RE THE MARRIAGE OF LORI LEA CALDWELL AND KEVIN CALDWELL

Upon the Petition of

LORI LEA CALDWELL,
Petitioner-Appellant,

And Concerning

KEVIN CALDWELL,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge.

Lori Lea Caldwell appeals from the district court's denial of her application to modify the custodial provision of the July 2002 decree dissolving her marriage to Kevin Caldwell. **AFFIRMED.**

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellant.

Kyle D. Williamson of Williamson Law Office, Davenport, for appellee.

Heard by Sackett, C.J., and Mahan and Vaitheswaran, JJ.

SACKETT, C.J.

Lori Lea Caldwell appeals from the district court's denial of her application to modify the custodial provision of the July 2002 decree dissolving her marriage to Kevin Caldwell. We affirm.

I. *Background*. Lori and Kevin have a son born in 1997 and a daughter born in 1999. At the time of the dissolution, the parties stipulated they would have joint legal custody, and Kevin would have primary physical care of the children. Lori was given substantial visitation, and when the parties' employment schedules made it feasible, Kevin voluntarily extended Lori's time with the children. Both parties make over $50,000 a year. Lori pays Kevin child support of $123 a month.

Lori sought modification claiming that for the past three years Kevin has made a de facto transfer of primary physical care to her and this warrants modification. She contends the children are in her primary physical care about eighty percent of the time. Kevin admits that when counting the time the children sleep, Lori has them for a greater share of the time, but that he has the children for the greater part of their waking hours. The schedule the parties now use allows the children to be with their mother rather than in child care during periods of Kevin's employment. Kevin because of this has not asked for any additional child support.

The district court denied Lori's application finding the schedule the parties had devised worked well and that each party is a good parent. The court noted that Kevin's decision to allow Lori to have the children rather than putting them in child care is now being used against him. The court found that the parties' work

schedules are not necessarily permanent. Finally, the district court found that Lori has failed to show she can render superior care.

II. *Standard of Review*. We review the record de novo in proceedings to modify the custodial provisions of a dissolution decree. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). We give weight to the findings of the trial court, although they are not binding. *Id*.

III. *Modification of Custody*. Modification of the custody provisions of a dissolution decree is only permissible when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). "The change must be more or less permanent and relate to the welfare of the child." *Id*. To change the custody set by the dissolution decree, the party seeking the modification must establish by a preponderance of the evidence conditions have so materially and substantially changed since the decree the children's interest make the requested change expedient. *In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa Ct. App. 1993) (citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)). The parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. *Id.*; *see also In re Marriage of Gravatt*, 371 N.W.2d 836, 838-40 (Iowa Ct. App. 1985). This heavy burden comes from the principle that once custody has been fixed, it should be disturbed only for the most cogent reasons. *Jahnel*, 506 N.W.2d at 474 (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)). Iowa Code section 598.21(8) (2005) lists the

factors to be considered by the court in determining whether a substantial change in circumstances warranting modification has occurred.

Lori contends she has become the de facto primary custodian and that this justified a change in primary physical care. There is authority for modifying custody to transfer physical care to a de facto primary custodian. However, we do not find theses cases supportive to Lori's claim that she is the de facto primary care parent.

In the case *In re Marriage of Scott*, 457 N.W.2d 29, 32 (Iowa Ct. App. 1990), we found a substantial change of circumstance and transferred custody where the mother, who had primary care, decided to relocate to another state and left her daughter in her father's care for two and one-half years. Similarly, in the case *In re Marriage of Green*, 417 N.W.2d 252 (Iowa Ct. App. 1987), the mother who was initially awarded physical care of the parties' daughters moved 150 miles away and left the children in their father's care for two school years. There we held the mother's move and the children's stable environment with their father constituted a substantial change of circumstances that warranted placement of the children in their father's physical care. *Green*, 417 N.W.2d at 253. Unlike the custodial parents in these two cases, Kevin has never left the area, maintains a home for the children, and spends time with them daily. He placed the children with Lori during his working hours. His current working hours are 11 p.m. to 7 p.m. At Lori's request the children frequently share the evening meal with her and she puts them to bed at her home.

In the case *In re Marriage of Spears*, 529 N.W. 2d 229, 229 (Iowa Ct. App. 1994), the mother who was the primary custodian sought to modify visitation

because she wished to leave the area. The father then sought primary physical care. *Spears*, 529 N.W.2d at 229. The district court noted while the father was not the primary custodian, he had assumed the responsibilities of the primary care parent. *Id.* at 302. The district court further found the father had shown a superior ability to address the children's needs and the children continued to need his help and guidance on a regular basis. *Id.* at 302-03.

The district court here found both parents to be good parents but did not find Lori to be the superior parent. We agree with this conclusion. *See Frederici*, 338 N.W.2d at 158 (noting the party "seeking to take custody from the other must prove an ability to minister more effectively to the children's well being"). Lori has failed to establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change, nor has she shown herself to the superior parent.

We credit both Lori and Kevin with being concerned about their children's welfare and find their ability to work out a schedule that maximizes contact with each parent prior to this dispute to be admirable. We affirm the district court's denial of Lori's petition to modify custody. We award no appellate attorney fees.

AFFIRMED.