IN THE COURT OF APPEALS OF IOWA

No. 7-102 / 06-0813
Filed April 25, 2007

PENNY SIGLER,
Petitioner-Appellee,

vs.

KENNETH DOUGLAS COOK,
Respondent-Appellant.

Appeal from the Iowa District Court for Wright County, Allan L. Goode, Judge.

Kenneth Douglas Cook appeals the district court's ruling dismissing his action for modification of a child custody order. **AFFIRMED IN PART AND REVERSED IN PART.**

Timothy Braunschweig, Algona, for appellant.

Kristy Arzberger of Arzberger Law Office, Mason City, and James McCarthy, Fort Dodge, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Kenneth Douglas Cook (Doug) appeals the district court's ruling dismissing his action for modification of a child custody order. He argues the district court erred in (1) failing to modify primary care; (2) modifying his support obligation; and (3) awarding Penny Sigler trial attorney fees. We affirm in part and reverse in part.

I. Background Facts and Proceedings

Doug and Penny are the parents of Briton, born in July 1999. The parents never married. On June 27, 2003, they jointly stipulated to an equity action declaring Doug to be the child's father, granting joint legal custody, and granting Penny physical care. Doug was also granted visitation that included every other weekend from Friday to Sunday, every Sunday, holidays, spring break, and six weeks in the summer. Since the custody order, Doug has married Samantha, who is the mother of a four-year-old daughter. Penny has been residing with Don, who has an adult son and daughter, and with whom she had a son.

Briton started preschool in the fall of 2003. As the result of his behavioral problems, a meeting was held with the Area Education Agency (AEA) with school personnel and both parents. In the summer of 2004 Doug and Penny agreed to have their son begin counseling with Kris Marvin, a licensed social worker with the Pheonix Group in Algona. The child had a total of nine sessions with Marvin. According to Penny, she came to an initial session, but Marvin told her her attendance would be "too confusing" and would put the child "in the middle." In August 2004 the child was diagnosed with attention deficit hyperactivity disorder (ADHD) and prescribed medication. At the end of the summer, Penny agreed

her son should continue counseling with Marvin, but later decided to switch therapists and began taking the child to Audry Frederickson, a licensed clinical psychologist at the Mental Health Center of North Iowa.

The child's behavior worsened throughout kindergarten. He began pushing, hitting, kicking, and choking other students. He also had temper tantrums and other various disruptive outbursts. He continued to see Fredrickson throughout kindergarten. Penny, however, was dissatisfied with his lack of progress and began taking him to James Anastasi, a licensed mental health counselor and family therapist, in June 2005. She also sought therapy with Anastasi. On July 12, 2005, Penny moved out of her residence with Don. She moved back, however, on August 29, 2005. During the child's summer visitation with Doug he resumed therapy sessions with Marvin.

At the modification hearing, the boy's kindergarten and first grade teacher testified she had observed some improvement in his behavior in the first grade. She described it, however, as "one step forward, two steps back." She testified she noticed no difference in the child's behavior based on his weekend visitations. Various day care providers gave conflicting testimony regarding the child's behavior after being cared for by Doug compared to his behavior after being cared for by Penny.

Doug brought this action for modification after an incident in May or June 2005 when Don allegedly physically abused the child. According to Don, the boy was baiting the family cat by putting cereal on the floor, then kicking the cat in the head when it came near the cereal. Don picked the boy up by the arm and the back of the neck. He lost his grip when the child struggled, and the child fell to

the floor. Don then took him by the arm and led him to his bedroom for a time-out. Later that afternoon, Don dropped the child off at the baby sitter's home. He told the sitter what happened and asked her to tell Penny to call him so he could tell her about the incident. The sitter did not notice any bruising or other injuries on the child. The child did not seem to be afraid of Don. When Penny called Don, he told her what had happened. Penny bathed her son that evening and did not see any bruising or other injuries. Penny told Doug about the incident the next day, when he had visitation. Doug did not see any bruising on the child, but reported the incident to the Iowa Department of Human Services (DHS). After an investigation, DHS determined the abuse was not confirmed.

Doug alleges various changes in circumstances to support his petition to modify physical care. The district court determined Don never abused the child. It also found that none of Doug's claims established a substantial change of circumstances and that Doug failed to show he would be a superior primary care giver for the child. The district court also modified Doug's child support obligation by raising it from $363 per month to $450.40 per month. Finally, the court awarded $3000 in attorney fees to Penny. Doug appeals.

II. Standard of Review

We review de novo. Iowa R. App. P. 6.4. Though they do not bind us, we give weight to the district court's credibility findings. *Id.* 6.14(6)(*g*). The criteria governing our decision are the same whether or not the parties are married. *Petition of Purcell*, 544 N.W.2d 466, 468 (Iowa Ct. App. 1995). Our primary consideration is the best interests of the child. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003).

III. Merits

A. Primary Care

In order to modify a change in primary care, Doug must show (1) a substantial change in circumstances relating to the welfare of the child not contemplated by the trial court and (2) his ability to offer superior care. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). This burden is heavy. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). If both Doug and Penny are equally competent to minister to the child's needs, primary care should not change. *Id.*

There have been several changed circumstances in the lives of Penny, Doug, and their son. Doug is now married to a woman with a child, while Penny has been living with Don and has a child with him. Penny has changed residences a few times. The son has been diagnosed with ADHD and has experienced many behavior problems.

However, we conclude the changes Doug alleges are not material and substantial and do not meet the burden required to alter the original custody decree. We agree with the district court's conclusion on this matter. In addition, we conclude Doug has failed to show he is the superior caretaker. Testimony from different care workers was conflicting as to the child's behavior following the child's time with either parent. The child's teacher did not notice a difference in the child's behavior. Both parents have sought treatment for the boy's behavioral issues. Both have been actively involved with his education. Both have tried to find solutions to his problems. We therefore conclude primary care should remain with Penny.

B. Child Support

Doug argues the district court incorrectly modified his child support obligation. He claims the issue was never raised in the pleadings. The district court stated in its order the issue was tried by consent.

We agree with Doug. First, Penny never requested the court to modify child support. *See Seaway Candy, Inc. v. Cedar Rapids YMCA*, 283 N.W.2d 315, 316 (Iowa 1979) ("Issues not pled . . . are entitled to no consideration.") Second, the record shows the district court requested the parties to submit child support worksheets. There is no indication that, absent the court's request, the parties would have submitted the worksheets. Child support would have been relevant had the court granted a change in physical care, however,

> [c]onsent will not be found . . . where the evidence was also admissible on a different issue that was raised by the pleadings. . . . Additionally, when evidence is relevant to an issue properly in the case, its introduction would not signal to the opposing party that a new issue is being tried.

Gibson Elevator, Inc. v. Molyneux, 668 N.W.2d 565, 567-68 (Iowa 2003). We also note the modification is not in the interest of judicial economy. The court modified the support effective two months before Penny was to graduate from her program. We reverse the district court's modification of Doug's child support obligation.

C. Attorney Fees

An award of trial attorney fees is within the district court's discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa 1994). The award should be reasonable and fair and based on the parties' respective abilities to pay. *Id.* We

conclude the district court did not abuse its discretion in awarding Penny trial attorney fees.

Penny has requested appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Penny's request for appellate attorney fees is denied. Costs of the appeal are taxed one-half to each party.

AFFIRMED IN PART AND REVERSED IN PART.