IN THE COURT OF APPEALS OF IOWA

No. 7-156 / 06-1637
Filed May 23, 2007

IN RE THE MARRIAGE OF MICHELLE D. CARTER AND ANDY W. CARTER

Upon the Petition of
MICHELLE D. CARTER,
Petitioner-Appellant/Cross-Appellee,

And Concerning
ANDY W. CARTER,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Muscatine County, Nancy Tabor, Judge.

Michelle Carter appeals and Andy Carter cross-appeals from a district court ruling granting Andy's application to modify the physical care and postsecondary education subsidy provisions of the parties' dissolution decree and ordering Andy to pay guardian ad litem fees and court costs. **REVERSED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

Thomas G. Reidel, Muscatine, for appellant.

J. Michael Metcalf, Muscatine, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Michelle D. Carter, now known as Michelle D. Hoppe (Shelly), appeals and from a district court ruling granting Andy Carter's application to modify the physical care and postsecondary education subsidy provisions of the parties' dissolution decree. Andy cross-appeals from the court order requiring him to pay guardian ad litem fees and court costs. We reverse on the appeal and affirm on the cross-appeal.

I. Background Facts and Proceedings

Shelly and Andy were married in West Liberty, Iowa, in 1987. The parties' marriage was dissolved in November 2004. The dissolution decree incorporated a stipulation that awarded the parties joint legal custody of their three minor children, Derek, Rex, and Shae.[1] The parties agreed Andy would have physical care of their sons, Derek and Rex, and Shelly would have physical care of their daughter, Shae. The decree provided that the parties would alternate weekend visitation with the children. Following the entry of the decree, the parties varied from the visitation schedule and agreed Andy would also have visitation with Shae every Wednesday after school until 9:30 p.m.

Approximately fourteen months after the parties divorced, Andy filed an application to modify the dissolution decree. He claimed a substantial and material change in circumstances had occurred since the entry of the decree that warranted a change in the physical care of the parties' minor child, Shae. The court appointed a guardian ad litem to represent Shae.

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[1] Derek was born in 1989, Rex was born in March 1991, and Shae was born in January 1995.

Shelly lives in Muscatine, Iowa, with Shae and her new husband, Sieg Hoppe.[2] She has resided in Muscatine with Shae and Sieg since August 2004.[3] Shae attends school in the Muscatine Community School District. Prior to residing with her mother and Sieg, she attended school in the West Liberty Community School District.

Andy resides in the parties' former marital home in Nichols, Iowa, with Derek and Rex, who attend school at West Liberty High School. Shelly and Andy are employed at the same jobs they held at the time of their dissolution. Their work schedules have not changed since the entry of the decree. Neither party presented any evidence regarding a change in income.

Following a hearing held in August 2006, the district court found a substantial change in circumstances existed justifying a transfer of physical care. The district court accordingly awarded physical care of Shae to Andy. The court also ordered that "the college expenses for the minor children be reserved until such time as each child is eligible for such subsidy." The court further ordered Andy to pay the guardian ad litem fees and court costs "due to the income disparities of the parties."

Shelly appeals. She claims the district court erred in modifying the physical care and postsecondary education subsidy provisions of the dissolution decree. Andy cross-appeals. He claims the district court erred in ordering him to pay the guardian ad litem fees and court costs.

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[2] Shelly's new husband has a Ph.D. in clinical psychology and has worked for Family Resources for the past nine years.

[3] Derek and Rex lived with Shelly, Sieg, and Shae in Muscatine from August 2004 until the entry of the dissolution decree in November 2004.

II. Scope and Standards of Review

Our scope of review in custody modification proceedings is de novo. Iowa R. App. P. 6.4; *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). We give weight to the fact findings made by the trial court, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). Prior cases have little precedential value, and we must base our decision on the facts and circumstances unique to the parties before us. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). Our primary concern is the best interests of the children. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

III. Modification of Physical Care

The legal principles governing modification actions are well established. As the party seeking modification of the dissolution decree, Andy is required to establish by a preponderance of the evidence that a substantial change in circumstances has occurred since the entry of the decree. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). The change must be more or less permanent and relate to the children's welfare. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the children. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). This heavy burden stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

The district court determined the physical care provision of the decree should be modified because "Shae's desire to be with her father has substantially increased since the dissolution. Further, Andy's involvement with school has increased and Shae's dislike and jealousy towards Sieg Hoppe has made her more reserved and withdrawn at the mother's home." Shelly contends Andy failed to demonstrate a substantial change in circumstances has occurred since the decree was entered. She also argues he failed to meet his heavy burden to show he can provide superior care. Upon our de novo review, we conclude the evidence does not support the district court's modification of the physical care provision of the parties' dissolution decree.

We give less weight to Shae's preference in this modification action than we would if this were the original custody decision. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). However, a minor child's preference as to which parent he or she wishes to live with, although not controlling, is relevant and cannot be ignored. Iowa Code § 598.41(3)(f) (Supp. 2005); *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985). In assessing Shae's preference, we look at, among other things, her age and educational level, the strength of her preference, her relationship with family members, and the reasons she gives for her decision. *Ellerbroek*, 377 N.W.2d at 258-59.

Shae was eleven years old at the time trial was held on her father's application to modify. Her testimony reveals her desire to live with her father is due primarily to her poor relationship with her step-father. Shae testified she did not like Sieg because he "sometimes is mean to my mom, and . . . to me." She testified that Sieg and her mother argue "about once a week . . . ." Shae stated

she could be happy living with her mother if Sieg moved out. She testified the time she is able to spend with her mother is limited due to her mother's work schedule and the time her mother spends with Sieg. She further testified "the reason why I want to stay with my dad is not because like he gives me stuff . . . . It's just because like I have had a lot of time with him, and he is willing to pay for my . . . guitar lessons . . . ." She also noted that during the summer, she is "able to stay up as late as she wants" at her father's residence. Shae, Shelly, and Andy testified that Shae has a close relationship with her brothers.

Shae's teachers and mother testified they noted she became "quieter and less outgoing" in the middle of the 2005-2006 school year. Her grades also worsened during the same time period. However, Shae's disposition and grades improved toward the end of the school year.

The guardian ad litem recommended that "Shae remain in the custody of her mother." She reported Shae "does express a strong feeling about wanting to live with her father while at the same time she expresses her reluctance about moving from her mother's home. She is confused . . . ." According to the guardian ad litem, Shae wants to live with her father because she dislikes Sieg, and "there is more freedom (less supervision) for her at her father's home." The family's counselor, Ruth Evans, Ph.D., remarked that Shae is a "precocious young lady," her "affect is bright," and she "functions well both social[ly] and academically . . . ." She testified that Shae's desire to live with her father is "a mixed feeling. It's clear that she wants to spend time with her mother and she wants to be at her dad's."

The district court observed that "[b]oth homes have positive attributes. Both homes have serious concerns." Andy is "very involved" with his children's education and extracurricular activities. However, he provides "very little structure and guidance" to Shae. A major concern with Andy is his "obvious disdain" of Shelly and her new husband, which has a "negative effect on all his children, especially Shae." *See* Iowa Code § 598.41(1)(c) (Supp. 2005) ("The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent . . . a significant factor in determining" custody). Shelly's involvement with the children's education and extracurricular activities is more limited. On the other hand, she provides more structure and supervision in her home than what is provided in Andy's home. She is also "supportive of the activities and time Shae spends with her father." A major concern with Shelly is her "lack of flexibility" and "unwillingness to accommodate her daughter's needs."

Based on the foregoing, we find Andy failed to establish a substantial change in circumstances has occurred since the entry of the decree that would warrant a change in the physical care of Shae. *In re Marriage of Behn*, 416 N.W.2d 100, 101 (Iowa Ct. App. 1987) (finding a father failed to meet the burden necessary to modify a decree where the claimed substantial change in circumstances was based in part on a ten-and-one-half-year-old girl's "adamant desire" to live with her father).

We further find Andy failed to demonstrate he possesses the ability to provide superior care for Shae. Andy's dislike for Shelly and her new husband is obvious from the record. He does not support a relationship between Shelly and

the children. His attitude has a negative effect on the children's well being. The guardian ad litem reported that "Shae would be well cared for by either parent." "If both parents are found to be equally competent to minister to the children, custody should not be changed." *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994).

Because Andy has not met his burden of proof, we conclude the district court erred in granting his application to modify the child custody provision of the dissolution decree.

IV. Modification of Postsecondary Education Subsidies

Shelly also claims the district court erred in modifying the postsecondary education subsidy provision of the parties' dissolution decree because no substantial change in circumstances exists warranting a modification of the subsidies for Derek, Rex, and Shae.

The parties' original decree awarded Andy the Uniform Transfer to Minors Act (UTMA) savings accounts for Rex and Derek and ordered him to "pay all mandated parental obligations for the college expenses for Rex and Derek." Shelly was awarded the UTMA savings account for Shae and ordered to "pay all mandated parental obligations related to college expenses" for Shae. The district court modified this provision and ordered that "the college expenses for the minor children shall be reserved until such time as each child is eligible for such subsidy."

We have already concluded Andy's application to modify custody should be denied. The parties still have three children, and we have concluded there will be no change in physical care. In addition, no evidence was presented that

the parties' incomes have changed. We conclude Andy has failed to demonstrate a substantial change in circumstances exists warranting a modification of the postsecondary education subsidy provision in the parties' stipulated decree. We therefore reverse the district court's ruling on this issue.

V. Guardian Ad Litem Fees and Court Costs

Andy contends Shelly should have been ordered to pay one-half of the guardian ad litem fees. The fees of a guardian ad litem may be considered along with attorney fees. *In re Blessing's Marriage*, 220 N.W.2d 599, 606 (Iowa 1974). The decision to award attorney fees rests within the sound discretion of the court, and we will not disturb its decision absent an abuse of discretion. *Maher*, 596 N.W.2d at 568. The record reveals Andy's income is nearly three times Shelly's income. Because of the disparity in the parties' incomes, we find no abuse of discretion in the district court's division of the guardian ad litem fees and court costs.

VI. Conclusion

Upon our de novo review, we reverse the district court's ruling modifying the physical care and postsecondary education provisions of the parties' dissolution decree. We affirm the court order requiring Andy to pay the guardian ad litem fees and court costs. The appellee is assessed the costs on appeal.

REVERSED ON APPEAL; AFFIRMED ON CROSS-APPEAL.