IN THE COURT OF APPEALS OF IOWA

No. 7-659 / 07-0284
Filed October 24, 2007

IN RE THE MARRIAGE OF JOHN E. WILLIAMS AND MICHELLE L. WILLIAMS,

Upon the Petition of JOHN E. WILLIAMS,
Petitioner-Appellee,

And Concerning MICHELLE L. WILLIAMS,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

A mother appeals the district court's decision denying her request to modify the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Christy R. Liss of Clark, Butler, Walsh & Hamann, Waterloo, for appellant.

Rick R. Lubben, La Porte City, for appellee.

Considered by Mahan, P.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.

I. Background Facts & Proceedings

John and Michelle are the parents of John III (Jay), born in 1993, and Collin, born in 1995. A dissolution decree was entered on September 22, 2000, which incorporated the parties' stipulation that John would have physical care of the boys. Michelle was granted visitation every other weekend, alternating holidays, and one week in the summer. By informal agreement, Michelle often had additional visitation on Monday evenings, and overnight on Thursdays.

At the time of the dissolution decree both parties lived in Black Hawk County. John was employed at Bertch Cabinets where he earned twelve dollars per hour and had limited benefits. In 2006 John took a job with the United States Postal Service in Onawa, Iowa, which is about a four-and-one-half-hour drive from Michelle's home in Evansdale. John now earns $18.03 per hour at his new job, and has much better family benefits. Due to the increased distance between the parties, Michelle's visitation was limited to the times actually provided for in the dissolution decree.

On July 11, 2006, Michelle filed a petition seeking to modify the custody provisions of the parties' dissolution decree. A modification hearing was held on January 11, 2007. Michelle presented evidence that Collin's grades had dropped substantially since moving to Onawa. Two of Collin's teachers testified that Collin had trouble turning in assignments and was falling asleep in class. Michelle had discussed the problem with Collin and the school principal, but not John. Michelle lives in a two-and-one-half bedroom home with her boyfriend,

who has shared custody of his two daughters. Michelle testified she wanted the boys to attend Union Community School District, where they had previously attended, even though she lived in the Waterloo School District. The parties had no information on whether Michelle would be able to enroll the children in the Union Community School District.

John testified he tried to help Collin with his homework, but had to leave for work before the boys went to school, so he did not know if Collin actually turned in his homework. Collin has been diagnosed with attention deficit hyperactivity disorder (ADHD), and during the previous year had taken medication for his condition. Collin was not taking any medication during the current school year. John had tried to change Collin's bed-time routine in order to improve his sleepiness problem at school.

The district court determined Michelle had shown a substantial change in circumstances based on John's move to Onawa. The court found, however, Michelle had failed to prove she could provide superior care for the children. The court found the evidence did not show Collin's relocation or new school were responsible for his scholastic problems. The court increased Michelle's summer visitation to six weeks. Michelle appeals.

II. Standard of Review

In this equitable action our review is de novo. Iowa R. App. P. 6.4. In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Merits

Michelle contends the district court should have modified the parties' dissolution decree to grant her primary physical care of the children. She claims John is not attentive to Collin's educational or medical needs because he did not address the concerns raised by the school regarding Collin's performance. She states she would address Collin's ADHD by reevaluating his need for medication. She also states she would do more to make sure he brought his homework to school.

A party seeking modification of a dissolution decree must establish there has been a substantial change in circumstances since the entry of the decree. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). Additionally, a party seeking a change in custody must show the ability to minister more effectively to the children's well-being. *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659 (Iowa Ct. App. 1991). A party seeking to change custody has a heavy burden because once custody is fixed it should be disturbed only for the most cogent reasons. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

Under Iowa Code section 598.21D (Supp. 2005), if a custodial parent moves 150 miles or more from the former custodial home, this may be considered a substantial change in circumstances. In this case, John moved from La Porte City to Onawa, a distance of more than 150 miles. We agree with the district court that there has been a substantial change of circumstances under section 598.21D.

We also agree with the district court that Michelle failed to prove she could provide superior care for the boys. While John has perhaps not done everything he could do to address Collin's problems, the evidence does not show the problems could be better addressed if Collin were in Michelle's care. While Michelle expressed great concern about Collin's academic performance, she had not contacted John to discuss ways to remedy the problem. Furthermore, it is not clear there is sufficient room at Michelle's home for the boys. Michelle, her boyfriend, and his two children already occupy her two-and-one-half-bedroom home.[1] Additionally, although Michelle stated she wanted the children to attend Union Community School District, she had not taken any steps to determine if the children could attend there while she was living in the Waterloo School District.

Considering all of the evidence presented, we conclude Michelle has not met her heavy burden to show she could minister more effectively to the children's well-being. *See Wedemeyer*, 475 N.W.2d at 659. We affirm the decision of the district court.

IV. Attorney Fees

Both parties seek attorney fees for this appeal. An award of appellate attorney fees is not a matter of right, but rests within our 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 was required to defend the district court's decision on appeal.

[1] The boyfriend's two children do not reside in the home full-time. The half bedroom is a basement room that is primarily used for storage.

In re Marriage of Wood, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We determine each party should pay his and her own appellate attorney fees.

AFFIRMED.