IN THE COURT OF APPEALS OF IOWA

No. 7-773 / 06-1689
Filed October 24, 2007

EARL L. CULLUM,
Petitioner-Appellant,

vs.

LAURELL WHITLEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

A father appeals from the district court's ruling on his application to modify the physical care and visitation provisions of a prior custody decree. **AFFIRMED.**

Harold DeLange, Davenport, for appellant.

Laurell Whitley, Kansas City, Missouri, pro se.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Earl L. Collum appeals from the district court's denial of his petition to modify the parties' prior custody decree to place physical care of the parties' children with him instead of with the children's mother, Laurell Whitley. We affirm.

I. Background Facts and Proceedings.

Earl and Laurell are the parents of Jameica Cullum, born in October 1993, and Jamarr Cullum, born in December 1997. Earl and Laurell never married, but they lived together for a substantial period of time following the birth of their first child.

In June 1999 the district court entered an order, by agreement of the parties, which addressed the issues of legal custody, physical care, visitation, and child support. The parents were awarded joint legal custody, and physical care was placed with Laurell. Earl was awarded visitation with the children, which included two weeks during the summer of 1999, one week every year beginning on Christmas Day and ending on New Year's Day, and each summer beginning in 2000. Additionally, each parent had the right to visit with the children on their birthday and anytime while the children were in the other parent's care, but not in excess of every other weekend.

Earl and Laurell have never really followed their visitation schedule. Since 1999 the parties have lived together off and on in both Davenport and Kansas City, Missouri. As a result, their children have moved back and forth between Davenport and Kansas City on several occasions. At times the children have resided with Laurell, and on other occasions they have lived with Earl. Part of

the time while Earl, Laurell, and the children lived in Davenport, they lived with Earl's parents.

Earl and Laurell have had several physical altercations. Laurell decided to leave Earl in 2004 after he attempted to hang himself in the basement of the parties' residence. The children were present in the home at the time. Laurell and the children returned to Kansas City, where her sister resided. Earl and Laurell have not lived together since that time. In May 2005 the children returned to Davenport to live with Earl. They continued to live with him until August 2006.

While the children lived with Earl from May 2005 to August 2006, Earl was residing with his parents. Although Earl took the children to school in the morning, the children's primary caretaker was Earl's mother, Shelvia Cullum. Shelvia was responsible for addressing the youngest child's learning disability and speech problems. She enrolled the child in private school and in a speech therapy program at Augustana College; additionally, she paid for his classes at Sylvan Learning Center.

In March 2006, while the children were living with him, Earl filed a petition to modify the parties' 1999 custodial order. He asserted a substantial change in circumstances warranted a modification of the order's physical care provisions. He contended that because Laurell had moved to Kansas City, and because the children had been residing with him in Davenport, a modification order placing physical care with him was warranted.

In July 2006 Laurell was charged with fraud for receiving welfare benefits in Missouri while the children were living with Earl in Davenport. In August 2006 the children again moved from Davenport to Kansas City to live with their mother.

In October 2006 a hearing was held on Earl's petition to modify the 1999 custodial order. At the time of the hearing, Earl was living in Muscatine with his fiancée, and Laurell and the children were living in Kansas City with her fiancé. Earl indicated that if he received custody of his children, he and his fiancée would find a residence in Davenport so the children could remain in the Davenport school system. Laurell indicated that she had no objection to the prior visitation schedule continuing to be implemented if she retained custody.

On October 10, 2006, the district court entered an order that denied Earl's petition to modify the parties' prior custody decree to place physical care of the children with him. Earl has appealed. He contends he should be awarded physical care of the children.[1] Laurell has not filed a brief on appeal.

II. Scope and Standards of Review.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We give weight to the trial court's findings of fact, 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, so we will predominantly base our decision on the facts and circumstances unique to the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

[1] Earl has not asked us to modify the parties' visitation schedule if his application to modify physical care is denied.

III. Merits.

As the parent seeking to modify physical placement, Earl bears a heavy burden. He must prove conditions affecting his children's welfare have so materially and substantially changed that it is in their best interests to alter their physical care. *In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). The change cannot have been contemplated by the district court when the order was entered, and must be more or less permanent in nature. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). Earl must also prove that he has a superior ability to minister to his children's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). He faces such a heavy burden because "once custody of children has been determined, it should be disturbed only for the most cogent reasons." *Id*.

In support of his application to modify, Earl indicates that the children have never actually established a firm home base in either Iowa or Missouri. He states that since the 1999 order "the children have spent as much time in the Davenport, Iowa area as they have in the Kansas City area and as much time in the custody of Earl as they have in the custody of Laurell." In his brief on appeal, Earl refers to Iowa Code section 598.21D (Supp. 2005), which states that the district court may find a substantial change in circumstances exists

> [i]f a parent awarded joint legal custody and physical care . . . is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded.

While the record reveals that the children have moved between Davenport and Kansas City multiple times since 1999, it also establishes that Earl has moved

with the children and Laurell on several occasions.[2] Moreover, 1999 was not the first time the children moved between Davenport and Kansas City.[3] Under the circumstances presented here, we do not believe the district court was required to find a substantial change in the parties' circumstances based on relocation by either parent.

Earl asserts that since 1999 he "has demonstrated that he is the parent who is more stable and has made better choices in both his relationships and facilitating the education of the parties' minor children." However, as we have already mentioned, once the court has fixed custody of children, we will disturb that determination only for the most cogent reasons. *Dale*, 555 N.W.2d at 245. Based on our review of the record, we do not believe Earl has been able to demonstrate that he possesses the ability to provide superior care for the children. *See id.*

The record reveals that Laurell is a good parent. It is apparent that Laurell has been active in caring for her children. At the time of the modification hearing, she had taken action to obtain information from Augustana College concerning her son's therapy progress and was attempting to obtain similar therapy in the Kansas City area or through the public schools.

The record also reveals that Earl is concerned about the welfare of his children. However, based on our review of the record, we agree with the district

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[2] In the summer of 2000, Earl, Laurell, and the children moved from Davenport to Kansas City. Then in March 2002, they all moved back to Davenport.

[3] In 1996 the parties had lived together for approximately one year in Davenport before Laurell moved to Kansas City with their daughter. Laurell and her children lived in Kansas City until the summer of 1999, at which time they returned to Davenport and lived with Earl and his parents.

court's conclusion that during the time the children lived with Earl in Davenport, Earl's mother was actually their primary caretaker. As the district court explained, "Earl has not participated to a great degree in the children's education, care, or in addressing Jamarr's specific needs for his disabilities."

Earl argues that he would be able to provide a better environment for the children due to Laurell's relationship with her fiancé, Ron Starks. At the time of the modification hearing, Laurell and her children were living with Ron. Ron has six children by four mothers. None of his children live with him. He has been convicted of operating a motor vehicle while under the influence of alcohol on at least two occasions. Ron is employed as a maintenance man, and he provides support for his children. The trial court expressed some concern regarding Laurell's living situation, but concluded that those concerns "did not rise to the level of warranting a change in custody." We do not believe the record provides a basis for overturning this conclusion.

IV. Conclusion.

Because Earl has not met his burden of proof, we conclude the court did not err in failing to modify the parties' prior order establishing custody and visitation.

AFFIRMED.