IN THE COURT OF APPEALS OF IOWA

No. 8-023 / 07-0817
Filed March 14, 2008

IN RE THE MARRIAGE OF SUE ANNE CHAPMAN AND DANIEL PAUL CHAPMAN

Upon the Petition of

SUE ANNE CHAPMAN n/k/a
SUE ANNE SANDER,
Petitioner-Appellee

And Concerning
DANIEL PAUL CHAPMAN,
Respondent-Appellant.

Appeal from the Iowa District Court for Cedar County, Bobbi M. Alpers, Judge.

Father seeking physical care appeals the court's order of joint physical care. **AFFIRMED**.

Bradley L. Norton, Clarence, for appellant.

Landon R. Dufoe of Lederer Weston Craig, PLC, Cedar Rapids, for appellee.

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

EISENHAUER, J.

When Daniel and Sue Chapman divorced on October 22, 1993, their son Ben was two-years-old; he will be seventeen in May 2008. They agreed to joint legal custody with physical care to Sue and reasonable visitation to Daniel. Sue has remarried and Ben gets along well with his stepfather. Daniel has also remarried and has two toddlers with Ben's stepmother. Ben also gets along well with his new siblings and stepmother. Sue and Daniel's homes are two miles apart and both have been actively involved in raising Ben.

In September 2006, Daniel filed a petition to modify the dissolution decree seeking physical care. Sue resisted Daniel's modification and later requested joint physical care on alternating weeks. In response to repeated requests from Ben, Daniel allowed Ben to continue to stay at his home after the 2006 Thanksgiving visitation. Daniel's unilateral decision to allow Ben to move in with him before the court hearing caused hard feelings between Sue and Daniel and interfered with what had been a good relationship in making joint decisions regarding Ben. After a February hearing, the court entered an order in April 2007, modifying the decree to provide joint physical care on alternating weeks. Daniel appeals the court's modification order and also seeks a reversal of the court's attorney fee award to Sue.

We review this equity action de novo. Iowa R. App. P. 6.4. We have a duty to examine the entire record and "adjudicate anew rights on the issues properly presented." *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. Iowa R. App. P. 6.14(6)(*g*).

In seeking to modify the physical care arrangement, Daniel has a heavy burden. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). He must establish "by a preponderance of the evidence, a substantial change in circumstances justifying [his] requested modification." *See In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, when seeking a modification to place physical care with him, Daniel has the burden of showing he will render superior care. *See In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). These requirements stem from the principle that once custody has been fixed, "it should be disturbed only for the most cogent reasons." *Id*. The best interests of the child are the controlling considerations. *Thielges*, 623 N.W.2d at 235. In this case the trial court was faced with neither party defending the status quo. Essentially consenting to a change in circumstances, the parties presented the options of physical care with Daniel or joint physical care.

Under the current arrangement the parties have raised a normal, well-adjusted and emotionally-healthy child. While Ben took medicine related to ADHD and oppositional defiant behavior up until eighth grade, as a sophomore he has not taken the medicine for over a year and has maintained a 3.3 grade point average. He is active in numerous sports and also participates in chorus. The district court:

> Finds credible evidence that for the most part both Daniel and Sue have been committed since their divorce to do all that each can do to assist their son in addressing any needs he may have and to help him succeed at school and in the community. Each parent has continued to support Benjamin's relationship with the other parent as both Daniel and Sue have raised Benjamin from a toddler to his current status.

At most, the record shows Daniel and Sue are both good parents who can provide the same level of care. Since Daniel has not met his heavy burden of proving he will give superior care, we will not place Ben in his physical care.

Ben testified he wants his father to have physical care because the rules are different at Daniel's house and he likes the additional freedom he is given by Daniel. Additionally, he wants to spend more time with his dad than occurred while his mom had physical care. Ben stated his relationship with Sue was strained when he first moved to Daniel's home, but now his relationship with his mother is back to equilibrium. We have considered Ben's testimony, but such testimony "is entitled to less weight in a modification action." *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). Additionally, our analysis "is far more complicated than asking children with which parent they want to live." *Id*. at 101-02. Under the circumstances of this case, we will not defer to Ben's stated preference to live with his father.

"It is generally in the children's best interests to have the opportunity for maximum continuous physical and emotional contact with both of their parents." *Thielges*, 623 N.W.2d at 238. A court may award joint physical care to joint custodial parents upon the request of either parent. Iowa Code § 598.41(5)(a) (Supp. 2005). While Daniel argues his relationship with Sue does not meet the communication and mutual respect requirements necessary for joint physical care, the district court concluded otherwise after its opportunity to observe the parties. *See In re Marriage of Hansen*, 733 N.W.2d 683, 698 (Iowa 2007). The court found: "Both parents are able to communicate with each other regarding

Benjamin's needs, although both parents have not always agreed as to how to address those needs."

While Sue and Daniel have different parenting styles, the joint physical care ordered by the district court is appropriate and fair, as is the court's discretionary order of $1000 in attorney fees. We conclude Ben has been assured the opportunity for maximum continuous physical and emotional contact with both Sue and Daniel and affirm the district court.

Sue seeks $4000 in appellate attorney fees, which are discretionary. *See In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). In addressing Sue's request we consider her needs in making the request, the ability of Daniel to pay, and whether Sue was obligated to defend the trial court's decision on appeal. Sue has prevailed on appeal and we order Daniel to pay $1000 toward Sue's appellate attorney fees. The appellate costs are taxed to Daniel.

AFFIRMED.