IN THE COURT OF APPEALS OF IOWA

No. 8-184 / 07-1327
Filed June 25, 2008

IN RE THE MARRIAGE OF TRACY A. FINCH AND ANTHONY FINCH

Upon the Petition of
TRACY A. FINCH,
Petitioner-Appellant,

And Concerning
ANTHONY FINCH,
Respondent-Appellee.

Appeal from the Iowa District Court for Butler County, Paul W. Riffel, Judge.

A mother appeals from the district court's modification of the shared care provision of the decree of dissolution. **AFFIRMED.**

Robert W. Thompson of Thompson Law Office, Reinbeck, for appellant.

Bruce J. Toenjes of Nelson & Toenjes, Shell Rock, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Tracy A. Finch appeals from a decree modifying the child custody provision of a decree dissolving her marriage to Anthony Finch. She challenges the district court's decision to modify a shared placement arrangement and place primary physical care of their daughters born in 2000 and 2001 with Anthony. We affirm.

I. BACKGROUND.

The parties' marriage was dissolved in September of 2005. At that time the district court approved the parties' stipulation where they agreed they would share physical placement of the children, with Tracy having the children every Monday, Tuesday, and every other Friday, Saturday and Sunday, and Anthony having the children every Wednesday, Thursday, and every other Friday, Saturday and Sunday. The parties had further agreed the children would attend school in the Aplington-Parkersburg School District, and if either party moved so that attendance there would not be practical, the custody arrangement could be reviewed by the district court.

Tracy filed this petition for modification of the custody provision of the decree in August of 2006. She contended she resided in Dumont and attendance at a school in the Aplington-Parkersburg School District was not practical. She asked that the primary physical care of the two girls be placed with her subject to Anthony's reasonable visitation. Anthony replied, contending there had been a substantial and material change in circumstances and primary physical care of the girls should be with him. The district court, after hearing evidence, concluded the shared physical placement was not workable and the

children would be better served in Anthony's primary physical care as the court found him to be the more mature and responsible parent and the parent more likely to support the other parent's relationship with the children. The court fixed Tracy's child support obligation at $355.00 a month. Anthony was required to continue providing health insurance for the children through his employer at a current cost of $56.26 a week and to pay sixty percent of any medical expenses not covered by insurance with Tracy to pay the balance. Tracy was allowed to claim one child as a dependant for income tax purposes as long as she was current with her child support. The court awarded no attorney fees and provided the parties should each pay one-half of the court costs.

Tracy challenges this finding contending Anthony should not have primary physical care because he has threatened her, has no respect for her, and will not help her foster a good relationship with her children. Anthony disagrees. He recognizes that communication between the parties has been difficult and he concedes responsibility for the problem while advancing that Tracy shares joint responsibility for the problem.

II. SCOPE OF REVIEW.

Dissolution actions, as equitable proceedings, are reviewed de novo. Iowa R. App. P. 6.4; *In re Marriage of Benson*, 545 N.W.2d 252, 253 (Iowa 1996). We give "'weight to the fact findings of the trial court, especially when considering the credibility of witnesses,' but these findings do not bind us." *In re Marriage of Duggan*, 659 N.W.2d 556, 559 (Iowa 2003) (quoting *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 51 (Iowa 1999)).

III. SUBSTANTIAL CHANGE OF CIRCUMSTANCES.

The first question we need to address is whether the record shows there has been a substantial change of circumstances such as is necessary for a modification of the custody provisions of a dissolution decree. Courts are empowered to modify the custodial terms of a decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child. *Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002).

The Iowa legislature has recognized joint physical care as an option for parents if it is in the best interests of their child. Iowa Code § 598.41(5) (Supp. 2005). Where parents respect the child's other parent and their child, recognize that cooperation and communication are important to their child's welfare, and put that welfare ahead of their own needs and petty differences, shared care can be beneficial to a child because it allows both parents to remain a viable and real part of the child's life. *See In re Marriage of Swenka*, 576 N.W.2d 615, 616-17 (Iowa Ct. App. 1998).

As the modification court found, the shared custody provisions agreed to by these parties and approved by the dissolution court have not evolved as envisioned by either of the parties or the court. Both parents appear to agree that joint physical care is not working. There is considerable discord between the parents that has had a disruptive effect on their children's lives and has encouraged the children to play one parent against the other. The record supports a finding of a substantial change of circumstances warranting a

modification of the decree. *See In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

IV. **PRIMARY PHYSICAL CARE.**

Having found the record supports a finding that there is a substantial change in circumstances to support a modification of custody, we address Tracy's contentions that she should have received primary physical care.

The parent seeking to change the physical care from a primary custodial parent to the petitioning parent has a heavy burden and must show the ability to offer superior care. *See In re Marriage of Michelson*, 299 N.W.2d 670, 671 (Iowa 1980); *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). Where one parent has primary care, that parent has been found to be the better parent. That is not the situation here, where the parents shared equally the physical and primary care of their daughters. The order splitting the children's time between Tracy and Anthony established that they both were suitable to be primary care parents. *See Melchiori*, 644 N.W.2d at 368-69; *see also In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983) (finding either parent a suitable custodian a predicate to joint custody). Therefore, the question is whether Tracy has shown she is the better parent. Tracy says she is and contends she should be the primary custodian.

As stated above, we have learned from the record there is considerable discord between the parents. We recognize it is not one-sided. That said, we believe the parties love their daughters and want what is best for them. Tracy is engaged and lives with her fiancé. Anthony has a girlfriend who spends time in his home. The younger daughter told a social worker she did not like Tracy's

fiancé because he puts her in her room, nor did she like Anthony's girlfriend because she puts her to bed. There is nothing in the record to suggest that either Tracy's fiancé or Anthony's girlfriend are unacceptable companions for the children.

Unfortunately, the parties have chosen to focus on what they consider to be unacceptable traits of the other. Tracy criticizes Anthony as being difficult. Anthony criticizes Tracy as sabotaging his relationship with the children. It appears they both have a basis for their criticisms. However, the record tells us little as to their priorities for the girls, the things they believe are important for the children to do, or their goals for their education and play time, among other things. The absence of such evidence gives us little insight as to where the interests of the children will be better served.

Barb Lind, a licensed, independent social worker who has her own clinic in Cedar Falls, Iowa, and specializes in working with children through play therapy, testified. She began seeing the children when Anthony initially presented them for treatment after an incident in the children's play raised concern. By the time of trial she had seen the children ten times and noted they were progressing in therapy but struggle with the current custody arrangement. She was of the opinion that both parents had things to offer the children and the children were bonded strongly to both parents. She found because of the bonding and loyalties the children have to both parents that they feel torn about who they are to love. She was further of the opinion the girls had more structure and accountability with Anthony and more nurturing with Tracy. She said the children were positive about both their homes though the younger child did express more hesitation

about going to Anthony's home. However, when she explored the child's hesitation further, it appeared it was primarily about bedtime and the fact she did not like the bedroom she had at Anthony's. She found control issues with both parents. She explained this to mean she saw that Anthony was more stringent and more concerned about it being socially appropriate. With Tracy she saw her control being exhibited in how the children feel and what their relationship should be.

This is an extremely close case. Both parents love their children and the children are bonded to each of them. We, like the district court, have concern with Tracy's smoking.[1] We also recognize as the district court did that custody with Anthony will allow the children to stay in the same school. We note that Anthony has shown more employment stability. Giving the required weight to the findings of the district court, particularly on credibility issues, we affirm.

V. APPELLATE ATTORNEY FEES.

We award no appellate attorney fees.

AFFIRMED.

[1] We were told at oral argument that she has not smoked for three months. While this is evidence outside the record we do commend her for conquering this habit.