IN THE COURT OF APPEALS OF IOWA

No. 8-190 / 07-1590
Filed May 14, 2008

Upon the Petition of

BRETT LYMAN,
Petitioner-Appellant,

And Concerning

MISTY BEHOUNEK,
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Michael J. Moon, Judge.

Brett Lyman appeals from the district court order granting Misty Behounek's petition to modify a custody order and placing the child in the physical care of the mother. **AFFIRMED.**

Larry W. Johnson of Walters & Johnson, Iowa Falls, for appellant.

G.A. Cady III of Hobson, Cady & Cady, Hampton, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Brett Lyman appeals from the district court order granting Misty Behounek's petition to modify a child custody order. The modification placed the child in Misty's physical care. Lyman contends the court failed to make a finding that a substantial change in circumstances occurred necessitating the modification. He further contends the order contains significant factual errors. He seeks a reversal of the order and a continuation of the shared care arrangement. We affirm.

I. Background Facts and Proceedings. Brett and Misty are the parents of Victoria, born in November 2003. They have never been married. At the time of Victoria's birth, the parties lived together. Following a separation in 2005, they sought an order from the district court to address issues of child custody and support. On October 31, 2005, the court entered its order granting the parties shared care of Victoria.

On February 1, 2007, Misty petitioned the court to modify the custody order to grant her physical care of Victoria. A trial was held. On August 27, 2007, the district court entered its order modifying custody and granting Misty physical care of the child.

II. Error Preservation. Brett complains the district court did not make a specific finding that a substantial change in circumstances warranted modification. Misty argues that because Brett failed to bring this error to the district court's attention in a motion to enlarge, he has waived error.

A motion to enlarge findings is necessary to preserve error when the district court fails to resolve an issue, claim, or other legal theory properly

submitted for adjudication. *Meier v. Senecaut,* 641 N.W.2d 532, 539 (Iowa 2002). However, a motion to enlarge is only required to preserve error when the district court fails to address an issue that has been properly submitted. *West Branch State Bank v. Gates,* 477 N.W.2d 848, 852 (Iowa 1991). For error to be preserved, the record must show the court was aware of the issue and litigated it. *Meier,* 641 N.W.2d at 540. Since the record reveals the child custody modification issue was litigated, we will pass on the question of error preservation and address the merits of Lyman's claim.

III. Scope and Standard of Review. We review a district court's ruling on child custody de novo. *In re Marriage of Pendergast,* 565 N.W.2d 354, 356 (Iowa Ct. App. 1997). We give weight to the findings of the trial court, although they are not binding. *Id.*

Brett complains of several factual errors he contends the court made in its ruling. Because our review is de novo, we need not address each of Brett's contentions, but rather we review the record anew.

IV. Substantial Change in Circumstance. A modification of child custody is appropriate only when there has been a substantial change in circumstances since the time of the original order that was not contemplated when the order was entered. *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the child. *Id.*

At the time of the entry of the original order, the parties were living in the same school district. Following the original order, Brett moved to Parkersburg and testified he intends to stay there. The parties now live thirty to forty miles

apart and are no longer in the same school district. The custody order provided, "This Court is aware that it may be necessary to alter custody and visitation when Victoria begins school attendance." In fact, the child has begun attending preschool. She is enrolled in different schools in her parents' respective towns.

Additionally, there is evidence the parents are unable to effectively communicate about their child. Misty testified that despite attempting to discuss the issue of preschool with him on several occasions, she did not find out about Brett's intention to enroll Victoria in a preschool in Parkersburg until the girl told her Brett had taken her to the school. There is evidence Brett has had difficulty controlling his anger with Misty. Most notably, Misty's neighbor testified to witnessing one of Brett's outbursts in which he yanked Victoria into the car, causing the child to cry.

Brett denies any difficulty in communicating effectively with Misty and denies having a temper. The district court found Misty's testimony to be more credible. Although we are not bound by the district court's credibility findings, we give weight to its findings because it has the opportunity to observe the parties' demeanor firsthand. *In re Marriage of Vrban,* 359 N.W.2d 420, 423 (Iowa 1984). The corroboration of Misty's claims of Brett's temper by an impartial witness bolsters her credibility.

We conclude Misty has demonstrated a substantial change of circumstance that warrants modification. Brett testified that he plans to remain in Parkersburg. Enrollment in two different schools with a schedule alternating care every three days is simply not feasible. Furthermore, the difficulty in the parents' communication qualifies as a change in circumstances warranting modification.

See In re Marriage of Rolek, 555 N.W.2d 675, 677 (Iowa 1996) ("When, following a dissolution decree providing joint custody, the actions of the parties indicate that they are no longer able to cooperate, a modification of the custody status is appropriate.").

V. Physical Care. Having found the existence of a substantial change in circumstances warranting modification, we must consider with whom physical care of the child should be placed. The criteria for determining child custody in original custody actions are applied in modification proceedings as well. *In re Marriage of Courtade,* 560 N.W.2d 36, 37 (Iowa Ct. App. 1996). The best interests of the child are the first and governing consideration in determining the child's primary caregiver. *Walton,* 577 N.W.2d at 870. Under the original order, both parents were found suitable to render primary care. *See Melchiori v. Kooi,* 644 N.W.2d 365, 369 (Iowa Ct. App. 2002). Thus, the question is which parent can render better care. *Id.*

We conclude Misty is better able to meet Victoria's best interests. She has provided the child stability, having remained in the same home and provided her with a consistent schedule, which is important at her young age. Meanwhile, Brett has changed employment several times and has moved in the short time between the filing or the original order and the petition to modify. He is currently attending school and could possibly move again following graduation, depending on his employment opportunities. The evidence shows he has a temper and has not maintained a consistent schedule for Victoria while she was in his care.

Because Misty has shown a substantial change in circumstances warranting modification of child custody, as well as the ability to provide Victoria

with superior care, we affirm the district court order modifying the child custody order to grant Misty physical care of the child.

AFFIRMED.