IN THE COURT OF APPEALS OF IOWA

No. 8-705 / 07-1163
Filed October 29, 2008

IN RE THE MARRIAGE OF DANIEL J. REICKS AND JANETTE REICKS

Upon the Petition of
DANIEL J. REICKS,
Petitioner-Appellee,

And Concerning
JANETTE REICKS,
Respondent-Appellant.

Appeal from the Iowa District Court for Chickasaw County, John C. Bauercamper, Judge.

Janette Reicks appeals from the denial of her petition for modification of her modified dissolution decree seeking a change in the physical placement of the three children. **AFFIRMED AS MODIFIED.**

Kevin E. Schoeberl of Story & Schoeberl Law Firm, Cresco, for appellant.

Christopher F. O'Donohoe of Elwood, O'Donohoe, Braun & White Law Firm, New Hampton, for appellee.

Patrick Dillon, guardian ad litem for minor children.

Heard by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Janette Reicks appeals from the denial of her petition for modification of her modified dissolution decree seeking a change in the physical placement of the three children she had with Daniel Reicks. She contends, among other things, she should have been awarded primary physical care of the children. We affirm as modified.

The parties' marriage was dissolved in 1999. The dissolution court approved and incorporated in the decree a stipulation of the parties that provided they would have joint custody and shared physical care of their children born in 1990, 1992, and 1994. In November of 1999, Janette filed a petition to modify. In October of 2000, the decree was modified to award primary physical care of the three children to Daniel. Janette filed a second petition to modify in November of 2002, asking she be given primary physical care of the children. After a hearing, the district court in September of the next year denied her request.

Then in October of 2006, she filed the petition to modify physical care that led to this appeal. The matter came on for trial in April of 2007. A guardian ad litem appointed for the children recommended to the court that custody not be changed. In the same month as the hearing, the district court denied Janette's request for modification of the placement of the children but modified the visitation to give Janette additional visitation. The court denied both parties' request for attorney fees, held each party responsible for court costs advanced by them or their attorney on their behalf, and expenses incurred by them to

secure witnesses and evidence at trial. Janette was ordered to pay the remaining court costs, including the fees and expenses of the guardian ad litem. Post-trial motions filed by Janette were denied.

SCOPE OF REVIEW. We review de novo. Iowa R. App. P. 6.4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*). Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree or the time of a modification of the decree, not contemplated by the court when the decree was entered, which is more or less permanent, and relates to the welfare of the children. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002); *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). The parent seeking to change the physical care from the primary custodial parent to the petitioning parent has a heavy burden and must show the ability to offer superior care. *Melchiori*, 644 N.W.2d at 368; *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). This is the burden Janette bears in seeking primary care of the children.

ISSUES ON APPEAL. Janette contends she has met the burden to support modification of the children's custody because of (1) the children's lack of academic progress and behavior problems, (2) Daniel's failure to supervise the children, (3) her strong bond with the children and her ability to communicate with

them and Daniel's reluctance to communicate concerning the children's needs, (4) the children's preference, and (5) her de facto custody. Janette alternatively seeks additional overnight visits. In addition, she requests modification of her child support obligation and attorney fees.

A review of the record shows that both parents are concerned about their children yet their communication with each other is poor. The children have had some problems and while not particularly serious, each parent seems prone to blame the children's problems on the other. As the district court noted and we find to be clear, the children have suffered from the parties' failure to communicate and their attitudes towards one another.

Daniel has allowed Janette additional visits which the oldest and youngest children have exercised. An event in 2004 caused the middle child to become angry with his mother and since that time he has had almost no contact with her and she has made no real effort to correct this and re-establish a relationship with the child. Nor has she, as the district court noted, attempted to arrange counseling to improve their communication.

ACADEMIC PROGRESS. The children are not at the top of their class but for the most part they do satisfactory work. Janette tends to blame any problems they have had in school on Daniel, contending when the children are with her they do better in school and he is not as concerned as is she about their academic progress. The record does not support her contention. Both parents are concerned about the children's academic progress and both have been in contact with their teachers and their schools. Daniel has shown considerable

concern, for example, when one child had difficulty reading, he made provisions for the child to attend the Sylvan Learning Center in a nearby community and spent some $3000 or $4000 on tuition. Janette was opposed to the child attending the center because she did not feel the child would want to do this during his summer vacation, and she did not think he should go to summer school. There were transportation responsibilities for the child, none of which she assumed. Daniel, also near time of trial, paid the fees so that his daughter could join her Spanish class on a trip to Spain. The record does not support Janelle's argument that she is better able to meet the children's academic needs.

FAILURE TO SUPERVISE. Janette contends she can better supervise the children in that she has more regular work hours and consequently would be more available to the children before and after school. Daniel's hours are longer, but he provides supervision for the children in the morning, and if he is not available after school, his parents, who live a short distance from his home, are available to check on the children, and do. Daniel is involved in the children's lives and they share household chores.

Janette also points to a situation where in March of 2004, some two years prior to the petition here being filed, Daniel started a fire after cleaning out the garage. Daniel went in the house. The children, then ages fourteen, twelve, and ten, stayed around the fire and ultimately threw WD40 and other things into the fire. There were no injuries. Janette learned of this when a child told her a can of WD40 he had purchased was to replace one of his father's cans he and his siblings had thrown in a fire. The incident was reported to the Department of

Human Services and an extensive investigation ensued. The Department found Daniel had exercised a lack of supervision and he agreed to certain restrictions if the children were around fires. We find, as did the district court, that there is no evidence of a repeat of a similar problem, rather it was an isolated incident.

STRONG BOND AND CHILDREN'S PREFERENCE. Janette contends she has a strong bond with the children and they want to be with her. The older child, who at this writing is eighteen years old,[1] indicated a preference to live with her mother. The second child, now sixteen, is adamant that he will not live with his mother. He has not exercised visitation with her for nearly three years and she has made no attempt to reconcile with him. The younger child, fourteen, says he would like to live with his mother but did not communicate a strong preference and he has vacillated on this. There is little or no evidence to show that the children may have a stronger bond with their mother than their father.

The Iowa courts have long recognized that deciding custody is far more complicated than asking children what parent they want to live with. *See In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). When we speak of what is best for the child, we do not mean that which the child wants. *Lursen v. Hendrichs*, 239 Iowa 1009, 1015, 33 N.W.2d 383, 386 (1948). We give less weight to a child's preference in a modification action than in an original custody decision. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). In assessing the children's preferences, we look at, among other things, their age and educational level, the strength of their preference, their relationship with

[1] As an adult the issue of her custody is now moot though she qualifies for child support until she completes high school.

family members, and the reasons they give for their decision. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985). We, as did the district court, consider the children's preferences but are not controlled by them. Nor do we find good reason to separate the two younger children.

DE FACTO CUSTODY. Two of the children spent more time with Janette than the modified decree provided. Daniel cooperated with her having the additional visitation. The middle child spent no time with her. She contends Daniel in essence gave her primary physical care. Daniel challenges her records, and notes that her records do not show how many children stayed with her and in many instances it was only one. There is no basis to this argument.

CHANGED CIRCUMSTANCES. After considering Janette's arguments above, we affirm the district court's refusal to modify the decree to grant her primary physical care. She has failed to show that she would be the superior parent.

ADDITIONAL VISITATION. The visitation provisions of the October 2000 modified decree, which appear to be the ones that controlled the visitation that were in place at the time of this modification hearing, basically gave Janette visitation on alternate weekends from 6:00 p.m. on Friday to 7:30 p.m. on Sunday, as well as every Wednesday while school was in session from after school until 7:30 p.m. There also was provision for specific summer and holiday visitations. The district court modified the decree to give Janette overnight visits on both Wednesday and Thursday nights. She asks here that she be given alternate overnight Sunday visits. We affirm the district court on this issue.

CHILD SUPPORT. Janette contends if she is awarded primary physical care she should be awarded child support. If she is not, because she has 167 overnights a year, she contends she should receive a twenty-five percent credit to the amount of guideline support and the credit should be retroactive to January 1, 2005, when she began exercising a number of mid-week overnights on a regular basis. We have affirmed the denial of her request for primary physical care. We address her claim for credit. Daniel argued against her claim for the reduction noting that the middle child is never in her care.

Iowa Child Support Guidelines Rule 9.9, Extraordinary Visitation Credit provides:

> If the noncustodial parent's court-ordered visitation exceeds 127 days per year, the noncustodial parent shall receive a credit to the guideline amount of child support in accordance with the following table:
>
> | Days | Credit |
> |---|---|
> | 128-147 | 15% |
> | 148-166 | 20% |
> | 167 or more but less than equally shared physical care | 25% |
>
> For the purposes of this credit, "days" means over-nights spent caring for the child. Failure to exercise court-ordered visitation may be a basis for modification.

Janette contends she has the children for more than 167 overnights but she fails to give us the benefit as to how she reached this calculation. We do agree, however, that it appears she is getting in excess of 167[2] overnights, but

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[2] With the modification she basically had two nights of visitation twenty times, and seven nights of visitation six times, and the additional two nights of visitation forty-six times. Additionally she had holiday visits which are difficult to compute because some of

this is only with two children; for she has failed to exercise visitation with her middle son and there is no evidence to support a finding she will do so in the future.

Janelle's child support obligation is a fixed sum for the three children. Consequently, in accord with the permission given by Iowa Court Rule 9.9 to modify the percentage of credit where a parent fails to exercise court-ordered visitation, we provide that she shall have a 16.7 percent credit against her child support obligation of $445.00 a month until such time as the older child is no longer eligible for child support. At that time her credit shall be reduced to 12.5 percent of her child support obligation of $381.00 a month. When only one child remains subject to support, her credit shall be twenty-five percent of her child support of $289.00 a month.[3] We modify accordingly. We deny her request for a retroactive credit. Prior to the modification of visitation her court ordered visits were less than the required number of days to receive a credit[4] and she had no visits with her middle son.

ATTORNEY FEES AND COSTS. Janette contends she should have been awarded attorney fees by the district court and the cost of the guardian ad litem should be taxed in its entirety to Daniel.

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the holidays would come during her regular visitation and some of Daniel's holidays would also come during her regular visitation.

[3] These child support amounts were fixed by the court in the October 5, 2000, modification and were not modified in the September 26, 2003, modification or in the modified decree from which this appeal was taken.

[4] Before the modification she basically had two nights of visitation twenty times, and seven nights of visitation six times. Additionally she had holiday visits which are difficult to compute because some of the holidays would come during her regular visitation and some of Daniel's holidays would also come during her regular visitation.

A. At the district court. The decision to award attorney fees rests within the sound discretion of the court, and we will not disturb its decision absent an abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). The district court did not abuse its discretion on this issue.

B. Appellate attorney fees. Janette also requests appellate attorney fees. Daniel did not file a cross-appeal requesting attorney fees but contends that he should have appellate attorney fees to discourage Janette's further litigation of this matter.

Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Applying these factors to the circumstances in this case, we award Daniel $3000 in appellate attorney fees. Costs are taxed one-half to each party.

AFFIRMED AS MODIFIED.