IN THE COURT OF APPEALS OF IOWA

No. 9-165 / 08-1889
Filed May 29, 2009

IN RE THE MARRIAGE OF SCOTT A. SITZES AND REBECCA D. SITZES

Upon the Petition of
SCOTT A. SITZES,
Petitioner-Appellant,

And Concerning
REBECCA D. SITZES,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Nancy A. Baumgartner, Judge.

Petitioner appeals contending the district court erred in modifying the parties' divorce decree to give the respondent primary physical care of the parties' daughter. **REVERSED AND REMANDED.**

Kevin H. Collins of Nyemaster, Goode, West, Hansell & O'Brien, P.C., Cedar Rapids, for appellant.

Joan M. Black, Iowa City, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Scott A. Sitzes, the father of a daughter born in September of 1999, appeals contending the district court should not have modified the physical care of the child and placed her with her mother, Rebecca D. Sitzes. He contends Rebecca has failed to meet the heavy burden required of a party seeking to modify the primary physical care of a child. We reverse and remand.

I. PREVIOUS PROCEEDINGS. It appears the parties' marriage was dissolved in Washington County, Iowa, in April of 2000, and the parties' agreement that they be awarded joint legal custody and joint physical care of their daughter, was approved by the district court.[1] The matter came again before the district court in Washington County after Scott filed a petition in March of 2003, asking the court to modify the decree and award him primary physical care. A hearing was held in October of 2003, and the next month the district court entered an order and determined it was in the child's best interest that Scott be designated the primary physical caretaker and that Rebecca have reasonable and liberal visitation. At the time, Scott lived in a rural area outside of Riverside, Iowa. He was single and had been employed by Oral B in Iowa City, Iowa, for about five years. Rebecca was living with her life partner, Christa Cochran. The court, in awarding Scott primary physical care, noted that the parties agreed the shared care arrangement was not working. This was evidenced by the fact that in the prior two years, shared care had not been exercised as Rebecca's contact with the child had been limited to two days a month. Also, the parties now

[1] The Washington County file was not made available to the district court sitting in Linn County.

resided some twenty-five miles apart in separate school districts. The court found that Scott had established a routine with the child which gave him substantial daytime involvement with her. The court did not accept Rebecca's position that Scott bore all the responsibility for her lack of parental involvement. Rather, it found Rebecca had made choices to spend time working and on other interests rather than maintaining substantial contact with the child. No appeal was taken from this order.

On September 7, 2007, Rebecca filed a petition seeking a second modification of the decree. She asked the court to modify custody, visitation, and support. The matter came on for hearing in Linn County on November 4, 2008, and on November 19 of that year, the district court entered its order finding that Rebecca showed a substantial change of circumstances and that she had the ability to provide the child with superior care. It determined that the decree should be modified to provide that she have primary physical care. Visitation was established for Scott, and he was ordered to pay child support. He appeals from this finding.

II. SCOPE OF REVIEW. Our review is 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 fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

To change the custodial provisions of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. *Id*.; *see also In re Marriage of Gravatt*, 371 N.W.2d 836, 838-40 (Iowa Ct. App. 1985). This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980); *In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa Ct. App. 1993).

III. BACKGROUND FACTS. Since the time of the first modification Rebecca has remained in the Cedar Rapids/Iowa City area and resides with her life partner. She testified at trial they would marry if it were permitted in Iowa.[2]

Scott, on the other hand, has moved several times. He met a woman, Gretchen, who is now his spouse, and he moved to Galena, Illinois, to be near her but continued to work in Iowa. As a result, the child spent considerable time with Gretchen as Scott's job then involved travel. Scott, Gretchen, and Gretchen's son moved to Rapid City, South Dakota, in about August of 2007. The move was the result of Scott taking another job that involved less travel and that he believed gave him the opportunity for greater financial security, although

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[2] Since the time of the hearing, the case of *Varnum, et. al. v. Brien*, ___ N.W.2d ___, ___ (Iowa 2009), has been decided, apparently opening the way for her to marry her life partner in Iowa.

initially he took a cut in pay. His wife also found a job in Rapid City as an insurance and securities agent with Farm Bureau.

The child had started school in the fall of 2004. Born in early September of 1999, she apparently was close to, or had just had, her fifth birthday. Scott testified he discussed schools with Rebecca and made the decision the child would attend Suburban Heights Baptist School because the school was small and there were only ten to twelve students in a classroom. Scott believed the child would do well in that atmosphere. She was bused to the school, which was in Fairfield, Iowa, and remained there through first grade. Scott testified she did well at this school and he tried to buy a house in that area but was not able to do so. The bus transportation to the Baptist school ended so he placed the child in the Riverside Elementary School for the first semester of her second grade year. He moved to Galena then and the child attended Tri-State Christian School in Galena for the spring semester. The child passed second grade but had some problems and Scott, because of these difficulties and her immaturity, and after consulting with Rebecca, determined that it was in their daughter's interest to repeat second grade. He sent her to the public school in Galena. Rebecca wanted the child in public school and Scott believed it would be easier for her to repeat second grade in a different school. The move to Rapid City in 2007 placed the child in Canyon Lake Elementary School where she was in attendance at the time of the modification hearing.

IV. CHANGE OF CARE. Scott contends the care of the child should remain with him. Rebecca contends that she has shown the required change of circumstances and the district court should be affirmed.

We agree with the district court that Rebecca has shown changed circumstances in that Scott has remarried and he has moved over 150 miles from what was the child's home at the time he was awarded primary physical care. The Iowa courts have historically not changed custody on the basis of a parent's move from the area where both parties reside absent other circumstances. *See In re Marriage of Vrban*, 359 N.W.2d 420, 425-26 (Iowa 1984); *Frederici*, 338 N.W.2d at 161. These cases pre-date legislative changes providing if a parent is to relocate the residence of a minor child to a location 150 miles or more from the residence of the minor child at the time custody was granted, the court may consider the relocation a substantial change in circumstances. *See* Iowa Code § 598.21D (2007).[3] This legislative change is compatible with other legislative

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[3] Iowa Code section 598.21D (2007) provides:

> **Relocation of parent as grounds to modify order of child custody.**
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> If a parent awarded joint legal custody and physical care or sole legal custody 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, the court may consider the relocation a substantial change in circumstances. If the court determines that the relocation is a substantial change in circumstances, the court shall modify the custody order to, at a minimum, preserve, as nearly as possible, the existing relationship between the minor child and the nonrelocating parent. If modified, the order may include a provision for extended visitation during summer vacations and school breaks and scheduled telephone contact between the nonrelocating parent and the minor child. The modification may include a provision assigning the responsibility for transportation of the minor child for visitation purposes to either or both parents. If the court makes a finding of past interference by the parent awarded joint legal custody and physical care or sole legal custody with the minor child's access to the other parent, the court may

changes in the past decade focusing on the opportunity for substantial parental involvement in a child's life by both parents even when there has been a marriage dissolution. *In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa Ct. App. 1998). Significantly, one of this section's[4] primary purposes is to assure maximum contact between the child and the noncustodial parent. *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App 1998). Clearly the circumstances here would call for, at a minimum, modification of Rebecca's visitation. *See, e.g., id*.

The more difficult question is whether Rebecca has shown she can render superior care. The burden to modify a dissolution decree is a heavy burden. *See Frederici*, 338 N.W.2d at 161. The parent seeking to change the physical care must show the ability to offer superior care. *See Mayfield*, 577 N.W.2d at 873. The burden to change visitation is less. *See In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985). In regards to who can provide superior care, the parties dispute which parent can provide more stability, and whether Scott is cooperative and supportive of Rebecca's relationship with the child.

A. Stability for the child. Scott contends Rebecca cannot meet the heavy burden for modification of primary physical care. He contends that the child has lived with him for nearly all her life and that she is bonded with him, her

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> order the posting of a cash bond to assure future compliance with the visitation provisions of the decree. The supreme court shall prescribe guidelines for the forfeiting of the bond and restoration of the bond following forfeiting of the bond.

[4] The statute was formerly section 598.21(8A).

step-mother, and her step-brother. He contends he loves the child and has provided her with a nurturing, safe, and child-centered home.

Rebecca contends she can provide the child more stability. She points out she has been in a committed relationship for six years, has been employed at Nordstrom's in Cedar Rapids for two years where Christa, her life partner, has worked for ten years in a supervisory capacity. She further contends she owned her own condominium for five years before purchasing a house with Christa. She argues that Scott has lived in seven different towns for as little as two months and in Rapid City he has lived in three different locations. The district court accepted Rebecca's argument, finding her life is more stable and more focused on the need for stability for the child.

Stability is very important in the lives of young children, but stability can be nurtured as much by leaving them with the same custodial parent as requiring that they live in the same neighborhood. *In re Marriage of Weidner*, 338 N.W.2d 351, 360 (Iowa 1983); *Jerome*, 378 N.W.2d at 306. The child enjoyed the stability of being primarily in her father's care for nearly all her life. This stability is taken away from her when a modification of custody occurs, which is why once custody of a child has been fixed it should be disturbed only for the most cogent reasons. *See In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

At the time of the modification hearing the child had been in the Rapid City school, had repeated the second grade, and she was beginning her third grade year. Scott had purchased a home in Rapid City.[5]

Scott had the child evaluated by James Simpson, Ed.D., who opined that:

> After interviewing the child and administering some projectives, I find her to be adjusting well to her father's recent move. I also find she is well bonded with both her biological mother and father as well as her bonus mother,[6] and is connected to [ ] Gretchen's son. As part of this dynamic, it appeared to me that Scott and Gretchen recognize [the child] needs a relationship with her mother, and are willing to do what they need to promote that relationship.
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> It is very clear I cannot offer a custodial recommendation. I don't know [the child's] mother and have never met her. All I can offer at this point is my professional opinion that [the child] is currently doing well with the recent move, and that nothing emerged in this review that would cause me to believe the child would benefit from a modification of custody. As a failsafe, it is my understanding that Scott has been appropriate about seeking medical and psychological advice and care in the past, and it is my impression he will continue to do so in the future if [the child] exhibits any adjustment problems.

The district court specifically found:

> It was absolutely clear from the evidence that Scott and Becky both love [their daughter] and that they are both good parents. Both Scott and Becky provide homes that are nurturing, safe and child-centered. . . . [N]either nit-picked over the other parent's ability to effectively parent [the child].

In addition to considering the fact Scott had frequent moves and Rebecca did not, the district court had additional concerns about Scott's care. The court

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[5] Upon moving to Rapid City the family had lived briefly with an aunt of Gretchen's and then moved to an apartment where they lived until they found a home to purchase. Rebecca argues this shows a lack of stability.

[6] Bonus mother apparently is the term used here to define Scott's spouse Gretchen. Both Rebecca's partner and Scott's spouse are responsible people who care for the child.

found the child repeating second grade was a negative effect of the moves. The child initially passed second grade. Scott testified that before making the decision to hold her back, he took the child to a counselor who advised him the child was a little immature for her age and would benefit from repeating second grade. He further testified he discussed it with Rebecca. While the move obviously presented a challenging situation for the child, Scott dealt with it in a mature manner, seeking professional help in making the decision. Additionally, we note that the child was barely five when she started kindergarten and in all probability was younger than the majority of her initial classmates.

B. Cooperation and Support between the Parents. The court further found that Scott did subtle things to undermine the child's relationship with Rebecca. The court noted that Scott purchased a cell phone for the child so she could communicate with her mother before seven o'clock in the evening and that he refused to program in Rebecca's phone number as an emergency contact. The court further considered the fact that Rebecca purchased a web cam so the child could see and talk to her mother via computer. Scott did not install it because he said his computer crashed and the web cam could not be loaded on his wife's computer because it was owned by her employer. The court further noted that Scott had not told the child Rebecca and her partner were staying at a water park hotel in Rapid City on the night before a scheduled visit and wanted her to stay with them; that he had cut the time off of a lengthy visitation with Rebecca over Christmas without giving a reason; and that Scott had apparently

not told Rebecca he was bringing the child to Iowa at the time of the hearing.[7] The court also considered evidence that before the first modification, Scott took the child to a babysitter rather than having Rebecca care for her.[8]

The court also noted concern that in 2005 Scott spanked the child leaving bruises on her bottom. The bruises were discovered by Rebecca and her partner who took the child to the hospital and a report was made to the Iowa Department of Human Services. Scott admitted he had spanked the child. He was not placed on the child abuse registry as the injury found was minor bruising on the buttocks. It was further determined that there were no previous reported injuries due to discipline and Scott agreed he would not cause further injuries. The investigating worker noted animosity between Scott and Rebecca and encouraged them both to work on communication issues. A review of the record here reflects neither party has given sufficient heed to this advice. However we do agree with the district court that Scott could have been more cooperative in certain areas.

C. Analysis. This is a difficult case. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value on custodial issues, and courts must make their decisions on

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[7] Scott's attorney told the judge Scott was planning to make arrangements for the child to see her mother following the hearing and apparently this visitation was arranged.

[8] We do not consider this evidence. The first modification court considered it. *See In re Marriage of Winnike*, 497 N.W.2d 170, 172-73 (Iowa 1992).

the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995). We are not inclined to overturn the district court's decision to modify custody. Even though our review is de novo, we have always accorded district courts considerable discretion in matters of this kind. *Paxton v. Paxton*, 231 N.W.2d 581, 584 (Iowa 1975).

However, the burden on the parent seeking modification is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children." *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994). The district court specifically found that Scott provides a home that is nurturing, safe, and child-centered. The child has been in his primary care nearly all her life. The first modification court found that Scott was the better caretaker.

His move from the area is unfortunate as is his failure to consult with Rebecca prior to making a decision to move. He did advise her when he learned he would be moving. Upon moving to a new city, Scott's decision to first stay with relatives and then in an apartment before buying a house was not irresponsible, nor do we find him irresponsible in making other moves. Both parties bear responsibility for the lack of communication and cooperation. The trial court found Scott could have been more cooperative. We have modified custody where one parent did not cooperate with the other. *See id*. The facts here do not sustain a finding that any lack of cooperation on Scott's part rises to the level to support a change of custody, particularly where the child is shown to be well-adjusted and happy in her father's care. Scott has a record of providing

care to his daughter for nearly her entire life. Rebecca has no such record, and despite having shared care of their daughter during the child's early life, she failed to exercise it or assume responsibility for the child. The record does not support a finding that she can render superior care, and the facts do not support a finding that the child should have been removed from the only custodial arrangement she had ever known.

We reverse the modification of custody. We find the change in circumstances sufficient to support a modification of the visitation provisions of the decree, and we remand to the district court to make such modification of visitation as it deems advisable.

REVERSED AND REMANDED.