IN THE COURT OF APPEALS OF IOWA

No. 9-286 / 08-1452
Filed June 17, 2009

JOHN K. RODEN,
Petitioner-Appellant,

vs.

JO ANN COATES,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, Charles H. Pelton, Judge.

John Roden appeals the district court's denial of his application to modify a child custody order granting Jo Ann Coates physical care of their son. **AFFIRMED.**

David M. Pillers of Pillers & Richmond, Dewitt, for appellant.

Jo Ann Coates, Clinton, appellee pro se.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

John Roden appeals the district court's denial of his application to modify a child custody order granting Jo Ann Coates physical care of their son. On our de novo review, we are persuaded that the district court acted equitably in declining to change the physical care arrangement.

Modification is appropriate only when there has been a substantial change of circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The applicant also must carry the heavy burden of showing an ability to offer superior care. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002).

John contends he established a substantial change by showing (1) Jo Ann's home environment is not safe; (2) the child has behavioral issues; (3) Jo Ann does not communicate with him regarding visitation and other matters involving the child; (4) Jo Ann does not make good decisions for herself and her children; and (5) Jo Ann denies the child maximum and meaningful contact with him. We will turn to these circumstances.

I. Jo Ann has four sons in addition to the child whose care arrangement is at issue here. Two are adults and one of these adult children lived with Jo Ann at the time of the modification hearing. He has an earlier conviction for possession of alcohol as a minor, and also has convictions for possession of marijuana and public intoxication. Jo Ann's third son, a minor who lives in the home, was adjudicated a delinquent for spray painting buildings in an alley. John asserts that these children rendered Jo Ann's home unsafe for their child.

While these children's behaviors were less than exemplary, the record reflects that the adult son was planning to move to his own apartment and the minor child apologized for his delinquent behaviors, paid restitution, and offered to help the neighbors with chores. Additionally, at John's behest, the Department of Human Services investigated allegations that the half-brothers fought with each other to the detriment of this child and found no basis for these complaints. Finally, the record reflects that John was aware of this circumstance at the time of the initial custody order, making it a "contemplated" rather than an "uncontemplated" change.

As for a related contention that one of the half-brothers kicked a hole in the wall of the apartment and exposed electrical wiring that made the home unsafe, Jo Ann testified that the hole was repaired within a week. For these reasons, we conclude the presence of half-brothers in the home does not constitute a substantial change of circumstances supporting modification of the physical care arrangement.

II. John also claims the child has "significant behavior issues" warranting a modification of the care arrangement. He relies on "behavioral updates" prepared by the child's kindergarten teacher and others at the child's school. These updates highlight silly, sometimes rowdy, and occasionally physical acting out by this six-year-old child. While certain incidents are troubling, the child's kindergarten teacher testified that Jo Ann expressed appropriate concern about the conduct, as did John. Additionally, Jo Ann testified that the acting out correlated with the tension between the parents. Finally, John conceded these behaviors did not affect the child's ability to learn. On this record, we conclude

the child's behaviors do not amount to a substantial change of circumstances warranting a modification of the care arrangement.

III. John next argues that Jo Ann did not effectively communicate with him about visitation and did not share school information with him. The record belies this assertion. Jo Ann testified she was amenable to providing extra visitation. This testimony is supported by her offer to give John additional summer visitation. As for John's concern about getting school information, the child's kindergarten teacher testified that she had contact with both parents "all year long" and the behavioral updates referred to above were provided to "both parents . . . every week." These circumstances, therefore, do not support a change in the physical care arrangement.

IV. John asserts that Jo Ann lacks good judgment when it comes to her children. He points to her excessive work hours, her choice of companions, two alcohol-related convictions, and her decision to drive without a license.

Jo Ann's excessive work hours are easily explained by her efforts to make ends meet without the benefit of child support for her older minor children. Additionally, Jo Ann testified that the child's grandmother cared for the child when he was not in day care.

As for Jo Ann's choice of companions, there is no question that those companions came with baggage of their own. However, at the time of the modification, they were not living in her home.

Finally, with respect to John's remaining criticisms of Jo Ann, John also had a history of drug and alcohol use and drove without a license.

In short, neither parent had a pristine background, but both parents made concerted efforts to break with their past. We are not persuaded that Jo Ann's continued struggles amount to a substantial change of circumstances warranting a modification of the physical care arrangement.

V. John's final argument is essentially a repetition of his third argument. We find it unnecessary to address this circumstance separately.

In light of our conclusion that John did not establish a substantial change of circumstances, we find it unnecessary to address the superior-care prong of the modification standard. We affirm the district court's denial of the modification application.

AFFIRMED.