IN THE COURT OF APPEALS OF IOWA

No. 9-307 / 08-2007
Filed June 17, 2009

IN RE THE MARRIAGE OF ASHLEY NOEL JOHNSON AND ADAM FLETTRE JOHNSON

Upon the Petition of
ASHLEY NOEL JOHNSON
n/k/a ASHLEY NOEL GOFF,
Petitioner-Appellee,

And Concerning
ADAM FLETTRE JOHNSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Marshall County, David R. Danilson, Judge.

Adam Johnson appeals from the district court's order modifying the physical care and other provisions of the decree dissolving his marriage to Ashley Goff. **AFFIRMED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C., Marshalltown, for appellee.

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

DOYLE, J.

Adam Johnson appeals from the district court's order modifying the physical care and other provisions of the decree dissolving his marriage to Ashley Goff. He also appeals the district court's award of trial attorney fees to Ashley, and both parties seek appellate attorney fees. Upon our de novo review, we affirm.

***I. Background Facts and Proceedings*.**

Adam and Ashley were married in April 2005 and lived in Marshalltown, Iowa. They are the parents of James, born in February 2006. The parties' marriage was dissolved on December 29, 2006. The decree of dissolution incorporated the parties' stipulation, which provided Adam and Ashley would have "joint legal custody, sharing primary and split physical care of . . . James." The stipulation also provided that James would attend school in the Marshalltown School District, unless otherwise agreed to by the parties. The parties further agreed "that if either party desires to move out of the immediate area, so that the shared physical custody arrangement is no longer feasible, that party would risk his or her custody rights as they currently exist."

At the time of the modification trial, Adam was twenty-five years old. He was a member of the Army National Guard from 2001 until January 2007. He received his degree in human resource management and has been employed at a bank in Marshalltown since February 2005. He owns his home in Marshalltown, and his parents live nearby. He is close to his family, and his parents generally provide daycare to James. James is close to his grandparents.

At the time of the modification trial, Ashley was twenty-three years old. She initially lived in Marshalltown. In approximately August 2007, Ashley began the nursing program at Marshalltown Community College. She dropped out of the program shortly thereafter and began working at a restaurant in Des Moines, commuting to work from Marshalltown to Des Moines. She wanted to continue her education, and spoke with a counselor at Des Moines Area Community College (DMACC) about the DMACC's nursing and dental assisting programs. In December 2007, Ashley moved into an apartment in Des Moines with a friend. However, that arrangement did not work out. In January 2008, Ashley met up with an old friend and former boyfriend, Joel Mattox. The two began dating and Ashley moved in with him. At the time of trial, Ashley and Joel were engaged to be married and Ashley had lived continuously with Joel in the duplex Joel owns.

In January 2008, Ashley left her employment and began DMACC's dental assisting full-time program. She has been very successful in the program, earning good grades and acting as the president of her class. James attends DMACC's daycare while Ashley is in school, and James has done well there.

After Ashley moved to Des Moines, Adam continued to have regular visitation with James. Ashley initially provided all of James's transportation to and from Marshalltown to facilitate James's visitation with Adam. Both parents continued to have visitation, but alleged the other was not supportive of his or her relationship with James. Ashley alleged Adam would not tell her information relating to James's doctors' appointments, that Adam gave her very short notice regarding James's baptism ceremony, and that Adam continues to bring up the past and their divorce. Adam alleged Ashley also would not tell him information

regarding James's doctors' appointments and that Ashley did not involve him in the process of selecting a daycare in Des Moines.

In approximately the spring of 2008, Ashley told Adam he would have to come to Des Moines and get James if he wanted visitation. In April 2008, Adam filed a petition to modify the decree claiming there had been a substantial change in circumstances and requesting he be awarded physical care of James. Ashley filed a resistance and counterclaim, agreeing there had been a substantial change in circumstances and requesting she be awarded "primary" physical care of James.[1]

Following a trial, the district court entered its order in December 2008 modifying the decree by awarding "sole" physical care of the child to Ashley and providing Adam with a liberal visitation schedule.[2] The district court determined a material and substantial change in circumstance had occurred and, although a close case, Ashley would be the superior caretaker for James. The court found both Ashley and Adam were capable and loving parents, but found Adam's testimony and demeanor at trial supported the conclusion that he was less likely to support Ashley's relationship with James. Additionally, the court found Ashley's testimony and demeanor led to the conclusion that she had a deep and abiding love and bond for James, and although Adam is a proud and loving parent, his demeanor and testimony left the impression of someone less attached to James. The court noted that Adam's longer period of stability was his greatest strength, but Ashley's strong bond and willingness to keep Adam

[1] The term "primary physical care" is not defined in Iowa Code chapter 598 (2007).
[2] The term "sole physical care" is not defined in Iowa Code chapter 598.

informed and involved with James, along with the evidence that she had matured, supported awarding physical care to her.

Adam now appeals.

II. Scope and Standards of Review.

We review the modification of a dissolution decree de novo. Iowa R. App. P. 6.4; *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We give weight to the district court's fact findings, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(*g*); *McCurnin*, 681 N.W.2d at 327. The district court has reasonable discretion in determining whether modification is warranted, and we will not disturb that discretion on appeal unless there is a failure to do equity. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). Prior cases have little precedential value, and we must base our decision on the facts and circumstances unique to the parties before us. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). Our primary concern is the best interests of the child. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

III. Discussion.

A. Physical Care.

The court can modify custody only when there has been a substantial change in circumstances since the time of the decree. *In re Marriage of Pals*, 714 N.W.2d 644, 646-47 (Iowa 2006); *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). To change a custodial provision of a dissolution decree, the applying party is required to establish by a preponderance of the evidence that conditions since the decree was entered have so materially and

substantially changed that the child's best interests make it expedient to grant the requested change. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the child, *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002), and to minister more effectively to the child's well-being. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). This heavy burden stems from the principle that once custody of the child has been fixed, it should be disturbed only for the most cogent reasons. *Mikelson*, 299 N.W.2d at 671.

The parties do not dispute that there has been a material and substantial change in circumstances. The question here is whether the district court erred in granting physical care of James to Ashley. Adam argues his stability, family ties, and supporting relationships evidence his superior ability to care for James, and that Ashley's move to Des Moines, her relationships, and her past instability evidence her inferior ability to care for James.

This is an extremely close case. It is clear both parents love James and would be suitable caretakers for James. The district court had the opportunity to observe the witnesses and concluded physical care should be awarded to Ashley. Upon our de novo review of the record, we see no reason to disturb the district court's decision. Adam conceded Ashley is a competent caretaker. Although Ashley moved to Des Moines against the spirit of the parties' stipulation, her move was not motivated by a desire to deprive Adam of contact with James. Accordingly, we affirm the district court's decision to place James's physical care with Ashley.

B. Child Support.

Because we affirm the district court's placement of physical care with Ashley, we need not and do not address Adam's assertion that he be awarded child support if awarded physical care of James.

***C. Tax Exemption*.**

Adam also argues in one sentence in his brief that he "should be provided the tax exemption for James in any event." The district court did order that Adam have the right to claim James in even-numbered years, and that Ashley have the right to claim James in odd-numbered years. Generally, the custodial parent receives the tax exemption for a minor child. *See* Iowa Ct. R. 9.6(4). The district court has the ability, however, to award tax exemptions to a noncustodial parent "to achieve an equitable resolution of the economic issues presented." *In re Marriage of Okland*, 699 N.W.2d 260, 269 (Iowa 2005). We find no error in the district court's allocation of the exemption.

***D. Trial Attorney Fees*.**

Additionally, Adam argues the district court erroneously awarded Ashley trial attorney fees. An award of attorney fees is not a matter of right, but rather rests within the court's discretion. *In re Marriage of Hocker*, 752 N.W.2d 447, 451 (Iowa Ct. App. 2008). We review the district court's award of attorney fees for abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). An award of attorney fees is based upon the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997).

The court concluded that Ashley, as the prevailing party, was entitled to an award of attorney fees, and ordered that Adam contribute $2000 towards Ashley's $4000 attorney fees. Due to their disparate earning capacities and in light of the respective financial stability of the parties, we cannot say the district court abused its discretion in awarding $2000 in trial attorney fees to Ashley. We therefore conclude the district court did not abuse its discretion when it awarded Ashley attorney fees.

***E. Appellate Attorney Fees*.**

Adam and Ashley both request attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *Okland*, 699 N.W.2d at 270. An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id*.; *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). After considering these factors, we decline to award either party appellate attorney fees.

***IV. Conclusion*.**

Because we find no reason to disturb the district court's decision to award physical care of the parties' child to Ashley, and find the district court did not err in allocating the tax exemption and awarding Ashley trial attorney fees, we affirm the district court's modification order. We decline to award appellate attorney fees.

AFFIRMED.