IN THE COURT OF APPEALS OF IOWA

No. 9-649 / 08-2049
Filed October 21, 2009

RICHARD D. KLINE,
Petitioner-Appellant,

vs.

MICHELLE AIRHART,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

A father appeals from the district court's order denying his application to modify physical care of his and the mother's son. **AFFIRMED.**

Richard Schmidt, Des Moines, for appellant.

Kent Balduchi, Des Moines, for appellee.

Considered by Vogel, P.J., and Potterfield, J. and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

Richard Kline appeals from the district court's order denying his application to modify physical care of his and Michelle Airhart's son, Ethan. He contends the order is not supported by the record and is not in the best interests of the child. He also contends the court erred in setting the amount of child support based on income imputed to him. We affirm.

I. Background Facts and Proceedings

Richard and Michelle are the parents of Ethan, born in July 2000; the couple never married. On October 30, 2002, the court entered an order granting Richard and Michelle joint legal custody of Ethan, and physical care to Richard. Michelle was granted visitation. Since the order, Richard has married and four children have been born to the marriage. In 2005 the family, including Ethan, moved to Alabama. In September 2005, Michelle filed an application to modify the custody, visitation, and support order, citing the move as a material change in circumstances. On December 21, 2006, the district court changed physical care of Ethan to Michelle. The court found that a substantial change in circumstances occurred when Richard moved to Alabama, and noted other factors that supported the change in care. Ethan began living with Michelle in Iowa in September 2007. Richard filed an application for modification in November 2007. The district court found that Richard did not meet his burden of proof that a substantial and material change in circumstances occurred since December 2006 to warrant a modification of physical care. Richard appeals.

II. Standard of Review

We review child custody orders de novo. Iowa R. App. P. 6.4. However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). The controlling consideration in child custody cases is always what is in the best interests of the child. Iowa R. App. P. 6.14(6)(*o*); *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

III. Physical Care

Richard contends that a substantial and material change in circumstances occurred, warranting modification. To change the custodial provisions of a decree, the party seeking modification must establish by a preponderance of evidence that conditions since the decree was entered have materially and substantially changed. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The burden to modify a custody provision is a heavy one. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). The parent seeking to change physical care of the child must prove an ability to minister more effectively to the child's well being than the current physical care parent can render. *Frederici*, 338 N.W.2d at 158.

Richard claims that he can provide superior care for Ethan, sufficient to merit modification. Evidence introduced at trial demonstrated that both Richard and Michelle have been active and loving parents in Ethan's life. However,

Richard contends that Michelle's behavior reflects her inability to properly parent Ethan. Alleging specific incidences, he claims that when combined, they demonstrate a substantial change in circumstances. Such incidences include Michelle's February 2007 conviction for operating while intoxicated, and her continued driving although she does not have a valid driver's license; Ethan's arrival to Richard's house for visitation with inadequate clothing, but with fireworks in his possession; Michelle's inability to adequately tend to Ethan's medical needs; and Michelle's failure to facilitate communication between himself and Ethan while Ethan is in her care. Richard asserts he can provide a better living environment and educational opportunities for Ethan, if he were returned to his home and family.

Richard also faults the district court for not considering events that occurred prior to the last modification hearing. However, we find the court properly restricted its findings to the evidence of the conduct of the parties since the last modification order, as it concluded, "[t]he Court is unable to relitigate the decision to change custody that was made in December of 2006." *See Mears v. Mears*, 213 N.W.2d 511, 514 (Iowa 1973) (stating that when modifying child custody, a court looks at evidence of a substantial change in circumstances since the time of the last modification order). Therefore on this appeal, we too, look only to any changes that have occurred since the December 2006 modification decree. While we believe both parents are capable of being the primary care parent, and we acknowledge Richard can provide a very suitable home environment for Ethan, Ethan has been living with Michelle since September 2007. We, like the district court, believe it is in Ethan's best interests that he be

in the home which will preserve the greatest amount of stability for him. *Thielges*, 623 N.W.2d at 235-36. Michelle has maintained employment, a suitable home, private schooling, and general stability for Ethan since he has been in her care. The evidence also supports that Richard is a very capable parent, and can provide excellent care for Ethan.

However, Richard has a very heavy burden to meet to show a change in physical care is warranted. *Mayfield*, 577 N.W.2d at 873. On our review of the record, we agree with the district court Richard did not prove that since December 2006 there has been a material and substantial change sufficient to warrant disruption in Ethan's life, by once again changing his physical care. Therefore, we affirm the physical care decision of the district court.

IV. Child Support.

Richard also argues the district court erred in calculating his child support obligation for Ethan, as he no longer has the same employment or income as he had before he moved his family to Alabama in 2005. Specifically, he argues the court erred in imputing income to him above his current earnings.

Prior to the move, Richard was "medically laid off" from Bridgestone Firestone, where he had an annual income of approximately $37,000. Unsuccessful in obtaining similar employment in Alabama, Richard enrolled in college, working towards a bachelor's degree in political science. At the time the December 2006 change of physical care decree was entered, Richard was ordered to pay child support but no amount was set. Therefore, in the current modification proceeding, the district court made income findings as to each parent in order to arrive at a child support amount. The court imputed $1500 per

month net income to Richard and set support at $337 per month retroactive to September 1, 2007, when Ethan was moved back to Iowa.

Our standard of review in equity is de novo. Iowa R. App. P. 6.4. When a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guidelines. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). However, before using earning capacity the court must "make a finding that, if actual earnings were used, substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice." *In re Marriage of Nielsen*, 759 N.W.2d 345, 348 (Iowa Ct. App. 2008). In making this determination, the court examines the employment history, present earnings, and reasons for the current employment. *Nelson*, 570 N.W.2d at 106.

The district court considered many factors before imputing income to Richard, including Richard's demonstrated earning capacity, and the choices he and his wife have made to accommodate their current family needs, as well as future goals. We conclude the district court was well within its discretion to impute $1500 per month net income to Richard for purposes of setting child support. We affirm the amount set by the district court.

V. Appellate Attorney Fees.

Michelle requests appellate attorney fees. An award of appellate attorney fees is within the discretion of the appellate court. *Spiker v. Spiker*, 708 N.W.2d 347, 360 (Iowa 2006). Whether such an award is warranted is determined by considering "the needs of the party making the request, the ability of the other

party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal." *Id.* Applying these considerations, we find Michelle should be awarded $1000 in appellate attorney fees. The costs of this appeal are assessed to Richard.

AFFIRMED.