IN THE COURT OF APPEALS OF IOWA

No. 9-811 / 09-0439
Filed December 30, 2009

IN RE THE MARRIAGE OF CRAIG R. FELLER AND DALENA M. FELLER

Upon the Petition of

CRAIG R. FELLER,
Petitioner-Appellee,

And Concerning

DALENA M. FELLER n/k/a
DALENA M. ELLIOTT,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Respondent appeals from the court's ruling modifying the custodial provisions of the parties' dissolution of marriage decree. **AFFIRMED.**

Diane L. Dornburg of Carney & Appleby, P.L.C., Des Moines, for appellant.

Karen A. Taylor of Taylor Law Offices, Des Moines, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Danilson, JJ.

SACKETT, C.J.

DaLena M. Elliott, formerly DaLena M. Feller, appeals from a decision of the district court modifying the custodial provisions of a decree dissolving her marriage to Craig R. Feller. She contends (1) there was not a substantial change of circumstances justifying the modification, (2) the court should not have ordered joint physical care, (3) the court gave undue weight to the child's preference, and (4) the court erred in delegating to the child the decision as to the school she would attend. We affirm.

I. BACKGROUND. The parties' marriage was dissolved in May of 2002. The decree provided that the parties should have joint legal custody of their daughter born in March of 1995 and DaLena was to have primary physical care. Craig was to have reasonable visitation including alternate weeks and holidays. Although DaLena was granted primary physical care, the parties shared care from week to week.[1]

In November 30, 2004, the parties agreed to a modification of the custodial provisions of their decree because Craig, then in the restaurant business, was required to work evenings and the shared care arrangement the parties had abided by would no longer work. The modified decree provided that Craig should have as minimum visitation with their daughter, every other weekend and one midweek overnight visit. The holiday visitation schedule was to remain as provided for in the original decree. After Craig later began working daytime hours again, the parties arranged for the child to be with Craig every

[1] The present modification court considered this a shared care arrangement as the parties shared custody week to week.

other weekend from Friday until Wednesday morning, with a Tuesday overnight on the weeks she did not have a weekend visit scheduled. The record reflects that while they had a visitation schedule, the parties were flexible when changes to the schedule were in the child's interest. The child was attending school in Norwalk during this period.[2]

In June of 2008, Craig filed an application to modify the November 2004 modification. He contended that since the modification there had been a substantial change in circumstances and the custody arrangement with reference to the parties' daughter should be changed. The filing followed conversations that began after DaLena moved in with her current husband in West Des Moines and she wanted the child to leave the Norwalk school system that she had attended from first to seventh grade. DaLena's plan was that in the fall of 2008, the child would attend Indian Hills in the West Des Moines School district and DaLena, despite Craig's disagreement, enrolled the child in Indian Hills. Craig wanted the child to stay in the Norwalk schools and the child wanted to stay in school there also. Craig had registered the child in Norwalk, but DaLena without his consent called the school and cancelled that registration. The parties had arrived at their first major impasse with reference to their child.

The matter came on for a hearing on February 10, 2009. The district court, seven days later, filed a decree modifying the November 30, 2004 decree. The court found that Craig had proved there was a substantial change of circumstances and that shared physical care was in the child's best interest. The

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[2] She attended Norwalk schools from first through seventh grade.

court ordered the parties to submit a joint physical care parenting plan or plans.[3] The court found that under Iowa Code section 598.41(5)(b) (2007), the parties both had the right to be involved in the decision as to where the child would attend school and DaLena was in error when she made the decision unilaterally. The court ordered that the child meet with a counselor, and then with the counselor's aid, both parents and the child would make a decision as to the school district she would attend.

The court also made findings as to the parties' current income for the purpose of determining a child support order. The court found DaLena's gross annual income to be $45,000 and Craig's to be $63,612, and ordered the parties to calculate the child support under the Iowa Supreme Court Child Support Guidelines in force at the time of the hearing and those to go into effect on July 1, 2009. Each party was held responsible for his or her own attorney fees.

II. SCOPE OF REVIEW. This matter was heard and determined in the district court by equitable proceedings. Consequently, our review of both the facts and the law is de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Grantham*, 698 N.W.2d 140, 143 (Iowa 2005). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are

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[3] Craig suggested a parenting plan where the child would be with him on Monday and Tuesday and with DaLena on Wednesday and Thursday and they would share the weekend. The district court rejected this plan as having too much back and forth which would be disruptive for the child.

not bound by them. Iowa R. App. 6.904(3)(*g*); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

III. MODIFICATION OF CUSTODY. The legal principles governing modification of the custodial provisions of a dissolution decree are well established:

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)).

IV. CHANGE OF CIRCUMSTANCES. DaLena contends Craig failed to show a substantial change of circumstances and that his proposed child care arrangement, rejected by the court, is not superior to the one the parties were following at the time of the present modification hearing.

The district court found that there were changed circumstances, and in doing so, considered evidence that Craig had changed employment and no longer was required to work nights so that his schedule facilitated the de facto shared physical care arrangement provided for in the original decree. The court also considered the fact that DaLena had remarried and moved from the Norwalk

school district where the child had attended school, to the West Des Moines school district, which made the choice between the two school districts necessary. DaLena contends these circumstances are not sufficient to justify the modification.

The burden to modify custody provisions is a heavy burden. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). A party seeking modification of a dissolution decree must establish by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since the entry of the decree or of any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). A modification of child custody is appropriate only when there has been a substantial change in circumstances since the time of the last modification that was not contemplated when the order was entered. *Mears v. Mears*, 213 N.W.2d 511, 515 (Iowa 1973). The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

We agree with DaLena that the question of whether or not there are changed circumstances to support the modification is a close question. The district court who heard the testimony of the parties and the child found there were changed circumstances sufficient to call for a modification. We give weight to the court's reasons for finding changed circumstances. We give weight as did the district court to the child's preference as will be discussed below. We also

consider the fact that the child has a new stepfather and two stepbrothers and that while DaLena's move did not preclude the child's continual attendance at the Norwalk school, DaLena despite the child's and Craig's wishes elected to place the child in a school system where the child felt less secure and where she was separated from long-term friends.[4]

However, custody should only be modified if the change will result in the child receiving superior care. *Mayfield*, 577 N.W.2d at 873. DaLena contends the modification will not provide the child with superior care. The district court basically determined that the child would receive superior care iN a shared care arrangement as it found that shared physical care was in the best interest of the child. The court specifically found, addressing the factors of Iowa Code section 598.41(3) that, (1) each parent was a suitable custodian for the child, (2) the psychological and emotional needs and development of the child will suffer from the lack of active contact and attention from each parent, (3) the child is significantly tied to both parents, (4) the parents had done a good job of communicating though it has recently broken down due to this litigation, but it has not disrupted the communications concerning the child's interest, (5) both parents actively cared for the child before and after their separation, (6) each parent can support the other parent's relationship with the child, (7) the child, at fourteen years of age, is intelligent and well-grounded, and favors the shared physical care arrangement, (8) Craig favors shared care and DaLena does not, (9) while living in different school districts, the parties' homes are only twelve to

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[4] We do not by these statements intend to compare the schools.

fifteen minutes apart and their geographic proximity does not pose a problem to a shared physical care arrangement, (10) neither the safety of the child or the parents will be jeopardized by a shared care arrangement, (11) there is no history of domestic abuse, and (12) the shared care of the child is appropriate under the circumstances.

DaLena contends the district court erred in considering Iowa Code section 598.41(5)(a)[5] which requires a court to find that a shared care arrangement was not in the child's interest when denying a parent's request for shared physical care. We disagree and believe that considering whether shared care is or is not in the child's interest is proper in a modification action.

V. CHILD'S PREFERENCE. DaLena also contends the district court gave too much weight to the child's preference.

While not controlling, we, as did the district court, give weight to the child's preference to have a shared care arrangement. *See* Iowa Code § 598.41(3)(f). We recognize we give less weight to the child's preference in a modification action than in an original custody decision, particularly when the child has developed an animosity towards one parent. *See In re Marriage of Woodward*, 228 N.W.2d 74, 76 (Iowa 1975). Here, the child clearly expressed that she wants to maintain a relationship with each parent and divide her time between the two

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[5] Iowa Code section 598.41(5)(a) provides in applicable part:

> If joint legal custody is awarded to both parents, the court may award joint physical care to both joint custodial parents upon the request of either parent. . . . If the court denies the request for joint physical care, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of joint physical care is not in the best interest of the child.

homes. In assessing the child's preference, we look at, among other things, her age and educational level, the strength of her preference, her relationship with family members, and the reasons she gives for her decision. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985).

The parties agree that their child, who is fourteen years old and in eighth grade, is intelligent, well-grounded, and an excellent student. The child testified at length. At the time she testified, she had been attending the Indian Hills school for about six months. In her testimony she expressed that she has a close relationship with both of her parents and they both are involved with her life as she wants them to be. She testified she had attended Norwalk school from first to seventh grade, was getting straight A's, liked her teachers and found they would always help her, as would her friends there. She said she was getting A's in all classes at Indian Hills except one. She testified that the biggest difference between the two schools was that Indian Hills is bigger and she likes the smaller school where she felt she got more help from her teachers than she did in the bigger school. She was clear that she wanted to attend school at Norwalk. She said her teachers were always available and she had better access to her friends. While she acknowledged she had made friends at Indian Hills, she said she was not as close to these friends. She further testified she made it clear to her parents that she wanted to stay in the Norwalk schools and she tried to convince her mother that she should stay there. She believed that transportation to the Norwalk school worked fine for her mother after her mother moved in with her new husband. The child did like the fact that in Indian Hills she was able to

take language earlier. She testified if she stayed in the West Des Moines schools she would move to Southwoods, a ninth grade school, and if she returned to Norwalk, she would remain in basically the same building where she had attended sixth and seventh grade.

This is an excellent student, and after reviewing her testimony we agree with the district court that she is mature, and clearly and strongly articulates her desire to share her week with both of her parents. Both parties have been excellent parents who have worked together in their child's interest and have been involved with her school work and other activities. While determining custody is more than asking a child where he or she wants to live, we do not believe the district court gave undue weight to her preferences in modifying the decree.

VI. CHOICE OF SCHOOL. DaLena contends the district court erred in delegating to the child the decision as to her choice of schools. DaLena felt or feels that as the parent having primary physical care, she has the right to make the unilateral decision as to the school the child should attend. In transferring the child to Indian Hills, she ignored the wishes of Craig and their child despite the fact that even with her move, the child's attendance at Norwalk was reasonable. The district court, citing section 598.41(5)(b), criticized her for making this unilateral decision as do we. The district court structured a provision that allows input from both parents and the child as to school attendance and provides for a counselor to assist in the decision. Given the situation, we find this to be reasonable.

VII. ATTORNEY FEES AND COURT COSTS. An award of appellate attorney fees rests in our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We award no appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED.