IN THE COURT OF APPEALS OF IOWA

No. 0-039 / 09-1152
Filed February 24, 2010

IN RE THE MARRIAGE OF DARCY RASMUSSEN AND ROBYN RASMUSSEN

Upon the Petition of
DARCY RASMUSSEN,
Petitioner-Appellant/Cross-Appellee,

And Concerning
ROBYN RASMUSSEN,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

Father appeals the district court's ruling denying his request to modify custody and mother cross-appeals. **AFFIRMED AS MODIFIED AND REMANDED**.

Melissa A. Nine and Barry S. Kaplan of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

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

Heard by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

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

EISENHAUER, J.

Darcy Rasmussen appeals a district court order dismissing his petition to modify custody. Robyn Rasmussen cross-appeals the district court's orders regarding visitation, child support, and attorney fees. We affirm as modified and remand.

I. Background Facts and Proceedings.

The parties were divorced in 2007. The decree provided for joint legal custody of their daughters and physical care with Robyn. A year later Darcy filed this action and Robyn counterclaimed. Each sought sole legal custody, physical care and supervised visitation.

During their marriage, Darcy and Robyn provided foster care for two children, Lynnette and Lori. Lynnette had suffered physical abuse and possibly sexual abuse. Lynnette's first foster placement was unsuccessful due to her self-abusive behavior and aggressive behavior toward an infant in the home. Lori entered foster care due to neglect and inappropriate physical and emotional sustenance.

Lynnette was adopted by Darcy and Robyn in 2005, and Lori was adopted in 2006. Darcy and Robyn disagree on numerous therapy issues concerning their daughters. Darcy was reluctant to allow Robyn to take Lynnette to Dr. Hoffman, but weekly therapy did occur from November 2006 to February 2008. Because Darcy did not observe the physical aggression by Lynnette toward Lori that Robyn was reporting, he suggested Lori join Lynnette for some therapy

sessions in order for Dr. Hoffman to view their interactions. The girls attended joint therapy sessions.

Lynnette became upset when discussing previous episodes of physical abuse with Dr. Hoffman. Dr. Hoffman discussed a need for one-hundred percent supervision of Lynnette with both Darcy and Robyn. Darcy did not believe Lynnette needed constant supervision.

Based on these discussions, Dr. Hoffman concluded Darcy was more willing to believe Lynnette was making good choices and her problems were caused by Robyn, while Robyn was doing her best to parent Lynnette, a difficult child. Dr. Hoffman opined there was no doubt the behaviors Robyn was concerned about were real—Lynnette discussed her inappropriate actions with Dr. Hoffman and Dr. Hoffman also witnessed the concerning behaviors in her office during Lynnette's therapy. Dr. Hoffman supported Robyn's use of alarms in her home as a supervisory aid.

Additionally, Dr. Hoffman and Darcy "had a disagreement on the physical discipline, the spanking." Dr. Hoffman suggested Darcy not use spanking as a form of discipline and believed spanking is not therapeutic for Lynnette due to her history of physical abuse. Darcy did not agree.

In May 2007, when Lynnette was six and Lori was three, Darcy and Robyn divorced. Darcy remarried in May 2008, and now shares his home with two elementary-age stepchildren. Darcy and his new wife also have a child together, born in December 2008.

In April 2008, Farrah Bonde began counseling Lynnette and Lori. Bonde stated Lynnette's diagnosis is post-traumatic stress disorder and oppositional defiant disorder and Lori's diagnosis is oppositional defiant disorder. Bonde opined Robyn's parenting style/choices did not contribute to the problems in the girls, who are fun, bright, and kind. Lynnette, however, has very real behavioral problems with a need for ongoing therapy.

Darcy originally participated in the therapy with Bonde, but quit in June 2008, because he disagreed with Bonde's suggestions. Despite discussions with Bonde about inappropriate touching between the girls and the need for heightened adult supervision, Darcy did not believe any inappropriate conduct was occurring, just normal childhood curiosity.[1] Although Darcy's home has five bedrooms, he was unwilling to follow Bonde's suggestion the girls have their own rooms and beds, stating: "Because I don't want to. They like sleeping together." Although spanking Lynnette was not recommended due to her past abuse and posttraumatic stress diagnosis, Darcy did not believe his "swats" were a big issue, stating: "He was spanked as a child and didn't see anything wrong with it."

Based on statements Lynnette made in therapy in conjunction with Darcy's unwillingness to provide supervision and separate the bedrooms, on several occasions Bonde contacted the Department of Human Services as a mandatory reporter. The resolved investigations were unconfirmed, with one

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[1] Dr. Kinnaird, the agreed-upon child custody evaluator, states: "[Darcy] reported in our interviews he had never seen Lynnette [engage in inappropriate sexual behavior], despite the mother's report[s] . . . . A review of documents reveals that [Darcy] had reported an instance of seeing Lynnette [engage in this behavior] in December 2006 and even had a brief conversation with the child about it." Further, Dr. Kinnaird states: "[Darcy] does not believe therapy is necessary."

report not concluded at the time of trial. The trial court found: "None of the reports to DHS by Bonde was prompted, insisted upon, or urged by Robyn."

Darcy and Robyn agreed to submit to a child custody evaluation with Dr. Kinnaird of Orchard Place. Dr. Kinnaird interviewed eight-year-old Lynnette and five-year-old Lori as part of her evaluation. In November 2008, Dr. Kinnaird, noting the rancor between Darcy and Robyn, stated: "It will be sadly ironic if the biggest 'handicap' these children have turns out to be two parents who cannot cooperate on their behalf." Dr. Kinnaird recommended the children remain in Robyn's physical care and urged Darcy "to look closely" at his "pattern of pulling out of a [therapy] process he does not agree with." Additionally, "I would strongly suggest" Darcy adjust Lynnette and Lori's bedrooms "now" to "address what I believe to be the inappropriate behavior that occasionally occurs when they share a bedroom."

Robyn additionally agreed to Darcy's request she submit to a psychological evaluation by Dr. Fialkov. Dr. Fialkov made no recommendation concerning custody, but determined Robyn has developed an adjustment disorder as a consequence of significant stressors relating to the divorce. Dr. Fialkov found Robyn's problems were exacerbated by Darcy's apparent indifference and antagonism toward her, stating: Robyn "lacks support from their father, her former spouse, who opted out of the marriage and his on-site parental responsibilities . . . ." Dr. Fialkov's report contained three pages of extensive recommendations, including continued counseling for the family, and concluded:

> The children should have their own rooms and beds. They should not bathe or sleep together, be left unsupervised while playing at

> either household or with friends to prevent potentially abusive behavior or exploitation by the older child towards the younger . . . . . .
> They need to establish a safe and stable housing for the family to limit change and volatility. If possible, the children should remain in their current housing arrangement, if it is financially feasible and suitable.

After a four-day trial, on July 22, 2009, the court granted Robyn sole legal custody, continued physical care with Robyn, and continued Darcy's unsupervised visitation. Additionally, Darcy's child support was decreased and Darcy was ordered to pay $10,000 of Robyn's attorney fees. This appeal followed.

II. Scope of Review.

We review this equity action de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). 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 trial court's fact findings, especially regarding witness credibility, but they are not binding. *McKenzie*, 709 N.W.2d at 531.

III. Modification of Custody.

Both parties agree joint legal custody is not effective in this case. In seeking to modify the physical care arrangement of the custody award, Darcy has a heavy burden. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). He must establish "by a preponderance of the evidence, a substantial change in circumstances justifying [his] requested modification." *See In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, "a

parent requesting a physical-care modification must also prove he or she has the ability to minister more effectively to the well-being of the parties' children." *Id. at 237.* The best interests of the children are the controlling considerations. *Id.* at 235.

We will not discuss the substantial change of circumstances requirement because our de novo review of the record convinces us Darcy has failed to meet the second test—superior care. Unlike in an original custody determination, the question is not which home is better, but whether Darcy, the parent seeking the change, has demonstrated he can offer the children superior care. *See In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). If the parents are found to be equally competent, custody should not be changed. *Id*. The burden upon the parent seeking a change 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." *Id*. at 213-14. Consequently, we follow the principle that once custody has been fixed, it "should be disturbed only for the most cogent reasons." *Id*. at 214.

Darcy contends the district court erred by failing to modify custody to award him physical care and argues he has a superior ability to parent. We disagree. The trial court had the parties before it and observed their demeanor and attitude while assessing credibility. The court found Robyn exaggerates and overstates the girls' problems, "but she does not exaggerate to the point of becoming a liar." The court also stated:

> Darcy, on the other hand, chooses to ignore obvious problems, believing that the girls should be treated as normal children. He

> further suggests that if they have any difficulties, those are attributable to Robyn and occur only while in her care. That is simply not the case.

Further, the court observed, "Darcy is intransigent in his positions and does not suffer comments concerning his parenting skills very well." The court discussed the parents' inability to communicate, noted Robyn finds Darcy intimidating, and stated: "It is readily apparent to the court during trial that Darcy had a bearing that could create such feelings in Robyn."

In determining what is in the best interest of a child in a proceeding to modify custody, we can look to a parent's past performance, because it may be indicative of the quality of future care that parent is capable of providing. *In re Marriage of Winnike,* 497 N.W.2d 170, 174 (Iowa Ct. App. 1992). The district court's ruling follows the recommendation of Dr. Kinnaird and continues physical care in the parent who has undeniably recognized the special needs and problems facing Lynnette and Lori. We agree with the court's conclusion Darcy has failed to meet his burden of proving by a greater weight of the evidence he is able to provide superior care. We affirm the order of sole legal custody and continued physical care to Robyn.

We likewise rely on the court's observation of the parties during trial in deferring to the court's determination Darcy's visitation continues to be without supervision. We note Dr. Kinnaird's report states: "[Robyn] believes the best outcome of the current litigation for Lynnette and Lori would be to maintain the current custody and visitation plan, as long as the girls are provided separate

bedrooms at [Darcy's] home." Darcy also has the recommendations detailed above in Dr. Fialkov's report as being in the best interests of his daughters.

We do, however, modify the decree as requested by Robyn by striking the provision allowing Darcy to give fourteen-days notice of his intended summer vacation visitation with the children. The provision is inconsistent with the requirement each party give May1/May 15 notice.

IV. Child Support.

Robyn cross-appeals from the district court's order reducing Darcy's child support obligation. The dissolution decree allowed Robyn to retain the adoption subsidies received for Lynnette and Lori. In revising child support, the court stated: Robyn "has income of approximately $1075 per month. This includes a subsidy she receives from the State of Iowa for the children."

We conclude the court erred. Income from state public assistance programs is generally exempt from child support determinations. Iowa Ct. R. 9.5. *See* Iowa Admin. Code r. 441-41.27(6)(x) (exempting subsidized adoption assistance). We remand for a recalculation of child support.

V. Attorney Fees.

Robyn argues the award of attorney fees for trial should be revised upward. Attorney fees rest within the district court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court's award for abuse of discretion. *Id*. We conclude the fees awarded are fair and equitable and find no abuse of discretion.

Additionally, Robyn seeks an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in our discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of the party seeking an award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* The record shows Darcy's income substantially exceeds Robyn's income. Robin expended $9791 in fees to defend the district court's decision on appeal and was successful in her defense. We award her $5000 in appellate attorney fees. Costs are taxed to Darcy.

AFFIRMED AS MODIFIED AND REMANDED.