IN THE COURT OF APPEALS OF IOWA

No. 0-137 / 09-1470
Filed May 12, 2010

SHERRI GERMAN, n/k/a SHERRI HAGENS,
Petitioner-Appellee,

vs.

BRIAN METCALF,
Respondent-Appellant.

Appeal from the Iowa District Court for Muscatine County, C.H. Pelton, Judge.

A father appeals the district court's denial of his petition to modify the joint physical care provisions of a child custody order and its modification of child support and assessment of attorney fees and costs. **AFFIRMED AS MODIFIED AND REMANDED.**

Constance Peschang Stannard of Johnston, Stannard, Klesner, Burbidge, & Fitzgerald, P.L.C., Iowa City, for appellant.

Patricia Zamora of Zamora, Taylor, Woods, & Frederick, Davenport, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Mansfield, JJ.

VAITHESWARAN, P.J.

Brian Metcalf and Sherri German, now known as Sherri Hagens, are the unmarried parents of Seth, born in 2002. In 2004, Brian stipulated he was the father, and the parents agreed to a joint physical care plan under which they alternated care of the child every two to three days. Neither party was ordered to pay child support.

In 2007, Brian petitioned for a modification of the order to afford him physical care of Seth. He alleged that Seth had "been diagnosed with [attention deficit hyperactivity disorder], but [Sherri] refuses to accept this diagnosis or to cooperate in appropriate treatment for the child."

Following a hearing, the district court denied Brian's request to modify the joint physical care arrangement and ordered Brian to pay $282 per month in child support. The court also ordered Brian to pay two-thirds of the fee for Seth's guardian ad litem/attorney and $1500 towards Sherri's attorney fees. All the court costs were assessed against Brian.

Brian appealed following the denial of his motion to enlarge or amend the court's findings and conclusions. He contends the district court (1) should not have denied his request for physical care of Seth, (2) should have imputed income to Sherri in calculating child support, and (3) should not have assessed attorney fees, guardian ad litem fees, and court costs against him.

I. Modification of Physical Care

Modification of a custodial order is appropriate only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered, is more or less permanent, and

relates to the welfare of the child. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The party seeking the modification must also carry the heavy burden of showing an ability to offer superior care. *Id.*

The district court concluded that Brian established a substantial change of circumstances. On our de novo review, we agree with this assessment.

Both parents recognized that Seth began exhibiting out-of-control behaviors when he started school. Both parents also recognized that they would have to take action to address the issue. To afford him more structure, they agreed to alternate parenting time on a weekly basis rather than every two or three days. After they implemented this plan, Seth was diagnosed with attention deficit hyperactivity disorder, oppositional defiant disorder, probable separation anxiety disorder, and night terror disorder. He was placed on medication, which resulted in an immediate improvement in his behavior.

These changes in Seth's needs amount to a substantial change in circumstances not contemplated at the time of the decree. *See* Iowa Code § 598.21C(1)(i) (2007). The question then becomes whether that change in circumstances is a sufficient basis for modification. *See In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991) ("[N]ot every change in circumstances constitutes a sufficient basis for modification."). In assessing this issue, we look at parenting ability, ability to communicate about the child's needs, and whether the current joint physical care arrangement is in Seth's best interests. *See Melchiori*, 644 N.W.2d at 369; *see also In re Marriage of Ellis*, 705 N.W.2d 96, 103 (Iowa Ct. App. 2005) ("[W]hen a marriage is being dissolved we would find excellent communication and cooperation to be the exception and

certain failures in cooperation and communication not to be surprising."), *overruled on other grounds by In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007).

The best evidence of parenting ability comes from Seth's teachers and principal, all of whom had extensive contact with the family.

Seth's kindergarten teacher testified she was "very impressed with how [Brian and Sherri] handled the situation with their child." She said that she thought "they did a great job," and Seth "knew he was loved and cared for." She stated she could not tell any difference in Seth's behavior based upon whose care he was in during the week.

Similarly, Seth's first grade teacher testified she did not notice a difference in Seth's behavior based on who was caring for him. She dismissed the idea that his problems at school were due to poor parenting, stating that "since he is such a different child in first grade than he was as a kindergarten child, one of the big reasons is because of his medical intervention." She said that, from what she saw in the classroom, "both parents seem to be interested" in Seth's care.

Finally, Seth's principal testified that she was aware of their custodial arrangement and "off the top of my head I . . . wouldn't know if it was a Sherri week or a Brian week." She believed Brian and Sherri cared for Seth "very dearly and that was . . . brought out at the very beginning of school, his kindergarten year, that both Brian and Sherri were there for Seth."

The evidence of parenting abilities is complemented by evidence that Brian and Sherri adequately communicated with each other and with third parties about Seth's welfare. For example, the school principal testified that Brian and

Sherri cooperated with one another in addressing Seth's needs and both parents communicated with the school on a daily basis. The record also reflects that Brian and Sherri together brought Seth to his pediatrician's office and together met with his teacher and principal. Although the parents disagreed on how to handle Seth's medical needs, Brian ultimately acknowledged that he and Sherri were "doing okay now" as far as communicating about those needs. Sherri similarly testified, "I try to communicate with [Brian] as much as I can about as many things as I need to." *See In re Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa Ct. App. 1998) ("If the parents of the children are able to cooperate and respect each other's parenting and lifestyles, a joint care arrangement can work.").

This evidence defeats Brian's argument that "he can minister more effectively and provide a better environment for Seth." *See In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994) ("If both parents are found to be equally competent to minister to the children, custody should not be changed."). As the district court found,

> [T]his is a case where it is in the child's best interests to have the benefit of both parents as his caregivers directing his growth and development. They supplement the other's shortcomings, constantly monitor Seth's circumstances, and provide him with their whole-hearted attention. . . . Were Seth to be placed in the physical care of one with visitation to the other, the Court fears it would be detrimental to Seth, potentially triggering his separation anxiety. The Court cannot find that joint physical care is not in the best interests of the child.

While Brian points to several other factors that he contends militate in favor of a modification, we are not convinced those factors are material. Seth has two devoted parents who have worked together for his benefit, despite their

differences with each other. Joint physical care is the best option under these circumstances.

II. Child Support

In calculating Brian's child support obligation, the district court found that Brian's gross annual income was $36,000 and Sherri's gross weekly income was $270 based on a thirty-hour work week at $9.00 per hour. Brian argues the court should have imputed additional income to Sherri. The district court denied Brian's request, finding,

> Sherri works more than 40 hours per week when she does not have Seth with her and works a few hours per week when Seth is with her. This averages out to approximately 30 hours per week with an average income from her two jobs of approximately $9 per hour. . . . [The Court] found that she had an ability to earn $270 per week gross pay. The Court could have, but declined to, attribute to her more hours or more income because this seems to be her standard.

Under the current child support guidelines,

> The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

Iowa Ct. R. 9.11(4). We may apply the current guidelines on appeal. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 n.2 (Iowa Ct. App. 1996) (applying guidelines in affect at time of appeal).

On our de novo review of the record, we are convinced Sherri's earning capacity should have been used in calculating child support in order "to do justice between the parties." *See* Iowa Ct. R. 9.11(4).

Sherri worked as a manager at a chain restaurant for the five years preceding trial. Her hours worked at that job had declined. At the time of trial she averaged about fourteen hours per week at that job, earning $9.25 per hour. She also worked another eighteen hours each week delivering pizzas for $7.25 per hour plus tips. In addition, she attended community college and received her associate of arts degree in May 2008.

Sherri earned $20,723 in 2004, $20,253 in 2005, $18,671 in 2006, $13,218 in 2007, and $13,520 in 2008. While she blamed her decrease in income partly on her schooling, she did not offer any reason for her decision to work part-time, other than her desire to stay at home with Seth when he was in her care. This court has said that "[w]hile we respect a parent's wish to remain at home with his or her children, we cannot look at this fact in isolation in determining earning capacity." *Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa Ct. App. 1996).

Given Sherri's newly acquired associate's degree and her past work history, we agree with Brian that the district court should have imputed additional income to her. *See, e.g.*, *In re Marriage of Robbins*, 510 N.W.2d 844, 846 (Iowa 1994) (stating it is "unreliable and unfair to fix child support obligations based solely on the most recent periodic income amounts"). Averaging her annual gross income over the past five years, we arrive at a gross income figure for Sherri of $17,277. *See In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991) (noting that when a parent's income is subject to substantial fluctuations, it may be necessary for the court to average the parent's income over a reasonable period when determining the current monthly income). We remand to

the district court to recalculate Brian's child support obligation using this revised income figure. *See In re Marriage of Nielsen*, 759 N.W.2d 345, 349 (Iowa Ct. App. 2008).

III. Trial Attorney Fees and Court Costs

Brian finally claims the district court should not have required him to pay two-thirds of the fees for Seth's guardian ad litem/attorney, $1500 towards Sherri's attorney fees, and all of the court costs. The law on allocation of costs, including guardian ad litem fees and attorney fees, is straightforward. *See* Iowa Code §§ 598.12(5) (authorizing amount of guardian ad litem fees to "be charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent, in which event the fees shall be borne by the county"), 600B.26 ("In a proceeding . . . to modify a paternity, custody, or visitation order under this chapter, the court *may* award the prevailing party reasonable attorney fees." (emphasis added)), 625.1 ("Costs shall be recovered by the successful against the losing party."); *Markey v. Carney*, 705 N.W.2d 13, 25 (Iowa 2005) (stating decision to award attorney fees rests within discretion of trial court); *Neubauer v. Newcomb*, 423 N.W.2d 26, 27-28 (Iowa Ct. App. 1988) (stating the "trial court has a large discretion in the matter of taxing costs and we will not ordinarily interfere therewith").

The district court found that Brian, as the losing party with the greater ability to pay, should be responsible for all the court costs. We discern no abuse of discretion in this ruling.[1]

[1] We decline to reach Brian's argument, raised for the first time in his reply brief, that the district court had no authority to appoint the guardian ad litem/attorney in this action

IV. Appellate Attorney Fees

Sherri requests an award of appellate attorney fees. An award of appellate attorney fees rests in this court's discretion. *Markey*, 705 N.W.2d at 26. We grant Sherri's request for appellate attorney fees given the fact that she partially prevailed on appeal and, even with imputed income, made more than fifty percent less than Brian. We order Brian to pay $1500 toward her attorney fees.

Costs on this appeal are assessed to Brian.

AFFIRMED AS MODIFIED AND REMANDED.

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brought under Iowa Code chapter 600B. *See Hills Bank & Trust Co. v. Converse*, 772 N.W.2d 764, 770–71 (Iowa 2009) (noting an issue cannot be asserted for the first time in a reply brief); *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (stating "issues must ordinarily be both raised and decided by the district court before we will decide them on appeal").