IN THE COURT OF APPEALS OF IOWA

No. 2-403 / 11-1709
Filed June 13, 2012

Upon the Petition of

LAURA M. SCHWERY,
Petitioner-Appellee,

And Concerning

JOHN L. BLAKE,
Respondent-Appellant.

Appeal from the Iowa District Court for Shelby County, Kathleen Kilnoski, Judge.

Respondent appeals the district court order denying his request to modify the physical care and child support provisions of a paternity decree. **AFFIRMED.**

Lloyd R. Bergantzel, Council Bluffs, for appellant.

Bryan D. Swain and J. C. Salvo of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellee.

Considered by Potterfield, P.J., Mullins, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, S.J.

John L. Blake, the father of two children, appeals from a district court order denying his request to modify a custody order and grant him primary or shared care of his children.

SCOPE OF REVIEW. We review this matter de novo. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. *In re Marriage of Bergman*, 466 N.W.2d 274, 275 (Iowa Ct. App. 1990). We are not bound by these determinations, however. *Id*.

BACKGROUND AND PROCEEDINGS. The parties, who never married, have two children, a son born in June of 2004 and a daughter born in March of 2006. On January 9, 2007, the district court entered an order that provided the parties should have joint legal custody of their two children and Laura Schwery was to have physical care. John was provided specific visitation that included every other weekend, extra time in the summer, and alternate holidays. He was ordered to pay child support of $750 a month for the two children.

John sought a modification and the court adopted a stipulation of the parties and modified the order to increase child support to $873 for two children and $591 for one child. The court also made minor changes to the visitation provision while Laura, who at that time was seeking a nursing degree at the Western Iowa Community College, was still in school.

On April 8, 2011, John again filed an application for modification seeking additional custodial rights. The petition was started because Laura had advised

him she intended to change her physical location to Council Bluffs, Iowa, and rent an apartment with a boyfriend. At the time the modification action came on for hearing on September 30, 2011, Laura no longer had a boyfriend nor did she intend to move to a new location. After hearing the evidence the district court dismissed John's petition for modification of custody, but made uncontested modifications to the visitation provisions of the paternity decree.[1]

MODIFICATION OF CUSTODY. On appeal John contends the district court should have granted him primary physical care or joint physical care of the children.

Courts should only modify the custodial terms of a dissolution decree if it has been established that conditions since the decree have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). This requires that the parent seeking to take custody from the other prove an ability to administer more effectively to the children's needs. *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005); *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). 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, 514 (Iowa 1973).

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[1] The modification ordered Laura to provide her work schedule to John and offer him the right to have the children any time she works and cannot care for the children or transport them to and from school. It also provided that at a minimum John should have the child one overnight each week and every other weekend.

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).

Laura and John's relationship appeared to have terminated around the time of the birth of their second child. There initially was some unpleasantness and Laura sought a restraining order. At the time the paternity and custody order was entered in October of 2007, Laura was living in Panama, Iowa, and John who had lived in Avoca, Iowa, had moved or was just moving to Harlan, Iowa. Laura continued to reside in Panama and was residing there at the time of the modification hearing. Harlan and Panama are in the same school district and apparently are about fifteen miles apart.

At the time of the hearing on the current petition for modification the children were attending the Harlan school. A school bus would pick them up at Laura's home. If they were staying with John, who lives a few blocks from school, they could walk to school or if driven the journey would be short.

In May of 2011 Laura received an associate's degree in nursing and was qualified as a registered nurse. At the time of the hearing on September 30, 2011, she was working three twelve-hour shifts a week at the Manning Hospital in Manning, Iowa. The shifts were either from 7:00 a.m. to 7:00 p.m. or 7:00 p.m. to 7:00 a.m. She has her parents and other relatives in a ten-mile radius of her home and they were available to assist with the children. At times Laura will take the children to John's home the school nights before she would go to work and they would go to school from John's home. Laura has little flexibility in her work schedule.

Since the paternity decree was entered John married and has a two-year-old child. His wife too is a nurse. She works at the Harlan hospital.

John rightly points out, and it appears that Laura agrees, that Laura has had some minor difficulties since she became employed at the Manning Hospital, particularly because her shifts frequently start early in the morning. The children have been late for school several times when they missed the bus. Also, in addressing a discipline problem with her young daughter she spanked her hard enough to leave a hand print on the child's behind. The Department of Human Services investigated a complaint regarding the incident. John contends the department confirmed the abuse. Laura disagrees with this conclusion and advances that the department did not place the incident on the record. At trial Laura testified she was sorry for what had happened, but there had been no other incidents.

Laura had an eighteen-month relationship with a man who lived with her in her home. When she received her associate's degree in nursing the two went out to celebrate and he had been drinking and pushed her down on concrete breaking her wrist, something Laura testified he had never done before. She filed an assault charge to which he pled guilty, she obtained a no-contact order, and she has had no further contact with the man.

Our conclusion is that both parties are dedicated and caring parents and while they showed problems initially they have appeared to work well together for the children's benefit. They face a shared problem in that their son has some difficulties. The child is on as many as six medications daily.

Laura had him evaluated at the Psychology Department of the Nebraska Medical Center in February and March of 2011. An extensive neuropsychological report was prepared by the Department and made an exhibit at the hearing. The report noted the reason for the referral was that the six-year-old child:

> Is displaying problems with noncompliance, aggressive behaviors, ADHA symptoms and expressive language.

The report noted among many other things that:

> The obtained neuropsychological profile may reflect possible inefficiencies with bilateral frontal and particularly, right prefrontal and subcortical processing. This appears to be overtly manifested by his persisting difficulties with expressive speech, executive function, left hand fine motor speed, low visual attention span, emotional dysregulation, mood instability, impulsivity, and attention difficulties.

A number of recommendations were made by the Center following the assessment including that:

> He would appear to learn most efficiently in a highly structured, but caring, small group learning environment. Behavior expectations and consequences, both positive and negative, should be clearly specified and consistently maintained. Distractions should be minimized and preferential seating is highly recommended. A multisensory instructional approach is also recommended in which traditional verbal instruction is systematically paired with visual aids, demonstrations, hands-on hearing experiences, and frequent opportunities for practice and over-learning. Instruction and assignments may need to be broken down into several smaller segments, each followed by review, feedback, and encouragement. He would benefit from monitoring and assistance during drug testing, and he may required additional time to complete tests.

John makes a compelling argument that the child needs structure and stability, and because of Laura's inflexible employment and her physical location, among other things, this makes it nearly impossible to provide the child the

structure and stability that he needs. John also argues that the long bus ride to school is frustrating for his son and because he lives so close to school the child, if he lived with him during school days, would not need to ride the bus and would not arrive at school frustrated.

John points to one of the Behavioral Observations made by the doctor that the child "shows elevated anxiety and worry when he was dealing with changes in his schedule for the day."[2]

John believes the child would be best served by living with him Monday through Thursday so he could come home from school, have a routine, go to bed, and then have time in the morning for a routine and then a short walk or possible drive to school. John expressed concern that while Laura will drop the child off at night it is frequently at bed time and he has not eaten, does not have his home work done, or had a shower. John argues he does not want to take Laura away from the child and would suggest she have more time in the summer. He also advances that because he works in a family-owned business he has more flexibility.

There is merit to John's argument that his son, because of his difficulties, needs structure and because of John's close proximity to the Harlan schools he, at least during the school year, is more able to provide this structure. John is also correct that Laura did not pick good company to live with her and her children, and she has used excessive force in punishing the child.

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[2] It is not entirely clear from the report whether the doctor made this observations or whether Laura reported this observation to the doctor.

While Laura is without the flexibility that John has because he works in a family business and her physical location requires their son to ride the school bus which can cause him frustration, Laura is a good mother and has labored to obtain the education and position to assure her children a secure future. She is also very aware of her son's condition and because of her medical training is in an excellent position to monitor him and his medications. John has failed to show the substantial change in circumstances necessary to modify the custodial provision of the decree. We affirm on this issue.

CHILD SUPPORT. On appeal John asks for a modification of the child support. We agree with Laura that this issue has not been preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting that issues must first be raised and decided by the district court before they will be considered on appeal). John has failed to show us how this issue was preserved for our review. We find the district court did not address it and neither shall we.

ATTORNEY FEES. Laura requests appellate attorney fees. An award of appellate attorney fees is within the discretion of the court. *Markey v. Carney*, 705 N.W.2d 13, 26 (Iowa 2005). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party seeking attorney fees was obligated to defend the district court's decision on appeal. *Id*. John contends both parties should pay their own fees as they both have respectable incomes. John was not successful on appeal. We order him to pay $1000 towards Laura's attorney fees and the costs of this action.

AFFIRMED.