IN THE COURT OF APPEALS OF IOWA

No. 2-641 / 11-2108
Filed September 6, 2012

IN RE THE MARRIAGE OF BRIAN CHARLET AND AMANDA CHARLET

Upon the Petition of

BRIAN CHARLET,
Petitioner-Appellant,

And Concerning

AMANDA CHARLET,
Respondent-Appellee.

Appeal from the Iowa District Court for Humboldt County, Gary L. McMinimee, Judge.

Brian Charlet appeals from the district court order denying his petition to modify the child custody, visitation, and support provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Dani L. Eisentrager, Eagle Grove, for appellant.

Dan T. McGrevey, Fort Dodge, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Tabor, JJ.

TABOR, J.

Brian Charlet appeals from the denial of his petition to modify the child custody, visitation, and support provisions of the 2008 decree dissolving his marriage to Amanda Charlet. He contends a substantial change in circumstances warrants granting him physical care of their daughter. In the alternative, he contends a substantial change in circumstances necessitates amending the visitation provisions of the decree. He also requests modification of his child support obligation, and argues the district court abused its discretion in awarding Amanda trial attorney fees. Amanda seeks an award of her appellate attorney fees.

The evidence fails to show a substantial change in circumstances warranting a transfer of physical care to Brian. Likewise, Brian's child support obligation should continue as set forth in the decree. We reject Brian's request for visitation during the entire summer and winter breaks. But we modify the time at which Brian's weekend visitations begin. We affirm the trial court's award of attorney fees and grant Amanda $2500 in attorney fees on appeal.

I. Background Facts and Proceedings.

Brian and Amanda were married in 2002. They have one child, Kelsey, born in 2001. Amanda has custody of a son, Tucker, from a prior relationship. Brian has a daughter, Paige, from a prior relationship. Paige is estranged from Brian and lives with her mother in Illinois.

On May 1, 2008, the parties were divorced. The decree, to which they stipulated, provides for joint legal custody with Amanda receiving physical care of

Kelsey. The decree granted Brian visitation on alternating weekends and every week from 6:00 p.m. Wednesday until 7:00 a.m. Thursday. The decree did not contain set provisions for summer visitation; Brian acknowledges he had "unlimited access" to Kelsey during the summer when he lived in Humboldt. Brian and Amanda were to share travel time and expenses for visitation and the court ordered Brian to pay $1000 per month in child support.

At the time of dissolution, Brian was a part owner of two companies in Humboldt: A.P. Air and Universal Parts. He was also employed by those companies, earning gross incomes of $191,831 in 2008, $233,793 in 2009, and $243,178 in 2010. In 2010, Brian sold his stock in Universal Parts for $100,000. He entered into a stock redemption agreement with A.P. Air to sell his shares for $425,000, minus the $75,000 he owed the company for a loan. Brian used the money he received to purchase an apartment building in Spirit Lake for $280,000 and one in Humboldt for $320,000. He now manages those properties. In the first quarter of 2011, Brian received $22,727 in rental money and had $19,582 in expenses for a net income of $3145. Brian projected that after the units are repaired and remodeled—which he anticipated happening by 2012—his income will increase by twenty percent.

In April 2010, Brian remarried. His wife, Pam, has custody of a sixteen-year-old son from a prior relationship. Pam also has two adult sons who are attending college. Brian and Pam built a new home in Arnold's Park. The property is appraised at $450,000 and is mortgaged for $275,000.

Amanda's boyfriend, John, moved in with her in May 2010. John has a criminal record including convictions for disorderly conduct and assault. John was not required to serve jail time for any of his offenses and has not had any convictions since 2008.

Brian's request for a change in physical care focuses largely on Kelsey's level of supervision during the summers since the divorce. Brian alleges that during the summer of 2009, Amanda was leaving Kelsey alone and unsupervised during the day. Amanda's son, Tucker, who was then thirteen years old, stayed at home with Kelsey. That summer, another boy visited the house and broke a window. Kelsey received a small cut on her face from the glass. The following day, Amanda arranged for two teenagers to supervise Kelsey for the rest of the summer.

During the summer of 2010, Amanda arranged for two friends to provide daycare for Kelsey. John was also at home during the day. While skateboarding in June 2010, Kelsey fell and sprained her wrist. Amanda contacted Brian about the injury and took Kelsey for medical treatment. Amanda lost her job that summer and thereafter stayed home with Kelsey until school resumed.

During the summer of 2011, Amanda stayed home with Kelsey. Because of her work hours, Amanda would sleep in during the mornings while Kelsey visited a neighborhood friend whose mother is a licensed daycare provider. At noon, the girls would return to Amanda's house for lunch. When Amanda was working, John stayed home with Kelsey.

On June 9, 2010, Brian filed a petition to modify the custody provisions of the dissolution decree. He alleged three substantial changes in circumstances: (1) Amanda was not providing sufficient supervision for Kelsey; (2) his remarriage and move to Spirit Lake; and (3) the number of "male visitors" Amanda had at the house when Kelsey was present.

On June 25, 2010, Brian filed an application for emergency order, alleging Kelsey was being left at home unattended and that Amanda was leaving Kelsey with "strange male associates or her boyfriends." He sought a temporary emergency order removing Kelsey from Amanda's custody. The district court denied the request on August 10, 2010.

The court held a trial on the modification action in May and July of 2011. On November 1, 2011, the district court entered its order finding Brian failed to prove a material and substantial change in circumstances warranting modification of custody. The court also found Brian failed to prove he could minister more effectively to Kelsey's well-being. Although Brian's support obligation using his new income varied by more than ten percent, the court found the guideline amount would result in a substantial injustice to Amanda and Kelsey. It concluded Brian's child support obligation should remain unchanged from the $1000 per month figure used in the decree. The court did modify the decree to provide Brian with visitation on alternating weekends during the school year and for three two-week blocks during the summer. The court also modified the decree to grant Brian the tax exemption for Kelsey in even numbered years. It ordered Brian to pay $1500 of Amanda's attorney fees. Brian appeals.

II. Scope and Standard of Review.

An action to modify a dissolution decree is an equitable proceeding. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). Therefore, our review is de novo. *Id.* We give weight to the trial court's fact findings, especially with regard to witness credibility, but we are not bound by them. *Id.*

III. Modification of Custody.

Brian first contends the district court erred in finding he failed to prove a material and substantial change in circumstances since entry of the decree. He also argues he would be able to provide Kelsey with superior care.

> The child custody provisions of a dissolution decree may be modified
>
> only when there has been a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered, which is more or less permanent and relates to the welfare of the child. The parent seeking to change the physical care from the primary custodial parent to the petitioning parent has a heavy burden and must show the ability to offer superior care.

Id. (citing *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004)). Iowa courts apply the criteria for determining child custody—those enumerated in Iowa Code section 598.41(3) (2009) and set forth in our caselaw—in modification proceedings. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa Ct. App. 1996). The critical issue is the child's best interest and determining which parent will create an environment most likely to bring the child to healthy physical, mental, and social maturity. *Id.*

A. Substantial Change in Circumstances.

On appeal, Brian argues the following circumstances mark a substantial change since entry of the decree: (1) Kelsey's lack of supervision during the summer months; (2) her relationship with her half-brother Tucker; (3) Brian's remarriage and move from Humboldt to Spirit Lake; (4) the male visitors allowed to stay in Amanda's home; (5) Kelsey's inadequate medical and dental care; (6) Kelsey's shabby wardrobe; (7) Kelsey's use of Facebook; (8) a neighbor boy's alleged sexual assault against Kelsey; and (9) Amanda's waning cooperation with his requests for additional visitation. We consider each allegation in turn.

1. Lack of supervision.

During the summer of 2009, Amanda left Kelsey at home during the day with her thirteen-year-old half-brother. On one occasion, Kelsey sustained a small cut from a broken window. After that incident, Amanda hired teenagers to babysit Kelsey while Amanda worked. The following summer, Amanda lined up daycare for Kelsey. When Amanda lost her job, she stayed home with her daughter. During the summer of 2011, Amanda was home during the days. While Amanda slept in the mornings, Kelsey would go to a neighbor's house. As the district court found, "Although one might debate whether Kelsey was adequately supervised before Brian expressed his concerns in 2009, she has been adequately supervised since that time." The evidence supports this finding.

2. Kelsey's relationship with her half-brother.

Brian argues Kelsey's relationship with her half-brother Tucker warrants modification. Generally, there is a preference for keeping siblings together. *Courtade*, 560 N.W.2d at 38. Siblings should not be separated from one another without good and compelling reasons. *In re Marriage of Smiley*, 518 N.W.2d 376, 380 (Iowa 1994). Brian suggests this sibling relationship is detrimental to Kelsey's well-being. He alleges Tucker makes a game out of seeing how fast he can make Kelsey cry and Kelsey is afraid he will hurt her.

The district court rejected Brian's position, finding Tucker and Kelsey "appear to have a relatively typical brother-sister relationship and Brian failed to establish a good and compelling reason to separate them." We defer to the district court's closer vantage point on this question. Although Brian and Pam testified to conduct by Tucker toward Kelsey they considered abusive, other witnesses denied observing physical altercations between the siblings. Brian was not aware of any incident where Tucker actually injured Kelsey. The record depicts a typical sibling relationship where the two children sometimes pick on each other and argue, but are also close and care for each other.

3. Brian's move and remarriage.

Since the parties' divorce, Brian has relocated from Humboldt to Spirit Lake, a distance of ninety miles. Iowa Code section 598.21D states:

> If a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation a substantial change in circumstances. If the court determines that the relocation is a substantial change in

> circumstances, the court shall modify the custody order to, at a minimum, preserve, as nearly as possible, the existing relationship between the minor child and the nonrelocating parent.

Because Brian does not have physical care of Kelsey and he moved less than one-hundred-fifty miles away, the statute does not assist Brian in his argument for modification.

Nor does Brian's remarriage itself constitute a material and substantial change in circumstances to support a change in custody. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa 1996). But the court may consider a parent's new romantic relationship. *In re Marriage of Downing*, 432 N.W.2d 692, 695 (Iowa Ct. App. 1988). The point when the circumstances surrounding remarriage will support a change in custody depends on the facts of each case. *Dale*, 555 N.W.2d at 245.

Brian contends his marriage to Pam "is a very positive change that would benefit Kelsey." We view this more as a claim that his remarriage enables him to offer Kelsey superior care. Brian does not establish that his move and remarriage qualify as a substantial change in circumstances not contemplated at the time of the decree.

4. Male visitors to Amanda's home.

Brian next expresses concern over the number of men Amanda has allowed to stay in her home following their divorce. The district court found Amanda has had nine different men stay overnight in her home since May 2008. Three of these men were friends with whom she had no romantic involvement. Three of the men were staying with Amanda's sister, who lived with Amanda

from August 2008 through August 2009. Amanda testified that if Kelsey was home, she would only allow her date to spend the night if they had been seeing each other for a significant time. None of the men who stayed overnight had convictions for child endangerment or related activity. The district court found no evidence Kelsey was endangered by these overnight guests. Moreover, at the time of the modification trial, Amanda had been living with John for over a year and Kelsey reportedly had a good relationship with him.

5. Medical and dental care.

Brian argues Kelsey has not been receiving adequate medical or dental care since the divorce. In the fall of 2010, Brian learned Kelsey had not been to a dentist for two years and took her for a cleaning, x-rays, and fillings. At the time, Amanda did not have dental insurance for Kelsey. He speculates that if he had not taken Kelsey to the dentist, she might have continued to go without dental care.

Brian also expresses concern that Kelsey suffers from urinary tract infections. He complains that when Kelsey arrives at his house for visitation, her medication is not in the original container. He also has concerns that Amanda allows Kelsey to take the medication herself. We find no other evidence that Amanda has failed to seek medical treatment for Kelsey or has endangered her health. Brian has failed to show Amanda's behavior amounts to a substantial change in circumstances.

6. Inadequate Clothing.

Brian complains that although he has paid $1000 per month in child support, Kelsey's clothing is inappropriate. He and Pam testified that Kelsey's clothes are ill-fitting, stained, and tattered. He admits that this issue, on its own, does not constitute a substantial change in circumstances.

Other witnesses testified Kelsey is appropriately groomed and dresses similarly to other children her age. The district court characterized the clothing dispute as follows: "Brian and Pam's concern about Kelsey's dress appears to be a simple difference of opinion with Amanda regarding how girls Kelsey's age should dress." The record supports this finding.

7. Facebook.

Brian objects that Amanda allows nine-year-old Kelsey to have a Facebook account. He argues it is inappropriate, citing an incident where a man exposed himself to Kelsey on line. Amanda counters that she limits access to Kelsey's Facebook page and points out Brian also has set up a Facebook account for Kelsey. Kelsey's use of Facebook does not meet the criteria of a substantial change in circumstances warranting modification.

8. Sexual assault.

Brian argues custody should be modified because of an incident where a boy in the neighborhood allegedly sexually assaulted Kelsey. Kelsey alleged the boy touched her inappropriately over her clothes and his hand touched either her breasts or genital area. Kelsey was uncertain whether the contact was intentional. Upon learning of the incident, Amanda spoke to the boy's parents

and contacted the school to report the incident. Although Brian is upset that Amanda allows Kelsey to continue to play with the boy, there has been no further report of inappropriate touching.

9. Cooperation between the parents.

Brian argues that following his remarriage, Amanda has been "very difficult" about allowing him extra time with Kelsey. He describes their communication as "poor at best"—with most exchanges occurring through email or text message.

A custodial parent's interference with a non-custodial parent's visitation rights could provide an adequate ground for a change in custody. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). Conduct that serves to diminish a child's relationship with the other parent may also serve as grounds for modification of child custody. *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005); *In re Marriage of Bolin*, 336 N.W.2d 441, 447 (Iowa 1983) ("Even though the parents are not required to be friends, they owe it to the child to maintain an attitude of civility, act decently toward one another, and communicate openly with each other. One might well question the suitability as custodian of any parent unable to meet these minimum requirements.").

The record does not show Amanda has denied Brian the visitation as set forth in the dissolution decree. Rather, Brian alleges Amanda does not allow him all of the extra visitation he requests. We see no evidence she has been unreasonable in denying his requests.

Brian asserts Amanda's level of cooperation changed when he married Pam and he believes Amanda has denied his visitation requests out of "spite." It would be unrealistic to attribute the hostility solely to Amanda. We find it telling that following Brian's remarriage, he also encountered difficulties with Paige, his daughter from a prior relationship. He has not visited Paige since April 2010 and has not spoken to her since September 2010. Brian blames Paige, who was fifteen at the time of trial, for the deterioration in the relationship. Amanda continues to maintain a relationship with Paige.

10. Aggregate factors.

Brian takes the position that when these issues are considered together, they amount to a substantial change in circumstances warranting modification. We disagree. The only credible and enduring circumstances identified by Brian are his move and remarriage and the heightened level of conflict with Amanda. With regard to the latter, a therapist who evaluated Kelsey in September 2010 recommended the adults reduce or resolve their conflicts and improve their communication. But the therapist also observed: "Given the level of conflict and/or hostility that I witnessed during this evaluation, it is surprising that this youth is not expressing a higher level of stress and consequently does appear to be fairly resilient."

We agree with the district court's conclusion that Brian has not established a material and substantial change in circumstances.

B. Superior Care.

Even if Brian could show a substantial change in circumstances, he has not shown a capacity to offer Kelsey superior care. Nothing in the record suggests Brian would foster a stronger bond between Kelsey and Amanda than Amanda encourages between Kelsey and Brian; if anything, the evidence suggests the contrary. As the district court noted, "It is difficult to believe that someone who has referred to Kelsey's mother as a 'dumb bitch' and as having a 'psychotic break' would be more supportive of her than she has been of Brian."

Transferring custody also would distance Kelsey from the half-brother with whom she has lived her entire life. Additionally, only Amanda continues a relationship with Kelsey's half-sister Paige. Because the evidence does not show Brian can offer superior care, we affirm the portion of the district court order denying Brian's request to modify custody.

IV. Modification of Visitation.

Brian next contends that even if he did not meet the burden of showing a substantial change in circumstances warranting a change in Kelsey's physical care, he did meet the less exacting test for amending a visitation schedule. He argues his move to Spirit Lake has prevented him from exercising the weekly overnight visitation on Wednesdays as provided in the decree and requests Kelsey be placed in his care for the entire summer to make up for not receiving his mid-week visitation. He also requests time with Kelsey during her winter break. Finally, Brian requests his weekend visitations be modified to begin after school ends on Friday, rather than at 6:00 p.m.

A lower burden applies to a parent seeking a change in the visitation provisions of a decree compared to the burden to modify custody. *Brown*, 778 N.W.2d at 51. The change in circumstances can be much less extensive. *Id.* A parent seeking to modify visitation must only establish "that there has been a material change in circumstances since the decree and that the requested change in visitation is in the best interests of the children." *Id.* at 52 (citing *In re Marriage of Salmon*, 519 N.W.2d 94, 95-96 (Iowa Ct. App. 1994)).

In establishing visitation rights, our concern remains the child's best interest. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation rights are in the child's best interest. *Id.* Visitation must "assure the child the opportunity for the maximum continuing physical and emotional contact with both parents." Iowa Code § 598.41(1).

The district court found Brian's ninety-mile move and the deterioration of his relationship with Amanda to constitute a substantial change in circumstances warranting modification of the visitation provisions. Seeking to alleviate the problems that resulted when Brian requested "extra" visitation, the court found a more structured schedule would be appropriate. The court found Amanda's proposal of allowing Brian two weeks of uninterrupted visitation each month in the summer was more reasonable because it would allow both parties extended periods of time with Kelsey and allow Kelsey to maintain contact with her friends and classmates in Humboldt. The court also granted Brian visitation for one-half of winter break.

We find Brian's request for visitation with Kelsey during the entire summer is not in Kelsey's best interest and does not assure her maximum contact with both parents. By providing for two weeks of uninterrupted visitation each summer month, both parents have the opportunity to take vacations with Kelsey. Additionally, Kelsey will be able to enjoy summer days with her half-brother and her friends in Humboldt. We also reject Brian's request that he be granted visitation with Kelsey for the whole winter break. Each parent should be allowed to enjoy the holidays with Kelsey.

In her brief, Amanda does not object to starting Brian's weekend visitations when school is dismissed on Friday. We modify the schedule to begin visitation at the close of school on the Fridays that Brian sees Kelsey.

V. Modification of Child Support.

Brian contends the district court erred in failing to modify the child support provisions of the decree. He argues he did not voluntarily reduce his income.

Again, to modify the dissolution decree, Brian must show a substantial change in circumstances of the parties since the entry of the decree. *See In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 332 (Iowa Ct. App. 2005). A substantial change in circumstances exists where "the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established." Iowa Code § 598.21C(2)(a).

Before applying the child support guidelines, the court needs to determine the net monthly income of the parents at the time of the modification hearing.

Kupferschmidt, 705 N.W.2d at 332. A party may not claim inability to pay child support when that inability is self-inflicted or voluntary. *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). If a parent voluntarily reduces income, or decides not to work, the court may consider earning capacity rather than actual earnings when determining child support. *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. *Nielsen*, 759 N.W.2d at 348.

The court found using actual earnings would result in a substantial injustice to Amanda and Kelsey:

> It is not fair to Amanda and Kelsey to have Brian heavily leverage himself into a new home and substantial investments that will only yield substantial income in the unforeseeable future, and to ask Amanda and Kelsey to help finance his new lifestyle by a reduction in his child support.

We agree a substantial injustice would result if the court calculated Brian's child support obligation based on his actual earnings from the first quarter of 2011. His earning capacity should form the basis for his support obligation.

Brian earned a substantial income as part owner and employee of two companies. Had he maintained that employment, his child support obligation would have increased to $1590 per month. But Brian chose to sell his stock in both companies, which garnered him approximately $450,000. He used some of this money to buy apartment buildings, from which he generates rental income. He held some of the money back to improve these buildings. Around the same

time, Brian built a new home appraised at $450,000. The property is mortgaged for $275,000.

Considering Brian's 2010 and 2011 earnings and his voluntary reduction of income, we find deviation from the child support guidelines is appropriate. We affirm the portion of the district court's order setting Brian's child support obligation at $1000 per month.

VI. Attorney Fees.

Finally, Brian contends the district court erred in ordering him to pay $1500 of Amanda's trial attorney fees. We review the fee award for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The decision depends on the parties' respective abilities to pay. *Id.* Because the record indicates Brian's superior ability to pay these legal fees, we find no abuse of discretion.

Amanda requests an award of $5400 in her appellate attorney fees. Appellate attorney fees are not a matter of right, but rest within our sound discretion. *Id.* In determining whether to award appellate attorney fees, we consider "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal." *Id.* Because Amanda was meritorious in all contested matters and because Brian can better afford to pay, we award Amanda $2500 in her appellate attorney fees.

Costs of the appeal are assessed to Brian.

AFFIRMED AS MODIFIED.