

IN THE COURT OF APPEALS OF IOWA

No. 6-1088 / 06-1112

Filed June 13, 2007

**IN RE THE MARRIAGE OF JAY EDWARD HANSEN
AND ROCHELLE V. HANSEN**

**Upon the Petition of
JAY EDWARD HANSEN,**
Petitioner-Appellant,

**And Concerning
ROCHELLE V. HANSEN n/k/a ROCHELLE V. WELKER,**
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, William J. Pattinson, Judge.

A father appeals from a district court order that denied his application to modify the parties' dissolution decree to place physical care of the parties' two minor children with him. **AFFIRMED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Barry Kaplan and Melissa Nine of Kaplan & Frese, L.L.P., Marshalltown, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Jay Hansen appeals from a district court order that denied his application to modify the parties' dissolution decree to place physical care of the parties' two minor children with him. We affirm.

I. Background Facts and Proceedings

Jay Hansen and Rochelle (Roe) Hansen were divorced in 1995. The parties stipulated they would share joint custody of their two children, Jacob and Kaley. Roe was granted physical care of the children, and Jay was awarded visitation and ordered to pay child support. Jay and Roe have both remarried.

Roe married Sherman Welker in 2001. Roe and Sherman adopted a daughter, Julia, in 2005.¹ Sherman has two daughters from a previous marriage: Kendall, age twenty, and Jordan, age seventeen. Kendall and Jordan have lived with their mother since her divorce from Sherman. Roe is a registered nurse. She works at the McFarland Clinic. Sherman is the president of Welker Construction Company. Roe and Sherman live on an acreage outside of Marshalltown.

Jay is a commercial real estate broker, landlord, and small business owner. He resides in Marshalltown with his wife, Jamie Bland. Jamie owns her own real estate company.

Jay filed an application to modify the physical care provisions of the dissolution decree on October 27, 2005. He contended a substantial change in circumstances had occurred that warranted a change in physical care of the

¹ Julia is twelve years old. She is the biological daughter of a college friend of Roe's. Julia's natural mother asked Roe to care for Julia while the mother sought drug treatment. Julia has lived in the Welker home since 2002.

parties' teenage children. Jay's application to modify was tried to the court on June 8, 9, and 30, 2006. At the time of trial, Jacob was fourteen years old, and Kaley was about to turn sixteen.

On July 6, 2006, the district court entered an order finding Jay's application to modify had no merit. The court denied the application and ordered Jay to pay all the attorney fees for the children's guardian ad litem, \$3000 of Roe's attorney fees, and court costs. Jay has appealed. He contends the evidence supports a change in custody, and he takes issue with the district court's award of attorney fees.

II. Scope and Standards of Review

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We give weight to the district court's findings of fact, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

III. Modification of Physical Care

The legal principles governing modification actions are well established. Courts can modify the custodial provisions of a decree only when there has been a substantial change in circumstances since the entry of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the children. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Jay, as the parent seeking to alter physical care, has a heavy burden and must prove he possesses the ability to provide

superior care for the children. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). This heavy burden stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. *Frederici*, 338 N.W.2d at 158.

This case was vigorously litigated over a three-day period. At trial, Jay testified that Kaley and Jacob had been asking to come live with him for some time before his application to modify was filed. He premised his application on claims that Roe has been physically, verbally, and emotionally abusive to Kaley and Jacob since the entry of the original decree. Jay called Kaley and Jacob to testify. Both children claimed their mother physically abused them by slapping them, spitting on them, and shoving them up against walls. The children testified they wished to live with their father. Although we give children's preferences some weight in a modification proceeding, we give their preferences less weight than in an original custodial determination. *Mayfield*, 577 N.W.2d at 873. Kendall and Jordan also testified Roe was aggressive and controlling.

Roe vigorously denied all the allegations leveled against her, and Sherman testified that Roe is not an abusive mother. The author of a home study, which was prepared when Roe and Sherman adopted Julia, found the Welkers to be exemplary parents and noted no dysfunction in the family. Sherman's father testified he had spent a great deal of time with the Welkers and the children. He heard no complaints from the children and witnessed no mistreatment of them by Roe. The family's pastor expressed no concerns about Roe's interaction with the children and described the children as normal, mature, intelligent, and respectful.

After considering the conflicting evidence presented, the district court concluded Jay had not shown a substantial change in circumstances. In doing so, the court made very specific and very strong credibility findings. The court stated it “believed practically nothing that the two Welker girls [Kendall and Jorden] had to say about Roe and their experiences in her home and care.” The court further found “Kaley and Jacob’s testimony also suffered from a lack of candor.” The court stated “the claimed abuses on Roe’s part amount to nothing more than an indignant, self-serving and self-righteous spin placed on otherwise innocuous episodes and events by two self-centered adolescents.” The court concluded Kaley and Jacob’s motivation to live with their father stemmed from the fact Jay is a more lenient parent than Roe.

The district court also concluded Jay had failed to demonstrate he was better able to provide superior care for the children. The court found the children have flourished under Roe’s care. Kaley and Jacob excel in academics, they have a number of friends, they are actively involved in their church and in youth groups, they participate in sports, and Kaley has a part-time job. Furthermore, the court found nothing in the children’s demeanor or bearing at trial that indicated they were being mistreated behind closed doors in Roe’s home. The court found Roe supports the children’s relationship with Jay. The record does not support the conclusion that Roe has failed to adequately care for the children in any significant way.

The court acknowledged Jay is a decent parent, but found he can be “inappropriately confrontational,” and concluded that “transferring Jacob and Kaley’s physical care to Jay would be imprudent.” The court expressed concern

that Jacob and Kaley had seriously misbehaved on several occasions while staying at Jay's home. About six months prior to trial, Kaley lied to Jay about her plans for the evening and went to a party where she became drunk. Kaley wandered away from the party and wound up in the home of a stranger where she passed out on the couch. Kaley's parents had to involve the police and spent the night searching for her. On another occasion several months earlier, Kaley and Jacob sneaked out of Jay's home in the early morning hours so Kaley could meet a boy. Jacob was caught by the police, but Kaley sneaked back to Jay's house and lied about where she had been all night.

The trial court was also unimpressed with Jay's behavior at Jacob's baseball game the night before the first day of trial. So are we. The record reveals Jacob was ejected from the game by Sherman, who coaches his team, because Jacob threw his helmet after making an out. At that point, Jay, who was a spectator at the game, aggressively confronted Sherman concerning his choice of punishment. Jay inappropriately entered the dugout, used foul language, and called Sherman vulgar names in front of the team and onlookers, including his son. Jay was eventually escorted from the dugout by another man who was watching the game. After the incident, Jay went to the police station, accompanied by his wife and the children, to file an "incident report" regarding Sherman. Jay's unfortunate behavior during and after the incident at the ballgame placed his son squarely in the middle of this custody dispute. His behavior seriously erodes his claim that the children's best interests require that he be their primary caretaker.

Upon careful review of the record, we are not inclined to overturn the district court's decision to deny Jay's application to modify. In this case, it is apparent the court's decision turned on its assessments of credibility. After carefully considering conflicting evidence, the court accepted the evidence it found most believable, decided the facts from the evidence, and then applied the controlling law. This is what trial judges are supposed to do. Even though our review is de novo, we have always accorded district courts considerable discretion in matters of this kind. *Paxton v. Paxton*, 231 N.W.2d 581, 584 (Iowa 1975). There is good reason for us to pay close attention to the district court's assessment of the credibility of witnesses. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). The district court is aided in making a wise decision by listening to and observing witnesses. *Id.* On the other hand, an appellate court must rely on the printed record in evaluating evidence. We are denied the impressions created by the demeanor of each and every witness as testimony is presented. *Id.* Giving due deference to the district court's assessments of credibility, we conclude the trial court's decision should be affirmed. We agree with the district court's conclusion that Jay failed to show a substantial change in circumstances and failed to meet the heavy burden of proving he possesses the ability to provide superior care for the children. *Mayfield*, 577 N.W.2d at 873.

IV. Attorney Fees and Costs

The district court ordered Jay to pay \$3000 of Roe's attorney fees and all of the children's attorney fees. Jay now contends he should not be required to pay any of Roe's attorney fees and Roe should be required to pay one-half of the children's attorney fees. Iowa Code section 598.36 (2005) provides that in a

proceeding for the modification of a decree, the court may award reasonable attorney fees to the prevailing party. The district court possesses considerable discretion in awarding attorney fees. *In re Marriage of Ranniger*, 423 N.W.2d 558, 560 (Iowa Ct. App. 1988). We conclude the district court did not abuse its discretion in the award of attorney fees.

Roe requests appellate attorney fees. An award of appellate attorney fees rests within the discretion of the appellate court. *Spiker v. Spiker*, 708 N.W.2d 347, 360 (Iowa 2006). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). The record before us justifies awarding appellate attorney fees of \$1000 to Roe.

Jay has filed a motion to tax excessive costs related to the production of the appendix to Roe. He contends Roe's designation of parts of the appendix was excessive. The record in this case was substantial because the trial spanned three days, and we conclude Roe's designation of the appendix was not excessive. We deny Jay's motion and tax the costs of this appeal to Jay.

V. Conclusion

Because Jay has failed to show a substantial change in circumstances since the entry of the decree and has failed to prove he possesses the ability to provide superior care for the children, we affirm the district court's decision to deny Jay's application to modify. We also affirm the court's award of attorney fees, and we award Roe appellate attorney fees.

AFFIRMED.