IN THE COURT OF APPEALS OF IOWA

No. 6-141 / 05-1538
Filed May 10, 2006

IN RE THE MARRIAGE OF WILLIAM ROBERT NELSON and ANNETTE MARIE NELSON

Upon the Petition of

WILLIAM ROBERT NELSON,
Petitioner-Appellant,

And Concerning

ANNETTE MARIE NELSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Clay County, Frank B. Nelson, Judge.

William Nelson appeals from the order denying his petition to modify the physical care provisions of the parties' dissolution decree. **REVERSED AND REMANDED WITH DIRECTIONS.**

Bethany J. Brands of Brands Law Office, Spirit Lake, for appellant.

Michael R. Bovee of Montgomery, Barry & Bovee Law Offices, Spencer, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

HECHT, J.

William Nelson appeals from the order denying his petition to modify the physical care provisions of the parties' dissolution decree. Because our de novo review convinces us that William established a significant change in circumstances and his ability to minister more effectively to the well-being of the parties' minor son, we reverse the district court's decision. We allocate the physical care of Wesley to William and remand for further proceedings consistent with this opinion.

Background Facts and Proceedings.

William and Annette were married in 1977. Three children were born during the marriage: Christopher in 1978, Elizabeth in 1987, and Wesley in 1992. William filed a dissolution action in 1997. When the decree dissolving the marriage was entered on October 28, 1997, Christopher was an adult and attending school in New York. Consistent with the parties' stipulation, the physical care of both Elizabeth and Wesley was allocated to Annette.

In March of 2005, William learned from Elizabeth and Wesley that Annette planned to move herself and Wesley from Spencer, Iowa, where the parties had lived since 1990, to Sheridan, Wyoming, a distance of 705 miles. Annette's sister, Margaret Field, who lived in Sheridan had encouraged Annette to move there.

After learning of Annette's plans, William promptly sought a judicial remedy. On March 22, 2005, he filed a petition asking the district court to modify the physical care provision within the decree. The next day William sought an injunction restraining Annette from removing Wesley from the Spencer school

district. Annette moved Wesley to Wyoming on March 28 before a hearing could be held on William's prayers for relief. On July 28, 2005, William's petition for modification came on for trial. The district court concluded William had not established he could minister more effectively to Wesley's well-being, and therefore denied the request for modification. William appeals.

Scope of Review.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith,* 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

Modification Standards.

Modification of the custody provisions of a dissolution decree is only justified when a substantial change in circumstances occurs after entry of the decree. *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must not have been contemplated when the decree was entered. *Id.* Iowa Code section 598.21(8A) (2005) provides that if the physical care parent relocates more than 150 miles from the residence of the children at the time custody was awarded, the court may consider the relocation a substantial change warranting modification.

The party seeking modification of physical care must prove the ability to minister more effectively to the child's well being. *In re Marriage of Frederici,* 338 N.W.2d 156, 160 (Iowa 1983). Iowa Code section 598.41(3) sets forth the

factors the court must consider in determining the custody arrangement which is in the best interest of the child.

Discussion.

We first conclude Annette's move with Wesley to Sheridan, Wyoming, a distance of 705 miles from their former Iowa home in Spencer, constitutes a significant change in circumstances.[1] *See* Iowa Code § 598.21(8A). Accordingly, the only remaining question is whether William has proved an ability to minister more effectively to the Wesley's well being. *Frederici,* 338 N.W.2d at 160. On this question, Wesley's best interests remain our polestar. *See In re Marriage of Walton,* 577 N.W.2d 869, 871 (Iowa Ct. App. 1998) ("The best interests of the children is the first and governing consideration in determining the primary care giver of the children.").

When determining the best interests of children, we consider the emotional and environmental stability offered by each parent. *In re Marriage of Williams,* 589 N.W.2d 759, 762 (Iowa Ct. App. 1998). On this count, we are strongly influenced by the testimony of, and letters written by, the parties' two adult children. The parties' eldest son Christopher, who is a graduate of West Point and a captain in the United State Army, is a mature, thoughtful, and very

[1] The parties' dissolution decree contains a stipulation providing that if Annette moves more than seventy-five miles from Spencer, the parties shall share in the transportation costs for visitation. Annette posits that this stipulation establishes that the parties contemplated that she might move away from Spencer. Consequently, she believes her move was contemplated at the time of the decree, and thus cannot be considered a substantial change in circumstances. We reject this argument. A move of 705 miles is significantly greater than seventy-five miles and threatens a much greater interruption in Wesley's contact with William.

concerned sibling of Wesley. In his letter to the court,[2] Christopher offered the opinion that "Wes will be happier and develop into a more confident, emotionally stronger, and stable person if he remains in Iowa under the custody of [William]." He likened Annette's interaction with her children to "emotional abuse" and described life with her as "extremely difficult and stressful." He further described an incident when he was fourteen years old following which Annette refused to speak with him for approximately six weeks. Conversely, he described the "family atmosphere" in his father's home and observed that Wesley 'thrives and enjoys life with [his] father . . . ."

Elizabeth likewise described a great disconnect in her relationship with her mother. Elizabeth noted she only talks to Annette when she "has to" and that Annette makes sure others are unhappy when she is unhappy. Elizabeth also remarked that "I have never felt I could talk to my mother about anything, I have always gone to someone else." On the other hand, she claimed that she was less stressed and more able to relax after moving from Annette's home to live with William. The extent of Annette's estrangement from Elizabeth is evidenced by the fact that Annette did not attend her daughter's wedding.

Regardless of her reasons for moving to Wyoming, Annette made the decision to relocate Wesley to a different school in the middle of a semester without consulting with William, the joint-custodial parent. *See In re Marriage of Wedemeyer,* 475 N.W.2d 657, 659 (Iowa Ct. App. 1991). Annette failed to offer any compelling reason to remove Wesley from a familiar school only a few weeks

[2] This letter was initially presented to the court in support of William's request for "temporary emergency jurisdiction" of the district court.

before the end of the school year. This lack of consideration for William's perspective as to such an important custodial matter gives us insight into Annette's view of her role as joint custodial parent and physical care provider. It is not a view consistent with her obligations under the law and it reflects poorly on her willingness to collaborate with William in important decisions and her ability to promote the relationship between William and Wesley.

We also believe that if Wesley's physical care is reallocated, William will foster and support a relationship between Wesley and Annette and her family, many of whom live in northwest Iowa. During a three-week visitation with William prior to the modification hearing, William enabled Wesley to visit and have contact with his aunt, uncle, cousins, and grandfather on Annette's side of the family.

Finally, while we do not assign this factor overwhelming weight, Wesley has clearly and consistently expressed a preference to live with William. *In re Marriage of Jahnel,* 506 N.W.2d 473, 475 (Iowa Ct. App. 1993) (concluding the child's stated preference is entitled to less weight in a modification proceeding than it would be accorded in an original dissolution proceeding). In view of Wesley's age of fourteen years, however, we do believe his preference is entitled to some weight.

Conclusion.

Our de novo review of the record convinces us Wesley will be most likely to reach healthy physical, mental, and social maturity in William's care. Because we conclude William has shown a substantial change in circumstances and has shown a superior ability to minister to Wesley's well-being, we reverse the district

court's order denying his application to modify physical care. We remand this case to the district court for such further proceedings as may be required to adjudicate child support and visitation issues.

REVERSED AND REMANDED WITH DIRECTIONS.