

IN THE COURT OF APPEALS OF IOWA

No. 6-144 / 05-1894

Filed May 24, 2006

IN RE THE MARRIAGE OF ANNE COLLEEN ROHLFSEN AND GREGORY THARAN ROHLFSEN

Upon the Petition of
ANNE COLLEEN ROHLFSEN, n/k/a
ANNE COLLEEN WIARDA,
Petitioner-Appellant,

And Concerning
GREGORY THARAN ROHLFSEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Dale Ruigh, Judge.

Anne Colleen Wiarda challenges the district court's modification of the custody provisions of the decree dissolving her marriage to Gregory Tharan Rohlfsen. **AFFIRMED.**

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

Michael Smith of Craig & Smith, L.L.P., Eldora, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

The district court modified a 1992 dissolution decree and transferred primary care of Macey Marie Rohlfen, born in 1989, from her mother Anne Wiarda to her father Gregory Rohlfen. Anne contends the district court was in error in changing primary physical care. We affirm.

We review de novo. Iowa R. App. P. 6.4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). We give weight to the trial court's findings of fact, but we are not bound by them. Iowa R. App. P. 6.14(6)(g). Courts are empowered to modify the custodial terms of a dissolution decree 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. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004); *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002); *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). 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. *Melchiori*, 644 N.W.2d at 368; *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998).

I. BACKGROUND

Anne and Gregory have two children. Their older child, a son, Nicholas, is now an adult. Following the dissolution Anne remarried, and she and her current husband Michael Wiarda have three children between the ages of six and ten.

Gregory never remarried but he has a daughter who is twelve and who is in the primary physical care of her mother. However, the child spends substantial time with Gregory.

The parties' relationship has been strained from the time they began having problems in their marriage to the current time. Anne's husband Michael has been an aggravating player in a long saga of disputes between Anne and Gregory. In April of 1998 Anne was found in contempt for denying Gregory visitation. In that finding the district court noted that Anne and Michael disapprove of Gregory and his life system and consider him to be inferior to them. The judge noted that Michael harbors an intense personal dislike for Gregory. The court, while recognizing Gregory was no Ward Cleaver, noted Gregory is unwilling to evaporate from his children's life and that Anne and Michael are without legal justification to deny Gregory his rights as the children's parent. The court also specifically found, "[Anne and Michael] should be aware that continued unwarranted interference with visitation rights may form the basis for a transfer of custody under Iowa Code Section 598.23(2)(b)."

In March of 2005 Gregory filed an application for modification contending there was a substantial change in circumstances and it was in Macey's best interest that he be awarded Macey's primary physical care. The modification followed an incident in January of that year where Macey said Michael kicked her out of the house he occupied with her mother. Macey went to live with Gregory and was with him in February and March. Anne arranged family counseling and Macey returned to Anne and Michael's home.

After the modification action was filed a guardian ad litem was appointed for Macey. The guardian ad litem filed a written report recommending that primary care not be changed, but noting that Macey wanted custody changed so she could live with her father.

In November of 2005 the district court entered the order from which this appeal is taken. There the district court specifically found:

The court concludes that Gregory has proven a substantial change in circumstances since the 1992 decree with regard to Macey's physical care. That change consists of Anne's failure to support Gregory's relationship with Macey, the breakdown of Mr. Wiarda's relationship with Macey, Anne's failure to timely address Macey's difficulties with her stepfather, and sixteen year old Macey's strongly-expressed desire to live with her father. Gregory has also proven that he is presently better able than Anne to fulfill the responsibilities of a primary physical caretaker. One important responsibility of a primary caretaker is to facilitate the child's contact with the other parent, unfettered by unpleasantries and recriminations. While he has certainly contributed to the parental conflict over the years by failing to communicate reasonably with Anne, Gregory's overall willingness to foster a continuing relationship between Macey and both of her parents is superior to Anne's. Over a period of several years, Anne and Mr. Wiarda have made it very difficult for Macey to maintain a guilt-free relationship with her father.

The district court also ordered Anne to pay Gregory child support of \$341 a month.

Anne contends (1) Macey's wishes should not be determinative, (2) she has been Macey's primary care provider for over thirteen years, (3) Gregory does not support Macey educationally and does not serve as a good role model, and (4) the transfer of custody separates Macey from her half-siblings.

We first address Anne's contention that Macey's wish to live with her father should not be determinative.¹ Macey testified at length. She was clear in her desire to live with Gregory. She indicated her awareness that Michael did not like her father and Michael liked to pick fights and argue with her about things her father did or did not do. She testified she felt leaving that environment would allow her to establish a better relationship with her mother and Michael. She testified her father has rules, assigns her chores, wants to know who she is with, lets her know when she should be home, expects her to do her homework, and he is easier to talk to than her mother is. She said her father also cooks for her. She indicated if primary care were changed she wanted to visit in her mother's home.

The ultimate question of whether Gregory can provide a superior home is far more complicated than merely asking Macey which parent she wants to live with. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993); see also *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981); *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985). We give less weight to Macey's preference in this modification action than we would if this were the original custody decision. *Jahnel*, 506 N.W.2d at 475. Yet a minor child's preference, with respect to which parent he or she wishes to live with, although not controlling, is relevant and cannot be ignored. *Ellerbroek*, 377 N.W.2d at 258. Her stated preference is a factor to be considered by the court in determining custody arrangements. Iowa Code § 598.41(3)(f) (2005); *In re Marriage of Levsen*, 510 N.W.2d 892, 894 (Iowa Ct. App. 1993); *In re Marriage of*

¹ Our review of the district court order convinces us this was only one of several factors the district court determined supported the modification.

Erickson, 491 N.W.2d 799, 803 (Iowa Ct. App. 1992); *In re Marriage of Bugg*, 492 N.W.2d 452, 454 (Iowa Ct. App. 1992).

In deciding how much weight to give Macey's preference, we consider the following factors: (1) Macey's age and education level, (2) the strength of her preference, (3) her intellectual and emotional make-up, (4) her relationship with family members, and (5) her reasons for her preference. See *Ellerbroek*, 377 N.W.2d at 258-59; see also *In re Marriage of Anderson*, 509 N.W.2d 138, 141-42 (Iowa Ct. App. 1993); *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987). In *Jones v. Jones*, 175 N.W.2d 389, 392 (Iowa 1970), the unqualified desires of fifteen- and thirteen-year-olds to live with their father added impetus to the court's decision to transfer custody to the father.

Macey was several months past her sixteenth birthday at time of trial. She is an intelligent child and, except for a period of difficulty, has been an A and B student. She has a good relationship with her mother and her father, though she described her relationship with her mother as distant. She wants to maintain her relationships with both parents. She has serious issues with her stepfather. Her preference to live with her father is extremely strong. We, as did the district court, give weight to her preference but do not base our decision on her preference alone, but consider it with other factors.

We consider Anne's contention she has been Macey's primary caretaker for thirteen years, has done an excellent job in caring for her, and has supported her financially. Anne argues that, other than Macey's problems in adjusting to the teenage years, Macey has done well.

We agree Anne has been an excellent caretaker of Macey and also recognize that she probably, with Michael's help, has provided nearly all of Macey's financial support. Gregory has a back problem that has made it difficult for him to secure employment. He has paid little child support. While Anne and Michael contend he should be working, the district court noted that the issue of Gregory's ability to pay child support had been litigated twice in the past six years and Anne's position was rejected by both trial and appellate courts.² The district court, while correctly giving Michael credit for helping Anne support Macey, found Michael's continuing criticism of Gregory's employment status to Macey and others increased the stress among the family. We give weight to the care that Anne has provided Macey. We also give Anne credit for seeking counseling services to attempt to resolve Macey's problems with Anne's home and husband.

We next address Anne's concern that Gregory does not support Macey emotionally and educationally and is not a good role model for his daughter. The district court considered the fact that Gregory had not attended school conferences but found Gregory was appropriately attendant to Macey's educational needs.

Gregory admits he has used controlled substances in the past, but findings in prior visitation disputes are that it has not interfered with his care of his children. He has told his daughter that he uses marijuana for back pain. The district court found nothing in the record that showed Gregory possessed or used marijuana while caring for or spending time with Macey.

² In 1999 Gregory's monthly child support was reduced from \$370 to \$75. Anne's subsequent petition to increase was denied.

The district court noted the parties have different discipline approaches. The court found Gregory was more laid back while Anne and Michael are more authoritative. Anne argues that Macey wants to be with her father because she can get by with more things. The district court found otherwise.

While we do not approve of Gregory's use of marijuana, we give weight to the finding of the district court in this and earlier proceedings that he has not used or possessed it while caring for or spending time with Macey.

Anne contends the district court's order separates Macey from her half-siblings. The physical custody of siblings should be separated only for good and compelling reasons. *Blume*, 473 N.W.2d 629, 631 (Iowa Ct. App. 1991); see *In re Marriage of Winter*, 223 N.W.2d 165, 168 (Iowa 1974).

Anne's three other children are six to ten years younger than Macey is. When asked about her relationship with them Macey said it was fine and then said, "they are younger, so at times I kind of wish that they weren't around quite as much, but that's just a sibling thing I suppose."

Macey's desire to visit her mother and these three half-siblings and the close proximity of the homes of her two parents allow her to maintain a relationship with these children. And while the district court order separates Macey from these half-siblings it puts Macey in closer contact with Gregory's other daughter who is closer to Macey's age than Anne's children. Gregory's younger daughter, though not in his custody, spends considerable time in his home with her mother's assent.

We consider the relationship of Macey with her half-siblings in assessing the modification order entered by the district court.

We also consider the district court's finding that Anne's longstanding unwillingness or ability to allow Macey to have a comfortable relationship with Gregory has undermined her effectiveness as a primary care parent.

Iowa Code section 598.41(1)(c) lists a number of directives to guide courts in child custody determinations. *In re Marriage of Udelhofen*, 444 N.W.2d 473, 475 (Iowa 1989). Section 598.41(1)(c) provides:

The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.

In *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994), we addressed a situation where parents sought to put the other parent in an unfavorable light and considered it a factor in modifying a custody award. Other cases have addressed similar complaints under other circumstances. See *Udelhofen*, 444 N.W.2d at 474-76; *In re Marriage of Leyda*, 355 N.W.2d 862, 865-67 (Iowa 1984); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659-60 (Iowa Ct. App. 1991). The hostile conduct need not come only from the custodial parent. In *Rosenfeld*, we considered the activities of the custodial father's current wife in affirming a district court decree modifying custody and transferring it to the mother. *Rosenfeld*, 524 N.W.2d at 215.

In conclusion, while Macey's wishes to live with her father are strong, she lived with her mother and stepfather for nearly ten years without a serious incident. Gregory has deficiencies but has remained in contact with his children. He has financial support from his family but he has not worked for some time and has applied for social security disability. He has a good relationship with both his

daughters, but his son continues to live with his mother and has no contact with Gregory.

A major problem in the Wiarda home has been the relationship between Macey and her stepfather, particularly his constant attempts to degrade Gregory in his daughter's eyes. We consider the actions of stepparents when they attempt to thwart a good relationship between their stepchild and his or her birth parent. See *Rosenfeld*, 524 N.W.2d at 215. In *Rosenfeld* we modified a custodial degree and in doing so gave substantial weight to the actions of the custodial parent's spouse who, among other things, forbade the child to speak to her birth mother at church functions. *Id.*

Michael testified that, since counseling, he is letting Anne discipline Macey. Macey testified Michael is more bearable, but she was fearful he might revert to his old habits. We can understand Michael's frustration with Anne not receiving support for the children from Gregory. Yet this does not justify the measures Michael has gone to in attempting to alienate Macey from her father. Anne also has considerable animosity toward Gregory and apparently sought to be very controlling in prior years. She certainly had an obligation to protect her daughter. However, earlier court rulings illustrate that prior courts have found her to be too controlling and adverse to Gregory.

The guardian ad litem consulted with Macey, Anne, Michael, Macey's brother Nicholas, Michael's mother Judy Wiarda, and the family counselor, Kathy Anastasi. In recommending that custody remain with Anne, the guardian ad litem noted that the family counselor was of the opinion she had beneficial results and recommended counseling continue. The guardian ad litem also recommended

that Anne and Gregory improve their communication, and that contact between Gregory and Michael should cease unless a part of counseling. The guardian ad litem also considered and appeared to give weight to a birthday present Macey had for Gregory in her closet that Macey's mother found. We give the opinion of the guardian ad litem weight. See *Rosenfeld*, 524 N.W.2d at 215. We are concerned however that the report the guardian ad litem filed, while relating he conferred with Michael's mother, makes no indication that he conferred with Gregory.

After careful review and giving the required deference to the factual findings of the district court, we affirm.

AFFIRMED.

Huitink, J., dissents.

HUITINK, J. (dissenting)

I respectfully dissent. The majority's decision contradicts the recommendations made by Macey's family counselor and her guardian ad litem. In a difficult and emotionally charged custody case such as this, we are better informed by the critical judgment of the professionals than we are by the preferences of a troubled adolescent or the highly partisan and self-serving testimony of the parents. Based on the recommendations made by the parties' family counselor and the guardian ad litem, I would reverse the trial court's modification decree and deny Greg's request for a transfer of physical care.