IN THE COURT OF APPEALS OF IOWA

No. 6-287 / 05-1944
Filed May 10, 2006

IN RE THE MARRIAGE OF UTHANA RENEE GOSENBERG AND CHRISTOPHER WAYNE GOSENBERG

Upon the Petition of
UTHANA RENEE GOSENBERG,
n/k/a UTHANA ADAMS,
Petitioner-Appellee,

vs.

CHRISTOPHER WAYNE GOSENBERG,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Christopher Gosenberg appeals from the denial of his application to modify the physical care and child support provisions of the decree dissolving his marriage to Uthana Gosenberg. **REVERSED AND REMANDED.**

Allison M. Heffern and Elizabeth V. Croco of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellant

Uthana Adams, Templeton, pro se.

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

EISENHAUER, J.

Christopher Gosenberg appeals from the denial of his application to modify the physical care and child support provisions of the decree dissolving his marriage to Uthana Gosenberg. He contends the district court erred in failing to enter judgment against Uthana, and in allowing her to offer evidence and testify by telephone. He further contends the court erred in concluding he had not proven the existence of a substantial change in circumstances warranting modification and had not proven he could offer superior care. We reverse and remand.

I. Background Facts and Proceedings. The parties were married in July 1992. They have one minor child, Daniel, born in 1993. The marriage was dissolved by decree on April 26, 2001. The parties agreed to issues relating to physical care and visitation with Daniel. Uthana was granted physical care, with Christopher receiving visitation weekly from 3:30 p.m. Thursday until 10:00 a.m. Sunday. At the time, both parties resided in Cedar Rapids.

On June 24, 2004, Christopher filed an application to modify the physical care and child support provisions of the dissolution decree based on Uthana's impending move to California. He requested he be awarded physical care of Daniel. Uthana moved with Daniel to California in August 2004.

Pretrial conference was scheduled for October 21, 2004, and later rescheduled for October 28, 2004. Uthana was to participate by telephone, but failed to participate. Her counsel was unable to reach her. The pretrial statement was left with Uthana's counsel to be completed and filed. On

November 11, 2004, Uthana's counsel withdrew from representing her. Uthana continued during the proceedings pro se.

On December 30, 2004, Christopher filed a motion to compel discovery and mediation. Although Christopher had been attempting to schedule mediation since July 6, 2004, Uthana had not responded. Additionally, Christopher had served Uthana with discovery requests on August 16, 2004, which remained unanswered. The court granted the motion on January 14, 2005. Uthana was given fourteen days in which to respond to the discovery.

On March 7, 2005, Christopher filed a motion for sanctions because Uthana had still not responded to the discovery requests. Christopher requested the court sanction Uthana by requiring her to provide a current address and phone number and to respond to the discovery within ten days. If Uthana failed to so do, Christopher requested default judgment be entered against Uthana and Daniel's care be transferred to him.

On April 29, 2005, the district court ordered Uthana to comply with the discovery requests and return the pretrial statement within thirty days or face possible sanctions, including default judgment, a finding of contempt, or assessment of attorney fees. The court also ordered the parties to participate in mediation.

On June 14, 2005, Christopher again moved to sanction Uthana. Shortly before the April 29 hearing, Uthana mailed to the clerk of court her answers to the interrogatories, but did not provide them to counsel. Uthana had failed, however, to file the pretrial statement or to respond to the request for production of documents. Furthermore, Christopher alleged her answers to the

interrogatories were incomplete. As a sanction, Christopher requested Daniel be transferred to his care until the court entered its final order on the application for modification.

On August 9, 2005, the court entered its order regarding Christopher's request for sanctions. The court found that while Uthana's responses to discovery were far from adequate, "her actions do not rise to the level of willful disobedience that compel me to visit a sanction upon her that may well determine the ultimate outcome of the litigation." The court deferred ruling on the motion for sanctions pending trial. The court also ordered that Uthana's failure to personally appear at trial would result in default being entered against her and Christopher would be permitted to present evidence in her absence. The court ruled that the trial would not be continued without Christopher's consent. The court further stated, "Uthana shall continue to respond to discovery and shall sign the releases requested by Christopher's counsel. She shall also confer with Christopher's counsel about scheduling the appearance of her witnesses and their mode of testimony."

In August 2005, Christopher's counsel attempted to contact Uthana regarding her ability to return to Iowa for a deposition and mediation. Uthana did not respond. Counsel then inquired as to her availability for deposition by telephone. Uthana again did not respond. Notice was sent on August 24, 2005, scheduling Uthana for a telephonic deposition on September 8, 2005. On September 6, Uthana indicated she would be unable to participate in the telephonic deposition and proposed the deposition be rescheduled for the following Saturday or Monday. She stated she did not have daycare for Daniel at

the time, who was home schooled, and she did not want him to overhear the deposition. Counsel explained that the times suggested by Uthana were not workable because they were either too short or outside of working hours. Uthana failed to call for the deposition at the scheduled time on September 8. On October 4, 2005, Christopher filed a motion for sanctions regarding Uthana's failure to appear at the deposition. He requested Uthana be kept from testifying at trial as a sanction. The motion was not ruled on prior to trial.

On October 14, 2005, Uthana requested she be allowed to participate at trial by telephone or, in the alternative, to continue the trial to a later date at which she would be able to personally appear. Trial had been scheduled for October 19 and 20 since June 21, 2005.

The matter of sanctions was discussed at trial on October 19, 2005. Uthana claimed to have laryngitis, so she communicated through her husband, Steve Adams. The court found Uthana in default, but noted that Christopher was still required to prove the grounds for modification. The court allowed Uthana to cross-examine witnesses. At the close of Christopher's evidence, Uthana and Steve testified by telephone.

On October 21, 2005, the district court entered its ruling on the motion to modify. The court found Christopher had failed to prove a substantial change in circumstance warranting modification. The court also found Christopher failed to show he was able to minister more effectively to Daniel's well-being. Finally, the court found it was in Daniel's best interest that physical care be continued with Uthana.

II. Modification of Physical Care. We review the record de novo in proceedings to modify the custodial provisions of a dissolution decree. *In re Marriage of Pendergast,* 565 N.W.2d 354, 356 (Iowa Ct. App. 1997). We give weight to the findings of the trial court, although they are not binding. *Id.*

Following the entry of default judgment, the court must still consider the evidence to determine whether physical care should be modified. A modification of child custody is appropriate only when there has been a substantial change in circumstances since the time 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 child. *Id.*

Iowa Code section 598.21(8A) (2003) states that a court may consider a move of over 150 miles to be a substantial change in circumstances warranting modification of a dissolution decree. While our courts have not historically changed custody on the basis of one parent's move, these cases pre-date the addition of section 598.21(8A). *In re Marriage of Mayfield,* 577 N.W.2d 872, 873-74 (Iowa Ct. App. 1998). We conclude Uthana's move from Cedar Rapids to California, a move of approximately 1500 miles, is a substantial change in circumstances not contemplated when the decree was entered.

If a substantial change in circumstance is found, the court must then consider whether a change in custody is warranted. *See In re Marriage of Whalen,* 569 N.W.2d 626, 629 (Iowa Ct. App. 1997). "A move in and of itself does not justify changing physical care." *Id.* at 630. The criteria for determining child custody in original dissolution actions are applied in modification

proceedings as well. *In re Marriage of Courtade,* 560 N.W.2d 36, 37 (Iowa Ct. App. 1996). The question is not which home is better, but whether Christopher has demonstrated he can offer Daniel superior care. *See In re Marriage of Morton,* 244 N.W.2d 819, 821 (Iowa 1976). Christopher must show an ability to minister to Daniel's needs superior to Uthana. *Whalen,* 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the children, custody should not be changed. *In re Marriage of Smith,* 491 N.W.2d 538, 541 (Iowa Ct. App. 1992). The burden for a party petitioning for a change in a dissolution is heavy. *See In re Marriage of Downing,* 432 N.W.2d 692, 693 (Iowa Ct. App. 1988). Children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. *In re Marriage of Rosenfeld,* 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). Custody, once fixed, should be disturbed only for the most cogent reasons. *See Downing,* 432 N.W.2d at 693. Christopher has the burden to show by the preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that Daniel's interests make it expedient to award custody to him. *See In re Marriage of Jerome,* 378 N.W.2d 302, 304 (Iowa Ct. App. 1985).

We conclude Christopher has shown he can provide Daniel superior care. Christopher has resided at the same residence for fifteen years. He has worked for the same company for nearly ten years. Evidence was presented at trial showing Christopher would be able to change jobs within his company to allow him to spend more time with Daniel. Christopher, by all accounts, is a very capable father. He provides consistency and stability for Daniel, and encourages

him in making the transition from childhood to adulthood. He encourages Daniel's relationship with other relatives, many of whom still live in Cedar Rapids. We believe Christopher will also be able to better foster a relationship between Daniel and Uthana than Uthana has afforded Christopher.

Conversely, Uthana has demonstrated a great deal of instability. She is unable to maintain consistent housing or employment. Her financial difficulties have caused her to lose her home and to have to move Daniel in with relatives and other families. In many cases, she and Daniel had to share a room as a result. Contributing to her financial difficulties is Uthana's decision to send Daniel to a private school and to invest Christopher's child support payments into a fund for Daniel's two-year religious mission when he turns eighteen. While it is ordinarily commendable for a parent to invest in their child's future, we must question the wisdom of so heavily investing in a child's future when so doing comes at the expense of providing basic shelter.

After moving to California, Uthana enrolled Daniel in a charter school. She did so one month after the school year began, despite knowing she would have physical care of Daniel within ample time to timely enroll him. She did not inform Christopher of her decision. The charter school provides Daniel with one day of classroom instruction per week. The other four days, Daniel is to study at home with Uthana as his teacher. Uthana has only had formal schooling through the sixth grade. Since enrolling in the charter school, Daniel's performance has slipped from average/above-average to below-average.

Uthana has also failed to inform Christopher of many important events. She regularly failed to notify Christopher when she moved. She also did not

advise him that she was remarrying and failed to share any information regarding Daniel's new stepfather. Uthana did not obtain information regarding Daniel's immunizations so that Christopher could bring them up to date.

We conclude Christopher is better able to bring Daniel to healthy physical, mental, and social maturity. Accordingly, we reverse the district court and grant Christopher physical care of Daniel. The matter is remanded to consider the issues of visitation and child support.

III. Discovery Sanctions. We have detailed the tortured procedural history of this case. However, because we have modified the physical care provisions of this dissolution of marriage decree, we choose not to address the discovery sanctions issue.

REVERSED AND REMANDED.