IN THE COURT OF APPEALS OF IOWA

No. 6-357 / 05-1857
Filed June 14, 2006

IN RE THE MARRIAGE OF DAVID L. WONDERS AND AUDREY C. WONDERS

Upon the Petition of
DAVID L. WONDERS,
Petitioner-Appellant,

And Concerning
AUDREY C. WONDERS,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

David L. Wonders appeals from an order modifying the decree dissolving his marriage to Audrey C. Wonders and increasing his child support. **AFFIRMED AS MODIFIED.**

Erin Broadston of Mowrey Law Firm, Marshalltown, for appellant.

Kevin M. O'Hare and Bethany J. Currie of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C., Marshalltown, for appellee.

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

SACKETT, C.J.

David L. Wonders appeals from an order modifying the decree dissolving his marriage to Audrey C. Wonders and increasing his child support. He further contends the district court should have modified the decree to give him primary physical care or additional visitation. We affirm as modified.

I. Background Facts and Proceedings.

The marriage of David and Audrey was dissolved in 2002. The district court approved their stipulated settlement, which put primary physical care of their two children, Jared, born in 1990, and Nicole, born in 1993, with Audrey. David was provided visitation every other weekend, certain holidays and school breaks, including six weeks in the summer. In addition, it was provided that while Audrey was employed at United Parcel Service, David would pick up the children from school or daycare and keep them until Audrey got off work at 7:30 or 8:00 o'clock in the evening. A deviation from the child support guidelines was ordered, and David was ordered to pay child support of $350 a month.

In January 2005 Audrey sought a modification of the decree contending David should pay additional child support. David counterclaimed contending he should be granted primary physical care of the children or that his visitation should be increased. He further requested in the event custody or visitation were changed that the issue of child support be revisited. The district court, after hearing the evidence, increased David's child support obligation to $541.85 a month. The court found David had failed to show he could minister more effectively to the children than Audrey and denied David's claim for primary physical care or additional visitation.

II. Scope of Review.

Our review of modification proceedings is de novo. Iowa R. App. P. 6.4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). 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 trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

III. Primary Physical Care.

We first address David's argument that he should have primary physical care or additional visitation. His basic argument is he is the primary care parent. He argues that while Audrey has the children in the morning, they get themselves up and ready for school and he has the children for most of their after school hours and for the evening meal. David says the children are involved in more activities than they were at the time of the dissolution and he transports them to their activities. David also advances that Jared has told him and a friend's mother he would rather live with his father.

The court can modify custody 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.* Additionally, the parent seeking custody must prove an ability to minister more effectively to the child's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). This strict standard is premised on

the principle that once custody of a child has been determined it should be disturbed for only the most cogent reasons. *Id.*

David's argument that he has the children for a large part of the day when they are not in school is not without merit; however, this is the arrangement to which the parties agreed and the court approved as long as Audrey was still working for United Parcel Service. She is still working there. Consequently, David has failed to show a substantial change of circumstance to support modification of either custody or visitation. Furthermore, the district court found, and we agree, that the children are doing well and have a close relationship with both parents, and David has failed to show he could render superior care. David has ample visitation and there was no reason for the district court to order more. We affirm the district court's refusal to change primary care or order additional visitation for David.

IV. Child Support.

David contends he was ordered to pay too much child support. He does not dispute that his income has increased. He does argue, however, that there should again be a deviation in his child support because of the extensive time he spends with the children. The parties initially agreed that David should have a about a sixteen percent reduction in his child support because he spends extensive time with the children. He continues to spend some four hours with the children on weekdays, provides their evening meal, and also provides a substantial portion of their transportation for activities. David arguably spends more time and effort with the children on weekdays than does Audrey. Audrey has the children overnight but the evidence is they get up by themselves in the

morning and fix their own breakfast. Audrey conceded at trial and in her brief that David spends considerable time with the children and she agreed he should have a reduction. David does not qualify for extraordinary visitation credit under Iowa Court Rule 9.9 because "days," as defined by the rule, means overnights spent caring for the children. However, rule 9.11 also provides for variation on a finding by the district court that substantial injustice would result to David, Audrey or the children or that adjustment was necessary to do justice. *See* Iowa Ct. R. 9.9. When justice clearly demands it, the guidelines provide for a modicum of flexibility. *See State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). Special circumstances can call for an adjustment up or down when necessary to do justice between the parties. *In re Marriage of Nelson*, 570 N.W.2d 103, 108 (Iowa 1997); *State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 695 (Iowa 1993). However, any request for variation should be viewed with great caution. *Nelson*, 570 N.W.2d at 108. Deviation from the child support guidelines is discouraged. *In re Marriage of Jones*, 653 N.W.2d 589, 593 (Iowa 2002). The court has judicial discretion to consider factors that make application of the guidelines unjustified. *In re Marriage of Thede*, 568 N.W.2d 59, 60 (Iowa Ct. App. 1997). Under the particular circumstances of this case we believe the district court abused its discretion in not granting David's request for a variation. We modify to reduce his child support by sixteen percent, the percent agreed to at the time of the original decree. David's child support shall be $455 per month. We deny Audrey's request for appellate attorney fees. Court costs shall be taxed one-half to each party.

AFFIRMED AS MODIFIED.