

IN THE COURT OF APPEALS OF IOWA

No. 6-577 / 05-1967
Filed August 23, 2006

IN RE THE MARRIAGE OF MICHAEL J. LENZ AND TRACY J. LENZ

Upon the Petition of
MICHAEL J. LENZ,
Petitioner-Appellant,

And Concerning
TRACY J. LENZ,
Respondent-Appellee.

Appeal from the Iowa District Court for O'Brien County, John Duffy, Judge.

A father appeals from the district court's denial of his petition to modify the physical care of the parties' child. **AFFIRMED.**

Randall G. Sease, Hartley, for appellant.

Andrea VanBeek, Orange City, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Michael Lenz appeals from the district court's denial of his petition to modify the decree dissolving his marriage to Tracy Lenz. Michael asserts the court erred when it denied his request to modify the physical care of the parties' child, Kari. We affirm the district court.

Kari was born in 1992. The decree dissolving the parties' marriage, entered in 1997, granted Michael and Tracy joint legal custody of Kari and placed the child's physical care with Tracy. In 1998 Michael filed a petition to modify physical care, which was denied by the district court.¹

In 2003 Michael again filed a petition to modify Kari's physical placement. Michael alleged a number of substantial and material changes in circumstances had occurred since the filing of the original decree, including the fact that Kari was expressing a desire to live with her father and that Tracy had become financially irresponsible, which warranted placing Kari in Michael's sole physical care. Following a July 2005 trial the district court denied the request, concluding Michael had failed to establish "that there are good and cogent reasons to modify" physical care, or that "he can minister more effectively to the long term best interests of the child." Michael appeals, asserting the court erred when it failed to modify the dissolution decree and place Kari in his physical care.²

We conduct a de novo review of the district court's decision. Iowa R. App. P. 6.4. We give weight to the court's fact findings, especially in determining

¹ The court did grant Michael's request to reduce his child support obligation.

² Michael asserts the district court further erred by failing to consider joint physical care. Such a request was neither pled by Michael nor ruled on by the district court, and Michael did not raise the court's alleged failure to consider the issue in a post-ruling motion. Accordingly, error has not been preserved for our review. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

witness credibility, but are not bound by them. Iowa R. App. P. 6.14(6)(g). Our overriding consideration is Kari's best interests. Iowa R. App. P. 14(6)(o); *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997).

Once the custody and care of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Accordingly, as the party seeking modification, Michael bears a heavy burden. *Id.* He must establish a substantial change in circumstances has occurred since entry of the dissolution decree or of any subsequent intervening proceeding that considered the situation of the parties upon a petition for the same relief, a change that was not within the contemplation of the district court at the time the prior relevant decree was entered. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). The change must be more or less permanent and relate to Kari's welfare. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Michael must also demonstrate he is the parent who can more effectively minister to Kari's well-being. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). We agree with the district court's conclusion that Michael has not met his burden.

Although Michael asserts the record demonstrates numerous substantial changes in circumstances, he fails to cite to any portion of the record where evidence of these changes can be found. Given Michael's failure to support his claim, we are not bound to consider his position. See Iowa Rs. App. P. 6.14(1)(f), (7); *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002).

Moreover, while a review of the appendix reveals several significant changes have occurred in Tracy's life since the dissolution decree was entered, including serious financial setbacks, there is no convincing evidence these changes have adversely affected Kari's welfare or that they will do so in the future. Rather, the evidence indicates Kari is a happy, active, healthy,³ well-adjusted child who has done well in Tracy's physical care. See *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995) (noting we give careful consideration to allowing a child to remain with the primary caregiver). She has a good relationship with not only her mother but her mother's live-in fiancé; is bonded with her younger half-sister, who was approximately two-years old at the time of trial; and is doing very well both academically and socially.

We recognize Michael is a capable and loving parent. We also recognize that, like Tracy, Michael is not without his faults. An assessment of each party's strengths and weaknesses indicates they are equally capable of providing Kari suitable care. However, Michael's mere suitability as a caretaker does not provide a sufficient basis to alter Kari's physical placement. Nor does Michael's unsupported assertion that Kari no longer wishes to reside with her mother.⁴ See *Thielges*, 623 N.W.2d at 239 (noting child's wishes are a relevant consideration, but are afforded less weight in a modification proceeding than in an initial care determination). Based on our review of record, we conclude Michael has failed to demonstrate either a substantial change in circumstances

³ Michael notes that Kari suffers from a congenital eye condition, but does not point to any evidence Tracy has failed to provide proper care and treatment for this condition.

⁴ This assertion finds no support in the appendix beyond the allegations in Michael's modification petition, and was in fact contradicted by Kari's psychologist.

or a superior ability to minister to Kari's well being. We accordingly affirm the district court's denial of his modification petition.

AFFIRMED.