IN THE COURT OF APPEALS OF IOWA

No. 6-722 / 06-0592
Filed December 13, 2006

IN RE THE MARRIAGE OF KRISTINA M. PICKENS AND KRIS D. PICKENS

Upon the Petition of
KRISTINA M. PICKENS,
Petitioner-Appellee,

And Concerning
KRIS D. PICKENS,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, David Schoenthaler, Judge.

A father appeals from a district court order that denied his petition to modify the parties' dissolution decree to place physical care of the parties' three minor children with him. **AFFIRMED.**

Michael Koury of Bush, Motto, Creen & Koury, P.C., Davenport, for appellant.

Arthur Buzzell, Davenport, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Kris Pickens appeals from the district court's denial of his petition to modify the parties' dissolution decree to place physical care of the parties' children with him instead of his former wife, Kristina. We affirm.

I. Background Facts and Proceedings

Kris and Kristina were married in 1989. The district court dissolved their marriage in January 2004. The dissolution decree awarded the parties joint legal custody of their three children, Jacob, born in July 1992; Alexandra, born in June 1994; and Carter, born in June 1998. The decree placed physical care of the children with Kristina. Following the dissolution of their marriage, Kristina and the children continued to reside in the marital home in Bettendorf, and Kris resided in a residence located approximately one and a half miles from Kristina's residence.

Kristina met Don, who lives in a suburb of Minneapolis, Minnesota, in August 2004. She began dating Don and became engaged to marry him. There have also been some changes in Kris's personal life. Kris has been engaged to marry Stacy since the fall of 2005. Stacy and her two children currently reside with Kris in his home in Bettendorf.

Kristina informed Kris she intended to relocate from Bettendorf to Minneapolis with the children. In response, Kris filed a petition to modify the physical care provisions of the dissolution decree. He contended a substantial change in circumstances had occurred which warranted a change in physical care based on Kristina's decision to move the children away from their extended family, friends, and school, making it more difficult for him to exercise visitation and participate in the children's lives.

The modification trial was scheduled for March 7, 2006. Just before trial, Kris was permitted to orally modify his application by adding a request for an injunction restraining his former spouse from moving the children from Iowa to Minnesota. Following trial, the district court entered an order that denied Kris's application to modify. The court also denied his application for injunctive relief. The court established a new visitation schedule for Kristina and Kris, which takes into account the distance between the parties' homes. Kris has appealed.

II. Scope and Standards of Review

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We give weight to the trial court's findings of fact, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). Prior cases have little precedential value, so we will predominantly base our decision on the facts and circumstances unique to the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Discussion

To modify the custodial provisions of the parties' dissolution decree, Kris must establish by a preponderance of the evidence the conditions since the decree was entered have materially and substantially changed. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). As the parent seeking to alter physical care, he must also prove he possesses the ability to provide superior care for the children. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). This strict standard is premised on the principle that once custody of

children has been determined, it should be disturbed for only the most cogent reasons. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996).

The ability of the primary care parent to relocate has been tempered by Iowa Code section 598.21(8A) (2005), which provides that the court may consider a relocation of 150 miles or more a substantial change in circumstances. Although section 598.21(8A) does not require the court to find a substantial change in circumstances from the mere fact of a distant relocation, we believe Kris has shown a substantial change in circumstances in this case. Under the parties' original dissolution decree, Kris has visitation every other weekend and every Wednesday. All other visitation exercised by Kris was as mutually agreed on by the parties. Minneapolis is approximately a six-hour drive from Bettendorf. The distance between the two cities will disrupt the visitation schedule established in the dissolution decree and limit Kris's access to the children. Applying section 598.21(8A), we conclude Kris has proven a substantial change in circumstances that was not contemplated by the district court, is permanent, and relates to the welfare of the children.

We next consider whether Kris has met his additional burden to prove he is better able to minister to the needs of the children than Kristina. We begin our consideration of this issue by expressing our agreement with the district court's conclusion that "these are two good parents." Each of the parties has a close relationship with the children. Both are capable caretakers.

Nothing in the record suggests Kristina's proposed move to Minnesota is motivated by a desire to defeat Kris's visitation rights or undermine his relationship with the children. Kristina informed Kris that she intended to marry

and move to Minnesota. Prior to her engagement, she discussed with the children the possibility she might remarry and move to Minneapolis. She remained in Bettendorf while this modification action was pending. In addition, she delayed her remarriage and chose not to relocate until the children finished their school year. Kristina proposed a modified visitation schedule that would provide Kris significant contact with the children after her move. Kristina's fiancé has expressed a willingness to facilitate visitation.

Kris is not critical of Kristina's care of the children. Kristina has been the children's primary care parent. She plans to continue as a stay-at-home mother after she moves to Minneapolis.[1] Her fiancé has a comfortable six-bedroom home within one mile of the public school and the Catholic Church which the children will attend after they move. The court found the children would be changing schools the year following trial whether they continued to live in Bettendorf or moved to Minneapolis. Although Kristina's proposed move with the children will make visitation more difficult, the visitation schedule established by the district court will allow Kris to remain active in his children's lives.

The record in this case demonstrates Kris is a competent parent. However, it does not demonstrate he has the ability to offer the children better care than they would receive if Kristina remains their primary physical caretaker. If both parents are found to be equally competent to minister to the children's well-being, custody should not be changed. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App.1997).

[1] Because of Don's income, it does not appear it will be necessary for Kristina to work outside the home.

IV. Conclusion

Because we conclude Kris has not met his burden to show he possesses the ability to provide superior care for the children, we affirm the district court's decision to deny his application to modify and his application for injunctive relief.

AFFIRMED.