IN THE COURT OF APPEALS OF IOWA

No. 7-426 / 04-0607
Filed August 8, 2007

IN RE THE MARRIAGE OF PATRICE C. DALLY AND DOUGLAS K. DALLY

Upon the Petition of
PATRICE C. DALLY, n/k/a
PATRICE C. SHERIDAN,
Petitioner-Appellee,

And Concerning
DOUGLAS K. DALLY,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

A father appeals from a district court ruling granting the mother's petition to modify visitation provisions of the parties' dissolution decree. **AFFIRMED.**

Douglas K. Dally, Evansdale, appellant pro se.

Timothy J. Luce of Anfinson & Luce, P.L.C., Waterloo, for appellee.

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

PER CURIAM

Douglas Dally appeals from a district court ruling granting Patrice Dally's, n/k/a Patrice Sheridan, petition to modify visitation provisions of the parties' dissolution decree. We affirm the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

The parties' marriage was dissolved on June 28, 1989. They had three children together, Christopher, born April 27, 1984, Jennifer, born August 16, 1986, and Megan, born October 15, 1989. The dissolution decree placed the children in the parties' joint legal custody and in Patrice's physical care. Douglas was granted visitation with the children.

Shortly after their dissolution, the parties began a long-drawn-out battle over virtually every aspect of their decree. As the district court aptly observed, "there is one word which describes the parties' relationship . . . acrimonious." The first of many contempt actions was filed only three months after the entry of the decree, and the first modification proceeding followed soon thereafter.[1]

In June or July 2002, Patrice remarried and moved to Illinois with Jennifer and Megan. The visitation provisions of the decree were modified on July 29, 2002, in order to accommodate the change in residence. Douglas was granted visitation with Jennifer and Megan on the first, third, and fifth weekend of every month.[2] He was also granted six weeks of visitation during the summer.

Patrice was found in contempt of court on August 11, 2003, for denying Douglas visitation with the minor children. She filed the present petition to modify

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[1] Since the entry of the dissolution decree, the parties have filed approximately five contempt actions and five modification proceedings.

[2] Douglas's visitation with Christopher was not addressed because he was eighteen years old at the time.

the visitation provisions of the decree on August 12, 2003, alleging the "children's school, extra curricular activities, and work schedules are causing conflicts with" summer and weekend visitation. Douglas filed a pro se "Answer and Counterclaim," seeking physical care of Jennifer and Megan due to Patrice's continued denial of visitation.

On February 5, 2004, the district court granted Patrice's modification petition and dismissed Douglas's counterclaim. After "listening to the testimony of [Patrice], talking to the parties' minor children and reviewing the written testimony of [Douglas]," the district court determined a "modification of visitation is absolutely essential." The district court reduced Douglas's weekend visitation from two or three weekends per month to one weekend per month and reduced his summer visitation from six weeks to five weeks. Douglas filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court granted his request that travel expenses be paid directly to him instead of as a credit on his child support obligation and denied the motion in all other respects.

Douglas appeals,[3] claiming the district court erred in modifying his visitation with Jennifer and Megan.[4] He contends Patrice failed to establish a

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[3] While this appeal was pending, Patrice filed another petition to modify on April 24, 2006, seeking a modification of Douglas's 2006 summer visitation with Megan. The district court granted Patrice's modification petition on June 28, 2006, and decreased Douglas's summer visitation with Megan. Patrice then filed a motion to dismiss this appeal, contending the June 28, 2006, "[m]odification is the current rule of the case and has not been appealed. . . ." Douglas timely appealed the district court's February 5, 2004, modification ruling, which was a final judgment. *See* Iowa R. App. P. 6.1(1); 6.5(1). We find the motion to dismiss the appeal should be overruled. *See Johnson v. Johnson*, 188 N.W.2d 288, 293 (Iowa 1971) (recognizing "there may be and often are two final decrees in the same cause . . . from each of which an appeal will lie." (internal quotation omitted)).

[4] Jennifer turned eighteen on August 16, 2004, during this appeal and is therefore now of legal age. Thus, the issue of whether the district court erred in modifying Douglas's visitation with Jennifer is moot. *See Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d

"significant change in circumstances" warranting a modification of visitation, and the modified visitation schedule "does not accord him maximum continuing physical and emotional contact with his child." [5]

II. SCOPE AND STANDARDS OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. 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 witnesses, but are not bound by them. Iowa R. App. 6.14(6)(*g*); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

III. MERITS.

In order to modify the visitation provisions of a dissolution decree, a party must establish by a preponderance of the evidence there has been a material change in circumstances since the decree, and the requested modification is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000). The degree of change required to modify the visitation provisions of a dissolution decree is much less extensive than what is required to modify the custodial provisions. *Nicolou v. Clements*, 516 N.W.2d 905, 906 (Iowa Ct. App. 1994). Generally, liberal visitation is in a child's best interests "insofar as is reasonable" because it maximizes physical and emotional contact with both parents. Iowa Code § 598.41(1)(a) (2003). However, "[a]lthough

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180, 183 (Iowa 2005). Furthermore, we note Douglas does not raise the district court's denial of his request for physical care of Jennifer and Megan as an issue on appeal.

[5] In support of his argument, Douglas refers to matters that occurred after the filing of this appeal. We are limited to consideration of evidence in the record at the time of the appeal, and any matters outside the record on appeal are disregarded. *In re Marriage of Keith*, 513 N.W.2d 769, 771 (Iowa Ct. App. 1994).

liberal visitation is the benchmark, our governing consideration in defining visitation rights is the best interests of the children, not those of the parent seeking visitation." *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994).

We find Patrice established a sufficient change in circumstances warranting a modification of Douglas's visitation with Megan. Since the last modification proceeding in 2002, Megan became busier with school, friends, volunteer activities, and sports. She is an honor roll student. She engages in regular volunteer work in order to assist her in obtaining grants and scholarships for her anticipated college career. She was not able to take part in her volunteer activities during the summer of 2003 due to her extended visitation with Douglas. Megan also participates in soccer, and she indicated an interest in becoming involved with her school's track program. Her soccer games take place on Saturdays. The visitation schedule provided for in the July 29, 2002, modification would require Megan to miss half of her soccer games.

The record evidences Megan's desire to modify her visitation with her father in order to accommodate her increasingly full life. "When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining" the custody arrangement. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). Megan is of sufficient age, intelligence, and maturity to have her wishes considered when creating a visitation schedule with her father.

We find the modified visitation schedule entered by the district court carefully balances the realities of Megan's busy schedule and the distance between the parties' households with the statutory preference of maximum continuing physical and emotional contact with both parents. *See e.g. id.* at 103 (approving a reduction in visitation between a father and his daughter due to the distance between the households and "the fact that [the child] . . . will presumably be increasingly involved with school and friendship related activities."). The visitation provisions of the district court's modification order are reasonable and in Megan's best interests.

IV. CONCLUSION.

Based on our de novo review, we conclude Patrice established a change in circumstances warranting a modification of the visitation provisions of the parties' decree. We further conclude Patrice established that modification of the visitation provisions is in the best interests of the child. We therefore affirm the district court.[6]

AFFIRMED.

[6] Douglas requests that we modify the parties' decree, "enter into an investigation of" Patrice's counsel, and find Patrice in contempt. We cannot grant such relief in our capacity as an appellate court. However, he is free to pursue any appropriate relief in the district court.