IN THE COURT OF APPEALS OF IOWA

No. 8-192 / 07-1862
Filed June 25, 2008

IN RE THE MARRIAGE OF JANET C. SCHILTZ AND RICHARD J. SCHILTZ

Upon the Petition of
JANET C. SCHILTZ n/k/a JANET C. MEYER,
Petitioner-Appellant,

And Concerning
RICHARD J. SCHILTZ,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

A mother appeals from the district court's modification of physical care and other provisions of the parties' dissolution decree. **AFFIRMED.**

Emily E. Reiners and Peter D. Arling of O'Connor & Thomas, P.C., Dubuque, for appellant.

Robert L. Sudmeier and Jenny L. Harris of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Heard by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Richard Schiltz and Janet Schiltz (now Janet Meyer) are the parents of Luke, born in 1993. When they divorced in 2002, they agreed to exercise joint physical care of Luke, with exchanges to occur on a weekly basis.

Four years after stipulating to joint physical care, Richard applied to modify the decree to afford him physical care of Luke. Janet answered and also sought physical care.

Following a hearing, the district court granted Richard physical care of Luke. The court reasoned that the level of hostility between the parents and their differing parenting styles made joint physical care unworkable. The court also determined that Richard could provide a more structured environment. The court also imputed $25,000 of annual income to Janet and ordered her to pay Richard $370 per month in child support.

On appeal, Janet argues (1) "the district court erred in awarding primary physical care of the parties' child to Richard," (2) the court "erred in imputing gross income of $25,000 to Janet . . . to calculate child support," and (3) the court "abused its discretion in concluding that each party should pay their own attorney fees."

I. Physical care

The standards for modification of a physical care arrangement are well established but bear repeating. There must be "a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the children." *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App.

1996). Additionally, the parent seeking custody must prove an ability to offer the child superior care. *Id.*

A. Substantial Change of Circumstances

Conflict between parents can amount to a substantial change of circumstances. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The district court found that this type of conflict existed. Although the court found that the hostility had "existed for a number of years," we are convinced that the degree of intractability reflected in the record was not contemplated at the time the parents stipulated to a joint physical care arrangement.

Under the stipulated dissolution decree, the parents agreed that Luke would be welcome in either home "at any time." They also understood they were to show "mutual respect" in dealing with Luke and would not "speak derogatorily against the other."

By the time of the modification Richard testified he had not "interacted with [Janet] in five years." He asserted it was better if he and Janet did not communicate, because she "lie[d] consistently." Similarly, Janet testified that her relationship with Richard had changed "extremely" since the dissolution. With respect to Luke she stated, "[t]he communication that should be taking place" was not there.

Luke's guardian ad litem confirmed this breakdown in communication. She stated:

> It is not necessary for parents to agree on every issue to effectively and responsibly raise a child, but it is necessary for them to display respect for each other. Luke's parents cannot do this. Everything that Richard stands for, Janet undermines when it comes to Luke. Richard is convinced that everything Janet does,

> she does out of deceit. Both parents refuse to try to communicate with the other. Neither consults with the other regarding decisions that affect Luke.

On our de novo review of the record, we conclude the breakdown in communication was so complete that a substantial change of circumstances was proven. *See Melchiori*, 644 N.W.2d at 368.

B. Superior Caretaker

The closer question is which parent could provide superior care. *Id.* The district court found that Richard had an authoritarian parenting style and Janet's was more permissive. The court concluded Richard's style would better serve Luke's interests.

The court's decision is supported by the guardian ad litem's recommendation. She concluded Richard could provide Luke with better care, because he would offer needed boundaries and structure. The court's decision was also supported by the opinion of a licensed psychologist who worked with Richard, his new wife, and Luke. Although the psychologist conceded he did not have much contact with Janet early on, he opined that Janet had difficulty with consistency and seemed willing to give Luke what he wanted.

This evidence is offset in part by evidence of Richard's troubled marriage to his new wife, including evidence that she was battling alcoholism and had been physically assaultive toward Richard and verbally assaultive toward Luke. While noting these problems, the guardian ad litem nonetheless appeared comfortable recommending Richard as the physical caretaker. Similarly, the district court found the evidence of the parents' marriages relevant but not controlling. In the end, we agree with this assessment.

Richard's new wife testified that most of her problems took place during a one-year period in the past. The guardian ad litem stated these problems were being addressed with a therapist.

Returning to the parents' capabilities, the record reflects strengths and weaknesses in both. In the face of this evidence, several witnesses declined to make physical care recommendations. Those who did stated Richard would be the superior caretaker. The district court found these recommendations persuasive and, on this record, we see no reason to conclude otherwise.

We reach this conclusion notwithstanding Luke's preference to live with Janet. We begin by noting that a child's preference is accorded less weight in a modification proceeding than it would be in an initial care determination. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Nonetheless, Luke was old enough and mature enough to have his wishes taken seriously, had they been unequivocal. The record reflects that they were not. Luke admitted to "having mixed feelings of what he wants." In an online chat session with Janet, he told his mother he wanted to live with her, but also stated, "I'm stuck in the middle I have to choose which side, and you have no clue, it's the hardest thing I've ever had to do in my whole life." Finally, the guardian ad litem stated that Luke told her he would be satisfied with maintaining the joint physical care arrangement.

Luke's conflicted views about physical care were understandable. As his school principal stated, he was fortunate to have two parents who "really seem to care about [him], love him, want the best for him." Given Luke's equivocation, we conclude this factor does not warrant a reversal of the district court's ruling.

II. Imputation of income

Janet contends the district court should not have imputed income of $25,000 per year for child support purposes. She maintains "she has averaged only $14,276.00 per year for the five year period of 2002-2006."

At the time of trial in August 2007, Janet had a bachelor's degree in business administration and was working toward her MBA. She earned some income by teaching computer classes and repairing computers. She is correct that this income was significantly less than $25,000 annually. However, her earnings were slated to at least double. Specifically, Janet testified that once she received her MBA in December 2007, her starting salary would range from $36,000 to $60,000. Based on her testimony, we conclude the district court acted equitably in imputing income of $25,000 to her.

III. Attorney fees

Janet challenges the district court's refusal to order the payment of her trial attorney fees by Richard. A district court's decision will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995).

The district court based its decision on the parties' respective abilities to pay. Richard estimated that his yearly income was $32,000. As noted, there was evidence Janet could earn at least the $25,000 annually that the district court imputed to her. Based on these income figures, we discern no abuse of discretion in the court's ruling.

Janet also seeks an award of appellate attorney fees. Based on the

income figures cited above, we deny Janet's request.

AFFIRMED.