IN THE COURT OF APPEALS OF IOWA

No. 8-732 / 08-0553
Filed January 22, 2009

IN RE THE MARRIAGE OF KREG ALLEN CUSTER AND MICHELLE ANNTONE CUSTER

Upon the Petition of
KREG ALLEN CUSTER,
Petitioner-Appellant,

And Concerning
MICHELLE ANNTONE CUSTER n/k/a
MICHELLE MCPHERSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

Kreg A. Custer appeals the district court's denial of his petition to modify the physical care provisions of the decree dissolving his marriage to Michelle A. Custer, n/k/a Michelle McPherson. **MODIFIED AND REMANDED.**

Christy R. Liss of Clark, Butler, Walsh & Hamann, Waterloo, for appellant.

Dawn D. Long of Howes Law Firm, P.C., Cedar Rapids, for appellee.

Laura Ebinger of Kids First Law Center, Cedar Rapids, for minor child.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Kreg A. Custer appeals the district court's denial of his petition to modify the physical care provisions of the decree dissolving his marriage to Michelle A. Custer, n/k/a Michelle McPherson. Michelle requests an award of appellate attorney fees. We modify and remand.

Kreg and Michelle began their relationship in March 1995. Michelle and her two daughters, Brandi and Faleesha, then six and four years of age, began living with Kreg in August of 1995. Kreg and Michelle have one child together, Cheyanne, born in September 1996, and the subject of this appeal. The parties were married in March 1999. Kreg, Michelle, Brandi, Faleesha, and Cheyanne then lived together as a family until November 7, 2003, when Kreg's Army Reserve Unit was activated and he was sent to Kuwait.

The parties' marriage was dissolved pursuant to a stipulated decree in July 2004 while Kreg was on leave from active duty with the military. The agreed-to decree provided for joint legal custody of Cheyanne and placed her in Michelle's physical care. While Kreg remained on active duty Michelle allowed Kreg's mother, Judith Estabrook, to exercise Kreg's visitation with Cheyanne. In November 2004, Kreg was released from active duty and returned to Waterloo to live.

Michelle married Jason McPherson on May 3, 2007. Kreg filed a petition for modification the same day seeking to change physical care of Cheyanne from Michelle to him. As noted by the district court, as grounds warranting a change in physical care Kreg relied on claims that (1) he was now released from active

duty and had obtained stable employment and housing; (2) he was now more actively involved in Cheyanne's life; and (3) he could better minister to the long-range best interests of Cheyanne, more specifically he would better be able to meet her needs for discipline, improved hygiene, improved grades at school, and in general would make a better all-around parent than Michelle.

In a written ruling filed February 8, 2008, the district court denied Kreg's petition for modification. The court concluded there had not been a material and substantial change in circumstances that was not in the contemplation of the court at the time the stipulated decree was entered. The court further concluded that Cheyanne was well cared for in Michelle's home and there was nothing to demonstrate Kreg could currently minister more effectively to Cheyanne's long-range interests. The court did voice serious concern about evidence that Cheyanne's sixteen-year-old half-sister Faleesha had sat on their stepfather Jason's lap on more than one occasion, the fact Michelle had allowed it to happen, and that neither Michelle nor Jason felt there was anything wrong with it. The court stated that if Michelle were to continue to allow it to happen, and if anything inappropriate were to occur, such could constitute cause to warrant a change in Cheyanne's physical care.

Kreg appeals the district court's denial of his petition for modification of physical care of Cheyanne. He contends the court erred in failing to find there has been a substantial change in circumstances since the entry of the stipulated decree and in failing to find that he could provide superior care to Cheyanne. Michelle seeks an award of appellate attorney fees.

This action for modification of a dissolution of marriage decree is an equity case. *See* Iowa Code § 598.3 (2007) ("An action for dissolution of marriage shall be by equitable proceedings. . . ."); *Id*. §§ 598.25 and 598.41(8) (containing provisions relating to modification of custody). Our review is thus de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). 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. P. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value on custodial issues, and courts must make their decisions on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

The legal principles governing modification actions are well established.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy

> burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

In re Petition of Anderson, 530 N.W.2d 741, 741-42 (Iowa Ct. App. 1995) (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Here, unlike in an original custody determination, the question is not which home is better, but whether the parent seeking the change has demonstrated he or she can offer the child superior care. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). If the parents are found to be equally competent to minister to the children, custody should not be changed. *Id*. The burden upon the parent seeking to change custody is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children." *Id*. at 213-14.

As set forth above, the district court concluded Kreg did not prove there had been a substantial and material change in circumstances that was not in the contemplation of the court at the time the decree was entered. More specifically, the court determined that Kreg's release from active duty, his housing and employment stability, and his concerns about Cheyanne's hygiene were all present and within the contemplation of the parties and the court at the time the decree was entered, and thus were not substantial and material changes in circumstances warranting a modification of physical care. The court also found that while Cheyanne is capable of getting better grades at school, it could not say her resistance to doing so was Michelle's fault. Furthermore, despite the concern voiced by the court regarding Faleesha being permitted to sit on her stepfather's

lap, the court apparently did not believe the situation was serious enough to warrant modification of Cheyanne's physical care.

For the following reasons, we respectfully disagree with the district court's conclusions. We conclude Kreg did prove there have been material and substantial changes in circumstances that were not in the contemplation of the court at the time the decree was entered, including Kreg's increased stability and Michelle's somewhat decreased stability, Cheyanne's declining grades, and the extent and severity of problems in Michelle's home with regard to her other daughters.

First, during the time Kreg and Michelle were together before his deployment Kreg would go through periods where he would be unemployed for six to eight months at a time before finding a job that might last only twelve to eighteen months. In addition, during their relationship the parties moved fairly frequently, living in no less than five different cities. In contrast, following his return from active duty Kreg had been employed at the same place and lived in the same residence for three years at the time of the modification hearing. On the other hand, since the entry of the decree in July 2004 Michelle had continued to move frequently from place to place, with some of the moves requiring Cheyanne to change schools. In one such move Michelle and her husband Jason moved out of their rental home on Memorial Day weekend 2007 and moved the family into a pop-up camper until September 2007. Kreg testified Cheyanne indicated to him her concern about the camper arrangement because she did not know where she would be living all summer and accordingly did not

know what school she would be attending. Kreg's mother, Judith Estabrook, testified Cheyanne told her she was concerned about living in the camper all summer because she was frightened by storms. The record indicates Cheyanne in fact spent only about two weeks in the camper that summer. However, this does not minimize the concerns she had, in particular her concern about what school she might be attending following yet another probable relocation at the end of the summer.

Accordingly, we conclude there had been a substantial change in circumstances not in the contemplation of the court at the time of the entry of the decree, Kreg's greatly increased stability in both residence and employment. Although it was in the contemplation of the court at the time of the decree that Kreg would return from active duty at some point, when that would occur was uncertain. Conversely, Michelle's housing situation since the decree had, at best, continued to be somewhat unstable and in fact seemed to be increasingly so. This instability in housing, including living in the camper for the summer, is a circumstance that related to and affected Cheyanne's welfare.[1]

Second, we cannot agree with the district court that Cheyanne's falling grades in school were merely the result of her own resistance to doing or turning in homework and not the result of any failure on Michelle's part. Cheyanne began to have problems completing and turning in homework in her fifth grade year. Up to that point, by all accounts she had done well in school and in fact scored very well on the Iowa Tests of Basic Skills. Her problems completing and

[1] Michelle's testimony indicated that her financial situation had also become more unstable since the entry of the decree, and was likely to become even more so as her husband planned to file for bankruptcy in the near future.

turning in homework got progressively worse in sixth grade. Michelle spoke with the school regarding Cheyanne's decrease in grades and in October 2007 Cheyanne became involved with the Skill Enhancement Program during school as well as an after-school homework help program. However, at the time of trial in January 2008 some of her grades continued to decline, to the point she was failing language arts and getting a D+ in science. At trial Michelle offered as part of the explanation for the falling and poor grades that Cheyanne was often "more interested in playing than in working." Kreg testified that when he talked to Cheyanne about her falling grades she stated she sometimes forgot to turn in her homework, but also that if she asked for help neither Michelle nor Jason would help her and that she was not allowed to use the computer at home for an assignment on one occasion. The school records indicate Cheyanne missed an average of seventeen days per year for each of the last three school years.

We conclude the decline in Cheyanne's grades is a substantial and material change in circumstance not contemplated at the time of the entry of the decree. Michelle and the district court seem to in large part want to blame Cheyanne for the problem, believing that for unknown reasons she is simply resisting doing or turning in her homework. To the contrary, we believe this is a behavior and a problem that needs to be corrected and directly dealt with by a parent, and one that cannot merely be glossed over and blamed on a child of Cheyanne's age. Cheyanne is clearly capable of much better school work. As indicated above, until fifth grade she did fairly well in school and scored high on her basic skills tests. Thus, the cause of her falling grades is due to her not

completing and not turning in her homework, precisely the type of problem that a parent should deal with and correct. We cannot agree with the district court that Michelle bears no responsibility for this problem. Cheyanne's greatly declining school performance and grades is a change in circumstance that supports, together with other changed facts and circumstances, a modification of physical care.

Finally, and perhaps most importantly, there has been another material and substantial change in circumstances not within the contemplation of the court at the time of the entry of the decree. Michelle has experienced continuing and rather severe problems in raising Cheyanne's half-sisters, Brandi and Faleesha. First, Cheyanne's oldest sister, Brandi, began having anger issues when she was fifteen, within six months of Kreg leaving the home. The problems were described as her being very rude, verbally inappropriate, and verbally taking her anger out on Cheyanne. Michelle testified she gave Brandi the option of going to Tanager Place or going to live with Michelle's mother. Brandi chose her grandmother. The plan was that Brandi would go live with her grandmother for from a few days to a couple of weeks until she could "gain control of her emotions." Brandi ended up staying with her grandmother for eighteen months. She returned to Michelle's home for her senior year of high school, but stayed at her boyfriend's house about once a week during that time. Brandi voluntarily moved out again following graduation.

Next, Cheyanne's other sister, Faleesha, has had serious mental health issues since the entry of the dissolution decree. Michelle testified that in October

2007 Faleesha was doing poorly in two classes at school so she told her she could not attend homecoming. Faleesha got extremely upset and hysterical, screaming and pointing her finger at Michelle, so Michelle pushed her up against the wall to get control of her. The next day Faleesha was upset and went to the school counselor. Faleesha then left school early and went to a friend's house. Faleesha apparently told her friend she did not want to go home and the friend's parent called a youth crisis counselor to come talk to her because they were worried about her. When Michelle called the friend's home looking for Faleesha the Foundation Two Crisis Center worker got on the phone and spoke to her. While speaking to the counselor Michelle found disturbing writings in Faleesha's journal at home, writings that prompted her to call the police. At that point it was determined by Michelle, the police, and the crisis worker that Faleesha should be hospitalized. Faleesha was having suicidal thoughts, cutting herself, and was diagnosed with borderline personality disorder. She remained in the psychiatric ward of the hospital for two weeks.

Carla Ellerman has a child, Addison, with Cheyanne's stepfather, Jason. Jason was not a part of Addison's life from the time she was born in 1997 until January 2007, when Carla decided to have Jason and Addison meet. Jason brought Michelle, Faleesha, and Cheyanne to the meeting. At the modification trial Carla testified that during the visit she observed Faleesha, then sixteen, sit on Jason's lap for approximately forty-five minutes, while draping her arms around his neck and rubbing his chest. In addition, on three separate occasions Faleesha suggested she could possibly serve as a surrogate mother for a child

between Jason and Michelle, and volunteered that Jason shaves his whole body. Carla further testified that Michelle acknowledged she could no longer have children and that surrogacy was being discussed.

Kreg's mother, Judith Estabrook, also testified regarding a time when she was eating at a restaurant with Cheyanne, Michelle, Jason, Faleesha, and Brandi in the summer of 2007. She stated that Faleesha sat on Jason's lap for a period of time at the restaurant. Brandi also testified that she had seen Faleesha sit on Jason's lap once or twice but for no more than ten minutes. She did not see anything happen other than her sitting on his lap, and although it bothered her a little she disregarded it because Faleesha just tends to be "clingy."

Michelle and Jason both denied that Faleesha had sat on Jason's lap on any occasion other than at Carla's house and asserted it had lasted only a few minutes on that occasion. Michelle testified she did not think anything much of it and believed it occurred just because Faleesha saw Jason as a father figure and she was insecure about the situation. She stated that even in hindsight she did not see why anyone should have a concern about it and did not believe anything bad had happened. Michelle testified there had been no prior discussion of Faleesha being a surrogate mother, and that she did in fact tap Faleesha on her shoulder at Carla's, give her "a look" about sitting on Jason's lap, and Faleesha then got up and moved. Jason also testified he did not think anything of Faleesha sitting on his lap and it was not an issue for him. He believed she just did it because she tends to be clingy, was uncomfortable in the situation, wanted attention, and wanted to comfort him.

Near the end of the trial the district court commented and made several inquiries of witnesses regarding the lap-sitting incidents. Many of the court's questions clearly stemmed from its concern about the possibility of Faleesha being abused, particularly in light of her other recent problems, and the possibility that Cheyanne could be abused in the future. In its written ruling the court found that allowing a child of Faleesha's age to sit on Jason's lap for any period of time was "problematic", and that Jason's explanations of why he permitted the lap sitting were "unconvincing." However, as set forth above, despite its obvious concerns regarding the lap-sitting, the court apparently did not believe those incidents were of such a serious nature as to support a change of physical care. We disagree.

In determining what is in the best interest of a child in a proceeding to modify custody, we can look to a parent's past performance, because it may be indicative of the quality of future care that parent is capable of providing. *In re Marriage of Winnike,* 497 N.W.2d 170, 174 (Iowa Ct. App. 1992). To summarize what has occurred with Michelle's other daughters since the entry of the decree: Brandi was asked to leave the house at age fifteen for eighteen months due to anger issues and Michelle's apparent inability to control Brandi's behavior; in early 2007, at age sixteen, Faleesha began sitting on her stepfather's lap and making somewhat disturbing comments about him, and neither he nor Michelle were particularly concerned about her behaviors; and then in October 2007 Faleesha was hospitalized for in-patient psychiatric treatment for two weeks due to her having suicidal thoughts and cutting herself and was diagnosed with

borderline personality disorder. We believe Michelle's non-exemplary parenting record since the decree warrants concern for the quality of future care she is capable of providing Cheyanne. Clearly these issues, especially those surrounding Faleesha, are very concerning and were not in the contemplation of the court at the time of the decree. The circumstances lead to a distinct and serious concern for Cheyanne's well being, as she is fast approaching the tumultuous teenage years during which Michelle began to have numerous, serious problems with her other daughters, years during which Cheyanne will be most susceptible to the same potential problems and dangers.

Accordingly, we conclude the circumstances since the entry of the decree have so materially and substantially changed as to justify a change of Cheyanne's physical care from Michelle to Kreg. These changes were not within the contemplation of the court at the time of the entry of the divorce decree in July 2004. Such changes include the stability of Kreg's employment and housing, Michelle's frequent residential moves, Cheyanne's ongoing decline in grades at school, and the extent and severity of the problems Michelle has had with her other daughters. These changes do relate to Cheyanne's welfare.

Courts should modify the custodial terms of a dissolution decree only if it has been established that conditions since the decree have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005). This requires that the parent seeking to take custody from the other prove an ability to administer more effectively to the children's needs and well-being.

Id.; Dale v. Pearson, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996).

We conclude that Kreg's recognition of the fact Cheyanne needs additional structured help at home to complete and turn in her school work, his recognition of the inappropriate and troubling nature of the lap-sitting incidents, and his ability generally to provide a more stable and emotionally healthy home for Cheyanne, demonstrate his ability to offer Cheyanne superior care at the present time. For these and all the reasons set forth above, we conclude Kreg has met his heavy burden to prove he can currently administer more effectively to Cheyanne's needs than can Michelle. We disagree with the district court's contrary conclusion.

Michelle seeks an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of the party seeking an award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* The parties' pre-trial stipulation shows Kreg earns approximately $38,632 per year and Michelle earns approximately $36,448. We have determined that Kreg's appeal has merit. Taking into consideration these relevant factors, we conclude each party should be responsible for their own attorney fees on appeal.

Upon our de novo review of the record as a whole and for all the reasons set forth above, with deference to the position of the trial judge to assess the demeanor and credibility of the witnesses, we are nevertheless convinced there have been material and substantial changes in the parties' circumstances since the entry of their dissolution decree that were not in the contemplation of the court at the time of the decree, and that Cheyanne's long-range best interests would be better served in the physical care of Kreg. Kreg can better provide an environment for Cheyanne that will bring her to healthy physical, mental, and social maturity. We therefore modify the physical care provisions of the dissolution decree and place Cheyanne in Kreg's physical care. We remand to the district court to make any necessary orders concerning visitation and to modify child support obligations as appropriate. Each party is responsible for their own appellate attorney fees. Costs on appeal are taxed to Michelle.

MODIFIED AND REMANDED.