IN THE COURT OF APPEALS OF IOWA

No. 8-947 / 08-0946
Filed February 4, 2009

RITA BRUELAND, f/k/a
RITA TEASDALE,
Petitioner-Appellee,

vs.

MIKE BALDUS,
Respondent-Appellant.

Appeal from the Iowa District Court for Boone County, William J. Pattinson, Judge.

Michael Baldus appeals the district court ruling granting Rita Brueland's application to change the physical care of the parties' child from him to Rita. **AFFIRMED.**

Dorothy L. Dakin of Kruse & Dakin, L.L.P., Boone, for appellant.

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellee.

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

MILLER, J.

Michael Baldus appeals the district court ruling granting Rita Brueland's application to change the physical care of the parties' child from him to Rita. Michael and Rita both request an award of appellate attorney fees. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Rita and Michael are the parents of one child, April, born in April 1994. The parties were never married to each other. Rita originally commenced this litigation in July 1994 in order to legally establish Michael as April's father and obtain a custody and support order. Michael agreed in his responsive pleading that he was the child's biological father, and filed a competing request for April's physical care. On February 15, 1995, the trial court entered its order granting the parties joint legal custody of April and placing her physical care with Michael. Rita was given visitation rights and ordered to pay $206 in monthly child support to Michael.

In April 1998 Rita filed an application asking that April's physical care be transferred to her. However, she later amended this application in April 2000 seeking only expanded visitation rights instead of a change in physical care. A stipulated order was entered thereafter increasing Rita's visitation. This arrangement remained until Michael, a member of the Iowa Army National Guard, volunteered for active duty in Iraq in early 2006. To facilitate his deployment, the parties agreed to, and the court entered, an order temporarily transferring April's physical care to Rita, suspending Rita's child support obligation, and ordering Michael to pay $617 per month in support while physical

care was transferred. The temporary order commenced on March 20, 2006. Upon Michael's return from active duty April was to return to his physical care and Rita's support and visitation rights were to return to what they were prior to the temporary order. The temporary order was terminated on August 13, 2007, after Michael's return from Iraq, and physical care of April was to be transferred back to Michael on September 1, 2007.

Before April was returned to Michael's care, Rita filed an application asking that April's physical care be transferred to her. She alleged there had been a material and substantial change in circumstances since the entry of March 2006 temporary order, namely that April was now established in Rita's home and school district (Ogden) and April desired to now permanently reside with Rita and attend the Ogden school district. Rita also claimed she was better able to provide a structured environment leading to April's full development and maturation, and thus changing physical care from Michael to Rita would be in April's best interests.

Trial on Rita's application was held in February 2008. At the time of trial Rita was forty-four years of age, Michael was forty-two years of age, and each was in good health. April was two months shy of her fourteenth birthday.

Rita had married Brent in January 1999. From a previous relationship Rita has another child, Tina, who was an adult at the time of trial. Rita's husband, Brent, had two children from a previous marriage, Lane, who was nineteen and attending college, and Wesley, who was fifteen. Wesley lived with Rita and Brent and was a freshman in the Ogden school district. Rita has been employed at

Iowa State University in a secretarial capacity for thirteen years. In 2005 she obtained an AS degree in Business Administration. The district court found Rita's child support guideline worksheet indicated that Rita would earn $34,293 for tax year 2008.

At the time of trial Michael was married to Beth and they had one child together, Devon, who was eight years of age. Michael also has a child from a previous relationship, Adam, who was an adult at the time of trial. Michael has been employed as a technician with the Iowa National Guard since 1989. The court stated that Michael's child support guideline worksheet indicated his gross annual income was $61,751.

In 2005, at around age eleven, April began to complain of stomach aches. Michael took April to their family physician who referred them to Blank Children's Hospital. During April's examination at Blank, Michael was asked to leave the room when Rita told the doctor she believed April's pain seemed to increase with stress. While Michael was out of the room April apparently told the doctor she felt the source of her pain was due to conflict with her stepmother, Beth. Michael does not deny there was stress in his home during 2005 due to issues with Beth's job and the fact Michael's younger sister, whom it is undisputed April greatly admired, was diagnosed and later died from cancer around that time period. Michael testified he and Beth were experiencing some marriage problems during that time, but went to see a marriage counselor and things had improved. The doctor at Blank suggested April might benefit from counseling.

Rita began April in therapy with Dr. Jennifer Ryan in October 2005. Michael was not originally informed of the counseling appointment because April was afraid of how he would react. Dr. Ryan recommended Michael be made aware of the counseling and thereafter he did participate in at least one of April's sessions with Dr. Ryan. During a November 2005 session with Dr. Ryan, Rita informed Dr. Ryan that April had told Rita that Beth had slapped April. There was conflicting testimony regarding this incident. April testified Beth slapped her once. Beth's mother testified that April was out of control and hysterical because she did not get to do what she wanted and in order to calm her down Beth put her hand on April's chin to make her look at her but never slapped her.

April stopped counseling in January 2006, but resumed again in October 2007, with Peggy Clark, a family and marriage therapist, when her stress level rose once again in response to the current physical care dispute. It was Michael's idea for her to see Clark. Rita, Michael, and April attended one session with Clark. Rita and Brent took April to see a different counselor, psychologist Dr. Kenneth Dodge, in November 2007 in order to help April stay focused and get through the pending physical care proceeding. Michael initially was not made aware of these sessions with Dr. Dodge, however Dr. Dodge told Rita he would not see April unless her father was made aware of Dr. Dodge's involvement. After Dr. Dodge's first session with April, Dr. Dodge contacted Michael about the counseling and Michael has been involved in the sessions since then. Michael agreed to stop counseling with Clark in favor of Dr. Dodge as things were going well with Dr. Dodge.

April began to express a strong desire to live with her mother during her sessions with Dr. Ryan in 2005. As set forth above, by agreement of the parties her desire became a reality by happenstance due to Michael's deployment to Iraq in early 2006. During the seventeen months April was with Rita their mother-daughter bond became much stronger. April became involved in a myriad of activities associated with her church, community and school. She attended school in the Ogden school district while with Rita, rather than attending in the Boone school district as she had while living with Michael. Rita encouraged and supported April's involvement in sports, church, music, dance, 4-H, and various civic projects. Rita also made certain that April had regular contact with Devon and Beth, and had electronic contact with Michael.

When Michael returned from active duty, April initially expressed a desire to return to his physical care. However, she made it adamantly clear she did not want to return to the Boone school district. Shortly thereafter, April began verbalizing a strong desire to remain not only in the Ogden school district but also in Rita's physical care. Michael did not agree to April changing homes or schools and compelled April to return to his care and the Boone schools upon his return. This prompted Rita to file the present application for change in April's physical care from Michael to her.

Following the trial, the district court entered a written ruling granting Rita's application and transferring physical care of April to Rita.

Michael appeals, contending the court erred in (1) transferring physical care after Michael returned from active duty given the recent enactment of Iowa

Code section 598.41C (*see* 2008 Iowa Acts ch. 1060, §1), (2) finding a substantial change in circumstances and finding that Rita had proved she was the superior caregiver, (3) giving April's preference too much weight, and (4) failing to consider the strong presumption that siblings should not be separated. Michael and Rita each seek an award of appellate attorney fees.

II. SCOPE AND STANDARDS OF REVIEW.

Our review in this equity matter is de novo. Iowa R. App. P. 6.4; *see also Callender v. Skiles,* 623 N.W.2d 852, 854 (Iowa 2001) (stating while "questions of paternity are reviewed on legal error," decisions as to the "reasonableness of the court's visitation and custody award" are reviewed de novo). The parties also both agree our review is de novo. Thus, 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).

III. MERITS.

As an initial matter we address Michael's contention on appeal that the court erred in transferring physical care of April after he returned from active duty given the Iowa Legislature's recent enactment of Iowa Code section 598.41C. This section, approved by the Governor on April 11, 2008, provides in relevant part

> If . . . a petition for modification of an order [regarding child custody or physical care] is filed after a parent completes active duty, the parent's absence due to active duty does not constitute a substantial change in circumstances, and the court shall not consider a parent's absence due to that active duty in making a determination regarding the best interest of the child.

Iowa Code § 598.41C. We readily agree with the sound *policy* behind this legislation, believe such a *policy* should apply even before the effective date of the legislation, and accordingly have applied that *policy* in our de novo review. The legislation itself does not apply to the case at hand, however, as it did not go into effect until July 1, 2008, and thus was not in effect at the time of either the February 2008 trial or the court's May 2008 ruling. *See* Iowa Code § 3.7(1) (2007) ("All Acts and resolutions of a public nature passed at regular sessions of the general assembly shall take effect on the first day of July following their passage, unless some other specified time is provided in an Act or resolution.").

Further, our rules of error preservation require that "[i]ssues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co.,* 539 N.W.2 352, 356 (Iowa 1995). The issue Michael now attempts to raise on appeal concerning applicability of this new legislation was not presented to and passed

upon by the district court. We conclude that not only was the provision in question not in effect at any relevant time, but also that the issue Michael attempts to present was not preserved and is not properly before us on appeal.

The criteria governing physical care determinations are the same whether the parents are dissolving their marriage or have never been married to each other. *See Jacobson v. Gradin*, 490 N.W.2d 79, 80 (Iowa Ct. App. 1992); *Hodson v. Moore*, 464 N.W.2d 699, 700 (Iowa Ct. App. 1990). Our primary consideration, as always in all cases involving custody and/or physical care, is the best interests of the child. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). A party seeking modification of a previous physical care order must establish by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since the entry of that order or of any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief.[1] *See In re Marriage of Maher,* 596 N.W.2d 561, 565 (Iowa 1999); *Mears v. Mears*, 213 N.W.2d 511, 514 (Iowa 1973). The change must be more or less permanent and relate to the welfare of the child. *In re Petition of Anderson*, 530 N.W.2d 741, 742 (Iowa Ct. App. 1995) (citing *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)). Additionally, a parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. *Id.* The heavy burden upon a party seeking to modify custody stems from the principle that

[1] Here we look to the time since the entry of the February 1995 order placing April in Michael's physical care to determine if such a change in circumstances has occurred.

once custody of children has been fixed it should be disturbed for only the most cogent reasons. *Id.*

In a modification action, 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. 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).

After recognizing that both parents are "solid people" who love April unconditionally and that either could provide a superior home life and nurturing atmosphere for her, the district court granted Rita's application for change of April's physical care. In reaching its decision the district court clearly disapproved of Rita's "no-holds-barred" strategy in this case, including hiring a private investigator to trail Michael and surreptitiously record his drinking behavior. As a result of the private investigator's informing law enforcement officials of Michael's drinking and driving, Michael was stopped and charged with operating while intoxicated, first offense. Rita and her husband also "strove

relentlessly" to keep the idea of life in Ogden fully in April's mind and "indoctrinate" April to their way of thinking on the physical care issue. They provided her with a subscription to the Ogden newspaper, sent her numerous Ogden related clothing items, and inundated her with "an inordinate number" of telephone and text messages. The court also found Rita's secret taping all of her conversations with Michael, encouraging April to keep track of when she had disagreements with Michael, and bombarding her with text messages and reminders of life in Ogden, to be "less-than-admirable stratagems in this custody battle."

However, the court concluded Rita's somewhat distasteful and overreaching litigation-related tactics did not change its conclusion that April's interests would best be served by transferring her physical care to Rita. In reaching its decision the court accorded significant weight to April's strong preference to reside with Rita. It did so because of April's age, maturity, the strength of her preference, the reasons prompting that preference, and her description of her relationships with all involved. The court further found that Rita's tactics during the litigation neither initiated April's express desire to live with Rita nor jaundiced her attitude toward Michael. Accordingly, the district court concluded

> the change in the interpersonal relationships that heretofore existed between April and her father and her mother, coupled with April's strong preference to reside with her mother, constitute a sufficient change in circumstances to warrant modifying the custody decree.
>
> I am also satisfied that [Rita] has established that, at present, she can provide parental care superior to that which [Michael] can supply.

For the following reasons, we agree with these findings and conclusions of the district court and adopt them as our own.

We agree that both parents love April and that each is more than capable of providing her with nurturing and supportive home life. The question, however, in this modification action is whether Rita can provide superior care, serve April's best interests, and bring April to healthy physical, mental, and social maturity better than Michael can.

We, like the parties and the district court, recognize one of the main issues here is what weight should be given to April's explicit and passionate preference to live with Rita and what part that preference should play in determining her long-range best interest. Michael contends the district court accorded April's preference too much weight. Clearly, the ultimate question of whether Rita can provide a superior home is far more complicated than merely asking April what parent she wants to live with. *See In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981); *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258 (Iowa Ct. App. 1985). Furthermore, a child's preference is given less weight in a modification proceeding such as this than it is given in an original custody determination. *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987).

However, we may consider the wishes of children who are of sufficient age, intelligence, and discretion to exercise enlightened judgment, although these wishes are not controlling and will be examined with other relevant factors. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). In determining what weight to give the children's preference, we consider (1) their age and

educational level, (2) the strength of their preference, (3) their intellectual and emotional makeup, (4) their relationships with family members, and (5) the reasons for their decision. *Ellerbroek*, 377 N.W.2d at 258-60.

April was nearly fourteen years of age at the time of the modification trial. Based our review of the record we agree with the district court that April appears to be of above average intelligence, quite mature for her chronological age, self-confident, and assertive, and that she did not hedge when presented with tough questions but answered them honestly and forthrightly. She is a better-than-average student and involved in a wide range of extracurricular activities. At trial April expressed her strong preference to live with Rita, a preference that seems to be genuine and deep-seated. In giving reasons for her preference, April contrasted her strong, positive relationship with Rita, with the growing strain and distance in her relationship with Michael. In describing her relationship with Michael, April stated, "[w]e just don't get along anymore," and "[h]e just really makes me mad." In strong contrast, when describing her relationship with Rita, April stated, "[w]e get along and I can talk to her about more stuff than I can with my dad." April also discussed the tension in Michael's home and the history of discord between her and her stepmother, Beth. That discord appeared to remain unabated at the time of trial. The record does not suggest that such discord exists between April and her stepfather, Brent, or that such tension exists in Rita's home. Furthermore, the record shows that April has a good and close relationship with her stepbrother Wesley, who is only a year older than her. April described him as "like my best friend." In contrast, she described her eight-year-

old half-brother Devon as "annoying and he always makes it look like that I did it when I didn't." She also believed that Beth favored Devon over her.

Accordingly, based on our de novo assessment of the factors set forth above, we agree with the district court's conclusion that

> After assessing April's age, her level of emotional and psychological maturity, the strength of her custodial preference, the reasons prompting that preference and her description of her relationships with the various family members involved, I am satisfied that April's preference should be accorded significant weight in this custody decision.

The court did not err in the significant weight it gave to April's preference.

In addition, although we also frown on Rita's overreaching and aggressive tactics in trying to influence April in this matter, we agree with the district court that it does not appear Rita's tactics initiated April's desire to live with her or overly colored April's attitude toward Michael. As early as 2005, before Michael's deployment, April was expressing to Dr. Ryan a desire to live with Rita because of what April felt was the stress and discord already present in Michael's home. Thus, April's sentiments began to form well before the initiation of the present litigation and the overly-aggressive tactics employed by Rita.

Michael also argues the court erred in failing to consider the strong presumption that it is in the best interest of the child to keep siblings together. He is correct that the only mention of siblings the district court made in its ruling was that April appeared to get along well with all of her half-siblings and step-siblings.

There is a presumption that siblings should not be separated. *Will*, 489 N.W.2d at 398; *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). Our

supreme court has held this general principle should also govern awards of physical care in cases of half siblings as well as others. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). However, this rule is not ironclad, and "circumstances may arise which demonstrate that separation may better promote long-range interests of children." *Will*, 489 N.W.2d at 398.

Although we agree with the district court that for the most part April appears to get along with all of her half-siblings and step-siblings, it also is clear from the record that she gets along better with her stepbrother Wesley than she does her half-brother Devon. As set forth above, Wesley is very close in age to April and they both go to the same school in Ogden. April testified she and Wesley goof around and have fun, and she considers him to be like a best friend. In contrast, Devon is much younger than April and there is some discord between her and Devon, at least from April's point of view. April testified she felt Beth favored Devon, he was annoying, and that he often made it look like she did things she did not do.

Accordingly, we conclude that based on the specific facts and circumstances involved in this case the district court did not err in not giving greater consideration to the presumption that siblings should not be separated. The facts here show that April and Wesley's sibling relationship is stronger and more positive than April and Devon's sibling relationship. Thus, the circumstances here demonstrate that having April and Wesley together will better promote April's long-range interests. *See Will*, 489 N.W.2d at 398.

In conclusion, we again quote the district court's thorough and well-reasoned findings, conclusions, and sentiments and adopt the following as our own.

> Granted, I recognize that both parents can provide more than adequate creature comforts, educational opportunities and other related benefits that will serve April well in her maturation process. However, the strong psychological and emotional bond that presently exists between April and her mother and April's ready response to her mother's beneficial parenting cues . . . convince me that [Rita] is in a better position to parent this particular child at the present time.
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> In that same vein, I perceive as detrimental to April's best interests the somewhat strained relationship that now exists between April and [Michael] and also that with her stepmother. While I recognize that most adolescents go through phases that include unhappiness with one or both parents to some degree, I believe the conflict here is more deep-seated.
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> That said, I hope that the end of this custody litigation will diminish the aforementioned discord, but I cannot bank on that occurring anytime soon. However, I do believe it is appropriate at this juncture to remove one generator of the father/daughter friction and place April with [Rita].

Michael and Rita both seek 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.* Taking into consideration these relevant factors, we award Rita $1,000 in appellate attorney fees and deny Michael's request for the same.

IV. CONCLUSION.

Based on our de novo review, and for all of the reasons set forth above, we agree with the district court that there have been material and substantial changes in circumstances since the entry of the previous physical care order and that April's long-range best interests will be better served in the physical care of Rita who can minister more effectively to April's well being and offer her superior care. Rita can better provide an environment for April that will bring her to healthy physical, mental, and social maturity. Physical care of April should be transferred from Michael to Rita. Rita is awarded $1,000 in appellate attorney fees. Michael's request for appellate attorney fees is denied.

AFFIRMED.