

IN THE COURT OF APPEALS OF IOWA

No. 0-127 / 09-1093

Filed April 21, 2010

**IN RE THE MARRIAGE OF MARY KATHERINE KELLEY AND CHARLES
GLENN KELLEY**

Upon the Petition of

**MARY KATHERINE BAKER,
f/k/a MARY KATHERINE KELLEY,**
Petitioner-Appellant,

And Concerning

CHARLES GLENN KELLEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Greg W.
Steensland, Judge.

Wife appeals order modifying physical care and order dismissing her
application for contempt. **AFFIRMED.**

Frank E. Robak, Sr. of Robak Law Office, Council Bluffs, for appellant.

Joseph G. Basque, Council Bluffs, for appellee.

Heard by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, J.

Mary Kelley/Baker appeals the district court's order modifying the dissolution decree to award physical care of the parties' son to Charles Kelley. Mary also appeals the court's order dismissing her application to hold Charles in contempt. We affirm.

I. Background Facts and Proceedings.

In June 2007, Charles and Mary were divorced pursuant to a stipulated decree. The decree awarded them joint legal custody of Caleb, their teenage son, with physical care to Mary. Charles agreed to pay Mary \$550 a month for child support. Charles received the marital residence subject to the outstanding mortgage and agreed to take steps to remove Mary's name from the mortgage within eighteen months. Charles also received the 2002 Ford Escape and its corresponding debt and agreed to hold Mary harmless on the car debt.

Also in June 2007, Mary purchased a residence and moved in with Caleb and Caleb's nineteen-year-old brother, Sam, who has cystic fibrosis. This home is located four blocks from a high school Caleb does not attend and has no interest in attending. In July 2007, Mary started dating Joe Baker, an admitted alcoholic.

In January 2008, Charles petitioned for modification requesting the court order specific visitation and a decrease in his child support payments due to his loss of employment. Mary answered, and in April 2008, filed a cross-petition seeking an order to sell the marital residence. She alleged Charles was consistently late with his mortgage payments and had failed to take action to

remove Mary's name from the mortgage. In May 2008, Joe recognized his alcohol addiction and gave up drinking.

In June 2008, Charles filed an amended petition for modification noting Caleb states he no longer wishes to reside with Mary and requesting Charles be awarded physical care with an appropriate adjustment of child support.

On October 6, 2008, the court signed a stipulated "temporary" order discontinuing child support while allowing Caleb to live with Charles "on a trial basis to determine if such a custodial relationship will be in Caleb's best interest." Caleb has continued to live with Charles and have visitation with Mary. The court also continued the hearing "to the call of the attorneys."

On December 6, 2008, Mary married Joe Baker. This resulted in Joe's teenage son moving into Mary's home where he and Caleb share a bedroom.

On March 27, 2009, Mary filed an application for a rule to show cause seeking to hold Charles in contempt for willfully failing to make the car payments on the 2002 Ford. The hearing on Mary's application was set for April 20, 2009. On April 17, 2009, Mary filed an application to terminate the "temporary" order and return Caleb to her physical care. On April 20, the court consolidated the issues and set a hearing for May 29, 2009.

In May, Caleb, almost sixteen-years-old, testified in chambers outside the presence of his parents. Caleb detailed several logical reasons for his preference to remain in the physical care of his father. Caleb also discussed his health issues that led to poor school attendance. Our review of Caleb's academic record reveals similar grades while living with either parent.

Mary testified she provides a more nurturing environment and Caleb needs her to structure Caleb's school and medical needs. Charles testified he is currently unemployed due to pain issues caused by a serious motorcycle accident. To help meet his bills, Charles rents a bedroom and the attic of his house to Michelle Cox and her twenty-five-year-old son. Caleb has a bedroom area to himself in the basement. Charles has applied for Social Security disability. Charles explained the rules and structure he provides to encourage Caleb to bring up his grades.

In July 2009, the district court found Charles had met his burden of proof, modified the dissolution decree, and awarded physical care to Charles. Mary was ordered to pay \$510 in monthly child support. The court found Charles was current on the Ford payments and did not hold him in contempt. However, the court gave Charles thirty days to sell one or both of his newly-purchased motorcycles to pay off the automobile loan. This appeal followed.

II. Modification of Physical Care.

Mary seeks review of the court's modification order. We review the trial court's decision de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). 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 trial court's fact findings, especially regarding witness credibility, but they are not binding. *McKenzie*, 709 N.W.2d at 531.

In seeking to modify Caleb's physical care arrangement, Charles must establish "by a preponderance of the evidence, a substantial change in circumstances justifying [the] requested modification." See *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, Charles must prove an "ability to minister more effectively to the well-being" of Caleb. See *id.* at 237. The best interests of Caleb are the controlling considerations. See *id.* at 235.

While technically Charles is the parent seeking modification, because Mary and Charles agreed to a change in physical care seven months before the trial, it is Mary who sought the court's assistance in an attempt to undo the existing physical care arrangement. Both Charles and Caleb want to continue the current arrangement. See *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993) (holding court assesses child's preference by looking at "age, educational level, the strength of his preference, his relationship with family members, and the reasons he gives for his decision"). Therefore, the trial court's ruling modifying the dissolution decree in actuality made permanent the already-existing physical care arrangement. See *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994) (holding changes are made "only for the most cogent reasons"). In concluding Charles had met his burden of proof, the court stated:

The Court heard directly from Caleb. While Caleb cannot dictate the custodial situation, this Court found his testimony to be

the single-most compelling factor in this case. He was steadfast in his position that he wants to be in the primary physical care of his father.

Caleb is going to be attending the 10th grade at Abraham Lincoln High School in Council Bluffs this fall. This is where he wants to continue to go to school. . . . The evidence and exhibits would tend to indicate that he's not performing up to par. Part of this is because he misses school from sickness more than the average student. It does appear from the testimony and evidence that Caleb is doing a little better in school. This Court finds that part of the problem is the limbo in which Caleb has lived for a while. This Court believes that entering an Order of Modification that is not "temporary" would provide Caleb with the sense of stability that would greatly assist him in improving his school attendance, grades, and overall performance.

In our de novo review, we give weight to the trial court's reliance on Caleb's testimony because the court has a firsthand opportunity to hear the evidence and view the witnesses. See *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). We agree Charles has proven by a preponderance of the evidence a substantial change in circumstances justifying modification and Caleb's best interests require physical care be modified. Accordingly, we affirm the court's placement with Charles.

III. Contempt.

Mary appeals from the court's dismissal of her application to hold Charles in contempt, contending substantial evidence shows Charles willfully violated the parties' decree by failing to keep the car payment current and hold her harmless on the debt.¹ Mary requests both trial and appellate attorney fees.

¹ Mary argues the court erred in not addressing her cross-petition's application for sale of Charles's house due to his failure to remove her name from the mortgage. Mary failed to file a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The purpose of such a motion is to provide the district court an opportunity to resolve an issue properly submitted, but one which the court has *failed to address*. See *Meier v. Senecaut*, 641

In seeking a contempt ruling, Mary has the burden of proving Charles had a duty to obey a court order and willfully failed to perform that duty.” See *Amro v. Iowa Dist. Court*, 429 N.W.2d 135, 138 (Iowa 1988). Contempt proceedings are quasi-criminal proceedings; therefore, Mary must establish willful disobedience by proof beyond a reasonable doubt. See *id.*

Charles argues a willful violation is not shown because at the time of trial, the car payment was current and because he had compelling reasons for falling behind on the car payment:

[Charles] had been seriously injured in an accident several months after the divorce was finalized, resulting in the loss of his job and an application for disability benefits. Charles had roommates in the house to help with his expenses. He had received no child support from Mary since Caleb moved in with him, further pinching him financially. Charles had no money left from the [accident] settlement, and he was paying his bills out of the remaining \$2000 in his bank account.

Contempt proceedings are “primarily punitive in nature” and our standard of review is “somewhat unique.” *In re Marriage of Swan*, 526 N.W.2d 320, 326-27 (Iowa 1995). Mary is appealing from the court’s refusal to hold Charles in contempt under a statute that allows for discretion. Iowa Code section 598.23(1) (2009) provides: “If a person against whom . . . a final decree has been entered willfully disobeys the . . . decree, the person may be cited and punished by the court for contempt” Because the statute provides for discretion, “a trial court is not required to hold a party in contempt even though the elements of contempt

N.W.2d 532, 539 (Iowa 2002) (emphasis added). Accordingly, the cross-petition’s request is not properly before us. See *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997) (observing “issues must be presented to and passed upon by the district court before they can be raised and decided on appeal”). We note Charles continues to be subject to the dissolution decree’s orders.

may exist.” *Swan*, 526 N.W.2d at 327. Unless its discretion is “grossly abused,” the trial court’s decision must stand. *Id.* After reviewing the record, we do not find a gross abuse of discretion. Therefore, we affirm the court’s dismissal of Mary’s contempt application and also affirm the court’s order requiring Charles sell one or both motorcycles to satisfy the car debt.

Because Mary has not prevailed, we decline her request for trial and appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED.