IN THE COURT OF APPEALS OF IOWA

No. 0-252 / 09-1477
Filed June 16, 2010

IN RE THE MARRIAGE OF CHRISTOPHER LEE MCCURDY AND JACQUE RENEE GREEN MCCURDY

Upon the Petition of
CHRISTOPHER LEE MCCURDY,
Petitioner-Appellee,

And Concerning
JACQUE RENEE GREEN MCCURDY,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Jacque McCurdy appeals the physical care and economic provisions of a dissolution decree. **AFFIRMED.**

John C. Heinicke of Kragnes & Associates, P.C., Des Moines, for appellant.

Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, and Frank Steinbach of McEnroe, Gotsdiner, Brewer, Steinbach & Henrichsen, P.C., West Des Moines, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.*

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

VAITHESWARAN, P.J.

Jacque McCurdy appeals the physical care and economic provisions of a dissolution decree.

I. Background Facts and Proceedings

Christopher and Jacque McCurdy married in 1994 and had two children, born in 2003 and 2004. They divorced in 2009.

The district court granted Christopher physical care of the children and, based on that determination, awarded him the parties' home. The court allowed Jacque to remain in the home for a two-month period after the findings and conclusions were announced. In its written decree, the court valued the house at its assessed value of $193,100, minus the encumbrance, and granted Jacque a lien for half the equity.

When Christopher took possession of the home, he discovered that the house had been stripped of fixtures and appliances and showed signs of neglect. Christopher filed a motion to enlarge or amend the dissolution decree, asserting the decree "does not equitably divide the parties' assets and liabilities based upon [Jacque's] actions in the neglect (and hence the depreciation in value) of the home and her willful removal of fixtures (assets) from the home."[1]

Following an evidentiary hearing at which a realtor opined that the home's value had declined to between $155,000 and $159,900, the district court reduced the value from $193,100 to $161,100, a difference of $32,000. The court accordingly also reduced Jacque's equitable lien against the residence.

[1] Before filing this motion, Christopher filed a motion to reopen the record, which the district court denied.

On appeal, Jacque takes issue with the district court's physical care determination and its recalculation of the equity in the home. Our review of both issues is de novo. Iowa R. App. P. 6.907 (2009).

II. Analysis

A. Physical Care

In granting Christopher physical care of the children, the district court reasoned that (1) "the father is the more emotionally stable individual as between these two parties," (2) "[the father] is more able to support the other parent's relationships with the children," (3) "[Jacque] has inhibited and at times prevented [Christopher] from having his visitation with his children," and (4)

> [W]hile there is some history here of assaults between the parties even early in the marriage, it appears to this Court . . . that the earlier assaults between the parties were, to a large extent, mutual. They were . . . the result in part of [Christopher's] drinking problem.
>
> . . . The confrontations more recently result from the inability of [Jacque] to control her emotions and frustration and anger.

We will address each of these findings.

1. Stability. The stability of a parent is a factor for consideration in the physical care determination. *See In re Marriage of Kunkel*, 555 N.W.2d 250, 254 (Iowa Ct. App. 1996) (noting the father had "clearly distinguished himself as the more mature and stable parent"). Jacque allowed her hostility toward Christopher to interfere with her parenting. As described in more detail below, she was arrested in front of the children during a visitation exchange; she physically assaulted Christopher in front of the children on at least two occasions; she denigrated Christopher in front of the children; and she impeded his visits with them.

Christopher, in contrast, did not minimize Jacque's role in the children's lives, often acceding to Jacque's unreasonable demands for more contact just to keep the peace. He testified that he initially believed a joint physical care arrangement would prove workable but, given Jacque's recent "volatile" behavior, he was rethinking that belief. Based on this record, we agree with the district court that Christopher proved himself to be the more stable caretaker.

2. Support of Children's Relationship with Other Parent. A key factor in determining which parent should have physical care is who will best support the relationship with the other parent. *See* Iowa Code § 598.41(3)(e) (2007). As noted, Jacque did not hide her bitterness toward Christopher. On one occasion, Jacque went to his apartment, began arguing with him in front of the children, and ultimately bit him on the arm. On another, she slammed the car door on his arm while the children were in the back seats. She enrolled one of the children in an extracurricular activity during the time that the child was scheduled to visit her father, and did so without asking or informing Christopher. She also misstated the time of a school activity, causing Christopher to miss it, and omitted his name from school registration materials. Finally, she took the children to see a counselor without obtaining Christopher's prior consent.

That counselor's testimony is instructive. She stated that Jacque's anger toward Christopher was "outside that norm of—or at least on the more serious side of what I would consider to be normal anger." She also noted that Jacque repeatedly disparaged Christopher in front of the children. While the counselor was not sure these statements registered with the children, she eventually

informed Jacque that she "would not be able to treat her kids effectively if she wanted to use every session to denigrate Chris." The sessions ended.

The guardian ad litem who was appointed to represent the children similarly reported that Jacque spoke poorly about Christopher in front of them. In a pretrial report, she recommended that physical care of the children be placed with Christopher, stating:

> [T]he factor that swings the pendulum to one side in my opinion is that Jacque is either unable or unwilling to support Chris as a parent and to work with him as a coparent. She has made unilateral decisions regarding extracurricular activities, religion, school, and other important decisions in the lives of the parties' children. She has asked at least one therapist to "make" Chris have the same rules in his home that she has in hers. Most importantly, the therapists who have worked with (or are working with) the kids have expressed concern about Jacque's rigidity and her unwillingness to work with Chris.

Based on this record, we concur in the district court's finding that Jacque did not support the children's relationship with Christopher.

3. Visitation. The denial by one parent of the child's opportunity to have meaningful contact with the other parent is a significant factor in determining physical care. *See* Iowa Code § 598.41(1)(c). We agree with the district court that Jacque impeded meaningful contact between Christopher and the children.

After the dissolution petition was filed, the parties agreed Jacque would exercise temporary physical care of the children, subject to visitation with Christopher. At trial, Christopher testified that for the first "two or three months of the temporary order, many of my weekend visitations were during the daytime, and then I would have to return [the children] to their mother's house at night to sleep." He stated the children told him "they were too afraid to sleep at my

house" because Jacque told them he was "sick" and a "bully." After the children began staying overnight at Christopher's apartment, Jacque insisted on reading them a bedtime story over the phone. Her telephone calls lasted twenty to thirty minutes.

Jacque also insisted that the children attend her church on the weekends when Christopher was exercising visitation. Christopher accommodated this demand and cut short his Sunday visits with the children.

Just a month before trial, Christopher attempted to call, e-mail, and text Jacque to arrange a spring-break visit with the children. Jacque did not respond. He went to her house at noon on the day he was to pick the children up. Jacque denied having received his messages and said she would not let the children leave with him until 5:00 p.m., his normal visitation time. Christopher left and returned to the house at that time only to find that Jacque and the children were gone. When he called her, she told him they were at a shopping mall but initially refused to specify which one. She eventually identified the mall and the exchange took place, though not at 5:00 p.m. When it was time to return the children, Jacque insisted on having them delivered early, purportedly for a church event. Christopher confirmed with the church that there was no such event and decided it would be prudent to have a police officer present for the exchange. When he arrived at his apartment, Jacque was very agitated. The police officer asked her to calm down. Jacque started to argue with the officer and was

ultimately charged with interference with official acts and assault on a peace officer.[2]

Following that incident, the parties agreed to the entry of a protective order that modified the temporary order and placed the children in Christopher's physical care with visitation for Jacque at the discretion of the guardian ad litem. The guardian ad litem implemented supervised visitation.

This evidence fully supports the district court's finding that Jacque impeded Christopher's visits with the children.

4. ***Domestic Abuse.*** Domestic abuse is one of several factors a court considers in determining which parent should have physical care of a child. *See In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997); *see also* Iowa Code § 598.41(3)(j). Christopher admitted to choking and punching Jacque on more than one occasion before the children were born. He testified that this physical abuse coincided with his excessive consumption of alcohol.

Commendably, Christopher sought help in 2003. Shortly after the first child's birth, he began participating in Alcoholics Anonymous and stopped drinking. At trial, he testified that he had been sober for more than five years and his physical abuse of Jacque ended with his drinking. Although Jacque testified otherwise, the district court found Christopher's testimony more credible. That credibility finding is entitled to deference. *See In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007) (noting we afford "considerable deference to the district court's credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses"). Based on this

[2] Those charges had not been resolved as of the time of trial.

credibility finding and Christopher's long-term modification of his behavior, we conclude the evidence of domestic violence does not require reversal of the physical care decision. *See In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa Ct. App. 1998) (declining to reverse physical care decision based on this factor).

B. Motion to Enlarge and Amend

As noted, the court reduced Jacque's equitable lien on the home based on post-trial findings that she stripped the home of fixtures and other items. Jacque raises a single argument to support reversal of this ruling: the "assets should be given their value as of the date of trial."

We agree that, in general, the value of the parties' assets should be determined as of the trial date. *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997). However, courts are "not locked into a set date as it is inherent in the court's equitable powers, to make appropriate adjustments, according to the unique facts of each case." *Id*.

The district court made the following findings:

> The unique situation herein is that the Court allowed one party to stay in the home between April and June even though it awarded the home to the other party. While it is questionable when the neglect and damage to the home took place, it is clear to this Court that the bulk of the changes in the condition of the home occurred sometime after the oral recitation of the terms and conditions of the Decree on April 17, 2009 and occupancy of the marital residence on June 1, 2009 by [Christopher]. During that time period, it is clear to this Court that the house was completely stripped by [Jacque] of the normal and customary items that a party leaves in the residence. By removing window coverings, curtain rods, towel racks, switch plates, mirrors and other items, it was [Jacque's] intention to leave the real estate in less of a condition than when she lived there and definitely less than when [Christopher] previously lived there . . . . What is quite troubling to this Court is that [Jacque] removed nearly every item that belonged to the children. . . . Clearly, this Court finds that [Jacque's] actions have

> resulted in a diminution of the value of the home prior to [Christopher's] return to the home.

The record supports these findings; Jacque removed items such as toilet paper holders and towel racks in addition to items she maintained were "family heirlooms." Based on these findings, we affirm the district court's modification of the home's value and the consequent reduction in Jacque's equitable lien on the property.[3]

III. Appellate Attorney Fees

Christopher requests an award of appellate attorney fees. Such an award rests in our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Although Christopher earns more than Jacque, he was forced to defend an appeal from detailed findings on physical care, all supported by the record. For this reason, we conclude Jacque should pay $1000 towards his appellate attorney fees.

We affirm the physical care and property provisions of the dissolution decree.

AFFIRMED.

[3] In reaching this conclusion, we recognize that a rule 1.904(2) motion to enlarge is not a vehicle to grant the type of relief Christopher requested. *See In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995) (stating motions under rule 1.904(2) "are permitted so that courts may enlarge or modify findings based on evidence already in the record. They are not vehicles for parties to retry issues based on new facts"); *accord In re J.J.S.*, 628 N.W.2d 25, 29–30 (Iowa Ct. App. 2001). However, Jacque does not challenge the court's post-trial ruling on this ground. For that reason, we decline to base our decision on this principle.