IN THE COURT OF APPEALS OF IOWA

No. 0-313 / 09-1251
Filed June 30, 2010

DANIEL RYAN,
Petitioner-Appellant/Cross-Appellee,

vs.

KRISTIN COLLIER,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

A father appeals the district court's modification of the parties' custody and child support decree. **REVERSED.**

Edward N. Wehr of Wehr, Berger, Lane & Stevens, Davenport, for appellant.

Lauren M. Phelps, Bettendorf, for appellee.

Heard by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Daniel Ryan (Dan) appeals the district court's modification of the parties' custody and child support decree. Upon our de novo review, we conclude neither party has proved themselves to be a superior caretaker, and we therefore reverse.

I. Background Facts.

Dan Ryan is the father and Kristin Collier is the mother of Anna, who was born in 2000.[1]

In 2006, a custody and support decree was entered awarding the parents joint legal and shared physical care. The two parents were never married, and their relationship was described in the custody decree as "off-and-on up to the birth of Anna." Dan had another daughter born after Anna, whose mother was Ricki Lugo (now Ricki Potter). At the time the original custody decree was filed, Dan was in a relationship with Yesika Duarte, mother of three. This relationship was volatile and resulted in domestic abuse charges against both Dan and Yesika. The court noted Kristin had lived in several residences since Anna's birth. Kristin also had another daughter after Anna, whose father was in prison.

In the 2006 decree, the court wrote:

> Based on the evidence, the Court is not impressed with either parent's attention to their children. They both have had other children since the birth of Anna and do not place Anna's needs ahead of their own. The main consistency in Anna's life appears to be when she is with . . . Dan's parents. . . . Neither Dan nor Kristin's past indicate to the Court that they are stable and able to nurture and care for Anna. The routine that Anna was following

[1] Paternity was established in December 2005.

> prior to the filing of this petition by Dan[2] appears to be dependent on Kristin's work schedule. Awarding either parent primary physical custody of Anna would not seem to be in her best interest. It would appear that her routine mainly consists of being with Kristin, Dan, or Dan's parents. Given the circumstances, the Court does not see any positive results in changing this routine.

The district court thus awarded shared physical care and established a rotation schedule.

In that earlier proceeding, the district court made findings concerning the parties' income, noting Anna's preschool and private parochial school tuitions were paid for by Dan's parents. Dan worked for his father as a realtor, and the district court noted that Dan's 2005 tax return indicated his taxable income was $335,790. The court, however, determined this was "based primarily on a one-time partnership paper transaction with the family business created by this father known as Ryan Family Partners of which Dan owns 12 percent." The court noted that as part of his father's estate planning Dan was also involved in another family partnership known as Ryan V. The court imputed $43,000 per year income to Daniel for purposes of child support. Kristin was attending community college. She worked as an exotic dancer one to three nights per week. The court rejected Kristin's $300-per-week earnings estimate, and instead found her income to be $500 per week or $26,000 per year. Based on these imputed incomes, the court set Kristin's child support at $330.06 per month and Dan's child support at $483.28 per month and ordered Dan to pay Kristin $153.22 per month in light of shared physical care. Dan was ordered to maintain health

[2] Petitions for custody and child support were filed by both parents in separate proceedings, which were consolidated.

insurance for Anna and to pay sixty percent of non-covered medical expenses. The parties were to alternate the income tax exemption for Anna.

In September 2008, Kristin filed a petition to modify, alleging that she planned to move to accept an offer of employment in Rockford, Illinois, which would make shared care unworkable. Kristin also alleged Anna had suffered "an injury and irritation to her genital area" while in the care of Dan's mother. Kristin asked to be awarded physical care of Anna. Dan filed an answer and cross-petitioned for an award of Anna's physical care.

Trial was held on May 21, 2009. At the time of trial, Kristin was twenty-seven and taking classes at Scott County Community College. She testified she worked as an exotic dancer until the fall of 2008, when she entered a full-time nursing program. She had not finished nursing school or moved to Rock Island, Illinois, as alleged in her petition to modify. She failed out of that program because medications she was prescribed for depression caused her to fall asleep in her classes. She began attending courses in cancer information management in January 2009 and achieved a 4.0 grade point average for her spring term. Kristin testified she hoped to graduate by December 2010 and typical salaries in the field ranged from $26,000 to $34,000 per year. Kristin's current sources of income were listed on her financial affidavit and included Family Investment Program (FIP) payments ($426/month),[3] student loans provide between $500 and $600 a month, food stamps ($500/month), and $500 per month loaned by her mother. Kristin listed a medical loan liability of $133 per

[3] Because Kristin is receiving financial assistance from the State of Iowa, a Child Support Recovery Unit assistant attorney general appeared and participated in the trial.

month, which she testified was for breast augmentation surgery she underwent the year before, financed by a loan guaranteed by her grandmother.

At the time of trial Kristin was expecting another child, the father of whom was Daniel Tomaszewski. Although Tomaszewski did not testify, Kristin explained that he works in Rock Island, but lives with his father in Cherry, Illinois, about an hour commute. She testified he gets along well with her two daughters and they planned to marry when she was done with school and "he is financially stable." Kristin stated she had received some parenting education since the custody decree. She described various dealings with DHS, Anna's health issues, and her concerns about Dan's mother. Kristin described herself as "a pretty lenient parent, but at the same time if the girls get out of line, I do discipline." Kristin also testified about the conflict she and Dan had surrounding Anna's religious education: Dan and his mother believed strongly that Anna should attend Catholic church and school; Kristin believed Anna should not be forced to learn a specific religion, noting that she and Anna had recently begun attending a Baptist church. She further testified that Anna was doing better in school and was involved in Girl Scouts and swimming.

Dan was twenty-eight years old at the time of trial. He testified about the private school Anna attends. He testified Kristin had moved several times since the entry of the custody decree. He commented on the schools to which Anna had gone, the doctors that had treated Anna, and the lyrics of songs on Anna's MP3 player (music player) to which he objected. He also asked to admit a "log," which was purportedly "in chronological order, every incident that I've done with Anna or contact with Kristin" since the last trial. The district court sustained an

objection that the proposed exhibit lacked foundation and contained irrelevant information.

Dan testified he was attending classes at Scott County Community College, hoping to get a degree in economics. He continues to work for his father selling real estate and testified his annual income in 2008 was $16,000.

On cross-examination, he admitted some $15,000 to $16,000 in cash had flowed through his checking account[4] the prior year. He admitted he receives $305 per month from a promissory note. His 2008 income tax return was admitted into evidence, which shows a total income of $32,515 (and an adjusted gross income of $29,555), and lists IRA distributions of $30,600 (with a basis of $9,000, leaving a taxable amount of $21,600), business income of $7,918, and capital gains of $11,403. He testified the $11,000 in capital gains listed on his 2008 tax return were "'probably carried over from the FLP" and that there "might have been a [cash] disbursement that I had used to pay back my dad on a previous debt." He testified that his father lent him "[a]pproximately $2,500" for his education in the last year. Dan's parents also paid for Anna's private school tuition. Dan lived in a house owned by his father for which Dan pays "roughly $400."

Dan testified he lives with Colleen Morgan and her seventeen-month-old child. Dan met Colleen on MySpace in October 2008 and Colleen moved in with him in January 2009. Colleen testified she was "[c]urrently unemployed, volunteering" for Dan's father's real estate business.

[4] He admitted on cross-examination that he had not turned over the records to this account and instead provided records of the "wrong one."

Conflict continued between Kristin and Dan in relation to Anna. Each had made allegations of child abuse against the other to the Department of Human Services (DHS). Kristin filed complaints in 2007 and 2008 involving Dan's mother and her insistence on washing Anna's private areas, despite Anna's and Kristin's objections. After a 2007 investigation, the DHS child protective worker wrote,

> There is no evidence of child maltreatment with the grandmother. It is quite possible she cleans Anna in a manner which is uncomfortable. Given the child's age, it may be time to instruct Anna on how to clean herself better, and perhaps use less abrasive methods.

Anna again complained to Kristin about Dan's mother's continued scrubbing of Anna's private area. Kristin asked Dan to have his mother stop, but the practice continued and Kristin filed another complaint with DHS in September 2008. Anna was interviewed, as were Dan and Dan's mother. DHS concluded the matter did not rise to the level of child abuse. However, DHS did create a Safety Plan, which specifically directed Dan's mother to stop bathing Anna's private area, and required both Dan and his mother to agree to the plan.

At the time of trial, Anna was attending sessions with a counselor, who testified she provided a safe place for Anna to discuss her feelings. The counselor testified she was not qualified to make diagnoses, but that it did appear that Anna was emotionally distressed, but seemed happy when she left sessions. She recommended Anna continue to attend counseling sessions.

Ricki Potter, the mother of Dan's other daughter, testified that Dan has an "excellent relationship with" her daughter and she had not observed problems between Anna and Dan. Ricki testified Dan and she share custody of their

daughter and he pays $350 per month to her in child support ("per our agreement").

Dan's mother testified she was an intensive care nurse for more than forty years and "take[s] care of the whole person, not just parts here and there."

> And when I had my grandchildren over, when I take care of them, when I give them a bath, on the girls I will clean them, not Anna anymore, but almost 100 percent of the time they need extra cleaning to what they can do in the tub or shower.

She testified that she has not bathed Anna since signing the Safety Plan. We note that Kristin disputes this. However, DHS has informed Dan and his mother that if the plan is not followed, Anna many not be able to visit grandmother unsupervised. There is nothing in this record indicating DHS has had to intervene on this issue since entry of the Safety Plan.

The district court entered a ruling on July 8, 2009, modifying the 2006 decree. The district court's ruling quotes extensively from DHS records in relation to the 2007 and 2008 child abuse reports concerning Dan's mother. The court wrote:

> While [Dan's mother's] conduct may not meet the department's definition of child abuse, it was inappropriate enough conduct to cause the child protective worker to create a safety plan that specifically directed [her] to stop doing what she was doing and to suggest consequences if she did. To have continued doing it for such a long period of time after being asked not to by the child is incomprehensible. Anna is not her child, and even if she was going to ignore her son's request to be gentler, she should have stopped doing it when it was demanded by Anna's mother Kristin. What she did was beyond unkind, it was tormenting the child, and she had no right to do so. When added to the evidence of the ongoing high level of conflict between Daniel and Kristin, the court is firmly persuaded the present joint physical care plan should be dissolved and primary physical custody of Anna should be placed with Kristin. These changes have been substantial and the ongoing conflict appears more or less permanent. The changes of circumstances

> clearly and unequivocally affected Anna's welfare. As between Daniel and Kristin, Kristin has shown she has the ability to provide superior care to that provided by Daniel. Daniel should be given visitation rights with specific condition that unless Kristin specifically consents, Anna shall not stay with his mother . . . unless Daniel himself also stays with her. In addition, unless Kristin specifically consents Anna shall not be required to attend parochial school and shall not be required to attend Daniel's church on weekends Anna is with Kristin.

The court then set a visitation schedule and ordered Dan to pay child support of $170 per month.

Dan appeals the modification of custody, and Kristin cross-appeals the child support award.

II. Standard of Review.

Proceedings to determine visitation and custody are equitable proceedings. *Phillips v. Davis-Spurling,* 541 N.W.2d 846, 847 (Iowa 1995). Therefore, our review is de novo. Iowa R. App. P. 6.907. However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). The best interests of the child is always the controlling consideration in cases involving custody. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

III. Discussion.

A. Dan's Appeal. Dan argues the district court erred in awarding physical care of the Anna to Kristin. Dan also asserts the district court erred in ruling that his "log" was not admissible.

In issues concerning custody and physical care, we employ the same criteria regardless of whether the parties were married or unwed. *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App.1994). A party seeking to modify physical care must first show a substantial change in circumstances since the entry of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

A parent seeking to modify the physical care provision of a decree has a heavy burden. *In the Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). "A parent seeking to take custody from the other must prove an ability to minister more effectively to the child[ ]'s well being." *Frederici*, 338 N.W.2d at 158.

Our task has been made considerably more difficult because Dan's brief and appendix do not comply with our appellate rules. His statement of facts sets forth sentence after sentence without any citation to the record. *See* Iowa R. App. P. 6.903(2)(*f*) (providing that all portions of the statement of facts in the appellate brief "shall be supported by appropriate references to the record or the appendix in accordance with rule 6.904(4)"). Dan has cited to record testimony in the argument section of his brief where, in a "shotgun" approach, he claims numerous errors in the trial court's findings. However, his appendix contains not a single page of testimony transcript. *See* Iowa R. App. P. 6.904(4) (requiring briefs to cite to specific parts of the record to which the party is referring and if that reference is to testimony, the reference is to be to the transcript page). Rule 6.905(3) states that the appendix "shall contain [r]elevant portions of the . . .

transcript." While this court does have access to the original transcript, there is but a single copy available for the reviewing panel.

In any event, we have conducted a de novo review and conclude the court erred in modifying the 2006 custody and support decree. Even if we assume there has been a substantial change of circumstances,[5] neither parent has proved themselves able to "administer more effectively to the child[ ]'s needs." *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005).

We have stated, "The question is not which home is better, but whether [the petitioner] has demonstrated [the petitioner] can offer the children superior care." *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). The party seeking to modify custody must show an ability to minister to the child's needs superior to the other. *Id.* If both parents are found to be equally competent to minister to the child, custody should not be changed. *Id*.

Both parents have employed poor judgment. Kristen has lived in three to five residences since the decree was entered in 2006. At the time of the trial she was pregnant with her third child, all with different fathers. She wished to move Anna from her school without Dan's blessing, even though Dan only lives one block from the school and Dan's family was paying for the parochial school tuition.

[5] A finding of a substantial change of circumstances here is highly doubtful. The changes contemplated in Kristin's original petition, i.e. Kristin's schooling and potential move, and allegations that Anna suffered injury in the care of Dan's mother, were not shown. We do not condone Dan's mother's conduct, but the grandmother discontinued her harsh bathing techniques approximately ten months before the trial and two weeks before petition was filed, and thus cannot be grounds for finding a change that is "more or less permanent." *Walton*, 577 N.W.2d at 870.

Dan should have been more expedient to terminate his mother's overly-vigorous bathing methods. While Dan makes much of Kristin's work as a stripper, we note he has two children with two different women, both of whom were strippers. He has moved in with another woman he met on-line.

But the record reflects that DHS has indicated that "[b]oth parents provide clean and adequate home[s]" for Anna and "appear to be protective of Anna." Whatever conflict there is between the parents is not new. The parties are able to communicate as needed to effectuate transfers. Anna appears to be progressing as expected in school and is benefitting from counseling.

"The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). Stability and continuity are important factors in considering custody and care decisions. *Id.* at 696. "Custody, once fixed, should be disturbed only for the most cogent reasons." *Whalen*, 569 N.W.2d at 628.

The original decree placed Anna in the shared care of her parents. Neither party has provided sufficiently cogent reasons for disturbing the original decree. We remind these parents that it is their responsibility to act in her best interest, which includes encouraging continued association with both parents and her extended families.

We also reject Dan's contention that the district court erred in not admitting his "log."

> On a number of occasions we have disapproved the practice of making evidentiary rulings in equitable cases. The basis for our disapproval is plain. Upon a de novo review it would be impossible,

> where we disagree with a trial court's evidentiary ruling, to consider necessary evidence which would be absent from the record.

Sille v. Shaffer, 297 N.W.2d 379, 381 (Iowa 1980) (citations omitted). However, we do not have such a problem in this case as the proposed exhibit was made a part of the record.[6]

We review evidentiary rulings of the district court for abuse of discretion. *Gamerdinger v. Schaefer*, 603 N.W.2d 590, 594 (Iowa 1999). In doing so, we give wide latitude to the district court in ruling on the admissibility of evidence. *Kalvik ex rel. Kalvik v. Seidl*, 595 N.W.2d 136, 140 (Iowa Ct. App.1999). We refrain from disturbing the district court's evidentiary rulings unless there is a clear and prejudicial abuse of discretion. *Carter v. Wiese Corp*., 360 N.W.2d 122, 130-31 (Iowa Ct. App.1984).

We have reviewed the proposed exhibit. It contains numerous instances of objectionable hearsay. The log also contains matters of little or no relevance (e.g. "8/19/08 12:40 Dr. Kumar"; "10/30/08 Anna went trick or treating with Dan"; and "11/3/08 Anna swimming").[7] We conclude the district court's evidentiary ruling refusing to admit Dan's "log" caused him no prejudice, and Dan's contention of error is therefore without merit. *See Carter*, 360 N.W.2d at 130-131.

B. Kristin's Cross-appeal. On cross-appeal, Kristin contends the district court erred in the amount of child support ordered. She notes that Dan's

[6] Unlike the testimony transcript, the proposed exhibit *is* actually contained in the appendix.

[7] One of the inherent difficulties of "logs" itemizing various parenting failures is that they are frequently voluminous and would literally take days to explain or discredit. We note that the parties to this action were granted one day for the modification trial and to give any weight to such an exhibit, had it been admitted, would be highly prejudicial to the opposing party unless additional trial time was afforded.

testimony and 2008 tax return contain information contrary to the court's acceptance of Dan's income being $16,000. She further notes that ordering Dan to pay only $170 in child support effectively shifts the burden of supporting Anna from the parent most able to provide for her to Kristin, "with the very necessary help of the State of Iowa." She asserts that the court, at a minimum, should have used the previously imputed income of $43,000.

We agree that the support ordered is without evidentiary basis. No financial affidavit for Dan appears in the record provided to this court. A child support worksheet is in the record, which lists Dan's income as $16,000. However, that figure is contrary to Dan's own tax return. Dan's testimony concerning his income is vague and, as the district court found, "hard to believe."[8] He testified his income was $16,000 for 2008, yet his 2008 income tax return lists income of $32,515, including IRA distributions of $30,600, business income of $7,918, and capital gains of $11,403. He admitted some $15,000 to $16,000 in cash had flowed through his checking account the prior year. He further admitted he receives $305 per month from a promissory note. Dan is a twelve percent owner of two family partnerships. He also receives a house from his father for minimal, if any, rent. He has no car payment. His parents pay for his tuition, as well as Anna's. His girlfriend, Colleen, "volunteers" her time working for Dan's father. The mother of his other daughter testified he agreed to and does pay $350 per month to her in child support.

[8] The district court wrote that Dan "denies that his parents are, for the most part, supporting him and Colleen, although he makes so little money, it is hard to believe otherwise."

Because we have found that modification of the custody provisions should not have been ordered, and because the record is insufficient to determine there has been a change of financial circumstances, we conclude the district court erred in modifying the support provisions. Support shall remain as fixed in the decree.

C. Appellate Attorney Fees. Kristin seeks attorney fees for this appeal. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt,* 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We decline the request for appellate attorney fees.

IV. Conclusion.

The district court erred in concluding there had been a substantial change of circumstances warranting the modification of joint physical care and of the support provisions of the parties' custody and support decree. We reverse.

Costs are assessed one-half to each party.

REVERSED.