IN THE COURT OF APPEALS OF IOWA

No. 1-110 / 10-1818
Filed April 27, 2011

IN RE THE MARRIAGE OF SHAWNA MARIE RIPPLE AND KYLE ROGER RIPPLE

Upon the Petition of

SHAWNNA MARIE RIPPLE,
Petitioner-Appellant,

And Concerning

KYLE ROGER RIPPLE,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Sean W. McPartland, Judge.

Petitioner appeals the court's *nunc pro tunc* order. **AFFIRMED.**

Mark D. Fisher of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

Jacob R. Koller of Simmons, Perrine, Moyer, Bergman, P.L.C., Cedar Rapids, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

EISENHAUER, J.

This is Shawnna Ripple's second appeal involving the March 2010 decree dissolving her marriage to Kyle Ripple. In September 2010, we upheld the court's placement of physical care of the parties' two young children with Kyle and modified the decree to increase Shawnna's summer vacation visitation from two weeks to six weeks. Shawnna now appeals the district court's November 2010 *nunc pro tunc* order clarifying the court's intent regarding the decree's first opportunity to care provision. We affirm.

I. Background Facts and Proceedings.

Kyle and Shawnna married in 2000, had their first child in March 2005, and their second child in May 2006. Shawnna is a teacher with time off during the summer. Kyle is a mechanic for the department of transportation. In February 2009, Shawnna petitioned for dissolution of marriage. In the joint pretrial statement, each sought physical care. Shawnna alternatively requested joint physical care. Both also proposed two weeks of summer vacation visitation for the other parent.

Both parties proposed a "first opportunity to care" provision. Shawnna's proposal states: "The parties agree to provide each other with the first opportunity to care for the children should they otherwise require child care." Kyle's proposal states: "The parties shall provide each other with the first opportunity to care for the children should they otherwise require child care."

During the November 2009 trial Shawnna testified:

> Q. And why is that? A. I feel like it was a loophole that wasn't covered with the temporary agreement, and that's why I wasn't able to have them over the summer.
>
> Q. Who do you believe should be watching the children if a parent [is] available? A. Other parent.
>
> . . . .
>
> THE COURT: . . .[I]f it turns out that one or the other of you has custody and there's something else going on, if it's going to be for a one-hour period, it wouldn't seem to me like it would make sense to notify the other party. It would have to be like a half a day or something—A. Um-hmm.
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> THE COURT: —you're not going to be able to exercise care. Is that what you're thinking about? A. Yes.
>
> Q. Are you thinking in terms of a full workday—A. Yeah.
>
> Q. –or an overnight? A. Yeah.
>
> THE COURT: Okay.

Kyle testified:

> Q. I guess, to answer the judge's questions earlier, what do you think should be the standard for when you should have to offer the other parent the opportunity to provide care in terms of how much time you're available? A. If let's—let's say that Shawnna has—with—anything over an hour, she has conferences that night, call me, see if I can have the kids or if I would like to have the kids. If I got to go in for something on the side of the road on a Saturday morning, I call Shawnna, hey, can you take the kids? I got to go to work for a couple of hours.

On March 1, 2010, the district court found "Kyle has been the primary care provider for the children during substantial periods of the marriage" and awarded Kyle physical care with Wednesday evening (not overnight) and alternate weekend visitation for Shawnna ending at 8:00 p.m. Sunday night. The court provided for holiday visitation and two uninterrupted weeks of summer vacation for each parent. Further:

> g. **First Opportunity to Care.** The parties agree to provide each other with the first opportunity to care for the children should they otherwise require child care for a period of more than four hours during their time with the children.

Two days later, on March 3, 2010, Shawnna filed her notice of appeal and a motion to stay. On March 5, 2010, Kyle filed a motion seeking a limited remand in order for the court to rule on his contemporaneously-filed motion to enlarge or amend requesting: (1) Shawnna's midweek visitation be Tuesday or Thursday evening, (2) Easter visitation be specified in the holiday spreadsheet, and (3) a clarification of whether child support starts March 1 or April 1. On March 31, 2010, the Iowa Supreme Court denied the motion to stay and motion for limited remand.

On April 12, 2010, Kyle's attorney sent a letter to Shawnna's attorney stating:

> [A] dispute has arisen between the parties concerning [the first opportunity to care provision] of the decree. Had Kyle's motion for limited remand been granted, we intended to file a supplemental request . . . for clarification of this provision as it relates to day care. . . . It is Kyle's position that the district court did not intend for [that paragraph] to apply to routine day care necessitated by the parties' respective work obligations. . . . Accordingly, Shawnna is not entitled to unilaterally remove the children from day care this summer. If, however, there are particular days that Shawnna would like to exercise additional visitation with the children when she is off work, Kyle is willing to be flexible in this regard.

On April 15, 2010, Shawnna's attorney replied:

> [T]he decree requires Kyle to contact Shawnna every time he requires child care for a period in excess of four hours. Child care, by its plain meaning, means daycare. Consequently, Kyle is required to notify Shawnna this summer when he works and the children do not have school. It is Shawnna's intent to exercise her right to first opportunity to care every day she is able to during the summer.

In her first appeal, Shawnna argued the district court erred by failing to order joint physical care and alternatively raised visitation issues. Kyle did not

file a cross-appeal. However, Kyle's appellee brief requested we clarify the issues of midweek visitation (not Wednesday)/Easter schedule/child support start date/first opportunity of care. Kyle stated:

> Kyle acknowledges that the preferred way to resolve these issues is pursuant to Iowa R. Civ. P. 1.904(2) [motion to enlarge/amend]. However, Kyle's attempt to do so in this proceeding was denied. To clarify these matters now will be of significant benefit to the parties and will likely result in the minimization of further conflict and the need for additional court intervention.

On June 17, 2010, Shawnna filed an application for rule to show cause seeking to hold Kyle in contempt for violating the terms of the decree by not giving her the first option to care for the children when Kyle enrolled the children in daycare during the summer months. On July 9, 2010, Kyle filed a resistance noting his appellee brief "requested clarification of the 'first opportunity for care' provision on appeal." On July 13, 2010, Shawnna filed a reply asserting the court should rule on her contempt application because:

> Kyle did not file a cross-appeal on this issue, and there remains no question before the Court of Appeals regarding the first opportunity to care. There is no basis . . . for a request for clarification to the Court of Appeals without an appeal of that issue.

In August 2010, the district court held a hearing on Shawnna's contempt application. In September 2010, we issued our opinion addressing the issues raised in Shawna's appeal and affirmed as modified. We ruled joint physical care is not in the best interests of the children and then turned "to Shawnna's alternate argument regarding visitation." We stated:

> Shawnna argues the court should have ordered overnight midweek visitation, extended the alternating weekend visitation to Monday mornings, and given her at least six weeks of uninterrupted

> visitation during the summer. While we are not persuaded by Shawnna's request for an extension of midweek and weekend visitation, we agree that two weeks of summer visitation is inadequate.
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> . . . .
>
> All concerned agreed that Shawnna was an appropriate caregiver. Additionally, Shawnna testified that her schedule as a school teacher allowed her time off in the summers to care for the children. While she acknowledged that she placed the children in daycare for three days a week during the summer of 2008, she testified the graduate school classes that required the placement were not a factor in 2009.
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> We recognize the decree already affords Shawnna "the first opportunity to care for the children should they otherwise require child care for a period of more than four hours during their time with the children." However, that provision simply addressed daytime care. We believe Shawnna is entitled to additional overnight summer visitation. For that reason we modify the decree to afford her a total of six weeks summer visitation with the children, to be taken in two-week increments each summer month unless otherwise agreed, subject to the terms and conditions contained in the summer visitation provision of the decree.

On October 7, 2010, Kyle filed an application for order *nunc pro tunc* and/or 1.904(2) motion to enlarge/amend. Kyle noted the Court of Appeals did not address his request for clarification of midweek visitation/Easter/child support start date/first opportunity to care and he asked the district court to clarify those issues.

On October 13, 2010, Shawnna resisted Kyle's application arguing the Court of Appeals "did not address [Kyle's] multiple requests for clarification . . . and, therefore denied each and every request." Also on October 13, 2010, the district court dismissed Shawnna's contempt application stating:

> [At the contempt hearing Kyle explained] the first care option only applied when a parent's unavailability was "outside the normal routine."
>
> Given the limited available record, this Court can only guess at the trial court's intent in entering this provision. [The judge] was

> definitely aware that Shawnna did not teach during the summer months. However, he made no special provision for the summer months other than the traditional two uninterrupted weeks of care. This signals the Court that [the judge] did not intend to alter whatever routine would be established by Kyle as the primary care parent while he was working and the children were not in school. Further, even if Kyle is wrong, he has been generally accommodating to Shawnna's complaints regarding scheduling mid-week visitation and medical appointments so she would not lose time with the children. Thus, there is no support for finding that Kyle is acting contumaciously [in] his carrying out of the decree.

On October 15, 2010, Shawnna filed a notice of intent to file written application for default due to Kyle's failure to provide her the first opportunity to care on October 8, 9, and 10, 2010. A few weeks later, Shawnna filed her second application for rule to show cause alleging Kyle failed to comply with the first opportunity to care provision on October 8, 9, and 10, 2010. Shawnna's two applications were set for a combined hearing in December 2010. Also in October 2010, Shawnna filed a petition for writ of certiorari seeking to have the Iowa Supreme Court vacate the district court's October 13, 2010 order dismissing her first application for rule to show cause.

On November 2, 2010, the district court ruled on the issue currently appealed: Kyle's application for order *nunc pro tunc* and/or rule 1.904(2) application. The court did not rule on Shawnna's October default and show cause applications, stating those issues would be addressed in the upcoming December hearing. The court concluded "Rule 1.904(2) does not authorize an order granting the relief requested." The court recognized "[*n*]*unc pro tunc* orders are limited to situations where there is an obvious error that needs correction or where it is necessary to conform the order to the Court's original intent" and ruled

"an order *nunc pro tunc* correcting and clarifying the Court's original decision" is appropriate regarding the Easter and first opportunity of care issues. The court determined changing midweek visitation from Wednesday night to Tuesday or Thursday "would be a substantive change to the terms of the Decree, or an order "now for then," and "not a proper subject of" a *nunc pro tunc* order. Finally, the court ruled "the Decree is clear in providing that the child-support payments were to commence April 1, 2010," therefore a *nunc pro tunc* order is not appropriate. Shawnna now appeals.

II. Merits.

We review this equity case de novo. Iowa R. App. P. 6.907. Shawnna argues the district court's *nunc pro tunc* order concerning first opportunity to care is improper and void.[1] Shawnna does not appeal the *nunc pro tunc* order's Easter clarification.

Nunc pro tunc "literally means 'now for then.'" *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995). The court's power "to make a *nunc pro tunc* order is inherent and is not lost by the mere lapse of time." *Id*.

> In the absence of a timely motion to enlarge . . . a trial court may not alter or undo a final judgment except . . . where the court corrects its ruling nunc pro tunc *to conform to what was actually intended* by the court when the judgment was entered.

Graber v. Iowa Dist. Ct., 410 N.W.2d 224, 228 (Iowa 1987) (concluding *nunc pro tunc* order improperly constituted a change in the judge's thinking) (emphasis added). Therefore, "a *nunc pro tunc* order can be used only to correct obvious

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[1] Shawnna also argues the *nunc pro tunc* order is not in the children's best interests. We do not consider issues raised for the first time on appeal and therefore decline to address this argument. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

errors or to make an order conform to the judge's original intent." *Id*. at 229. The court cannot change a prior order, but only "show what took place." *State v. Onstot*, 268 N.W.2d 219, 220 (Iowa 1978). Further:

> [T]he purpose of a *nunc pro tunc* entry is to supply or correct a record to make it conform to that which was actually done at an earlier date, and that as between the parties it operates to validate or correct the original judgment.

Weissenburger v. Iowa Dist. Ct., 740 N.W.2d 431, 434 (Iowa 2007). The trial court cannot use a *nunc pro tunc* "to remedy an error in judicial thinking, a judicial conclusion, or a mistake of law." *Id*. The "intent of the trial judge is crucial to the determination of whether a *nunc pro tunc* order is appropriate to 'correct' a record . . . ." *Graber*, 410 N.W.2d at 229. We consider the "words used by the court in its order, the nature of the alleged error, whether the matter had previously been called to the court's attention, and the length of time passing before the mistake's 'discovery' . . . ." *Id*. at 229-30.

First, we note the parties' dispute regarding this provision was not apparent at the time Shawnna filed her first notice of appeal nor at the time Kyle filed his motion for limited remand. Second, due to Kyle's failure to file a cross-appeal and due to the language in our first decision, we conclude the first opportunity for care provision was not considered. Third, Kyle did not delay, but filed for *nunc pro tunc* clarification in a timely manner. We therefore turn to the "words used" in the *nunc pro tunc* order to determine its appropriateness:

> In retrospect, *the intention of the Court in the original Decree could have been better expressed*. The provisions of the original Decree related to the issue of first opportunity of care, however, were made in consideration of the parties' agreement in the pretrial statement . . . and with an understanding that [Shawnna] did not

> teach during the summers while [Kyle] did generally work regular business hours during the summer, and made no specific provision allowing a first opportunity to care to alter the routine established by the primary care parent related to child care while [Kyle] was working and the children were not in school.
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> In short, the Decree *made no special provision for the exercise of the first opportunity to care as suggested by [Shawnna] because it was not the intent of the Decree to do so*. To interpret the Decree as suggested by [Shawnna] would mean that [Shawnna] would have the first right to care for the children during any and all periods of time in the summer when [Kyle] was working for more than four hours, but she would not be obligated to provide such care. Such a situation would leave the child-care arrangement . . . in a constant state of flux and subject to the day-to-day preferences of [Shawnna], likely resulting in disruption to the children. Moreover, with the Decree now having been modified to provide for six weeks of uninterrupted care by [Shawnna] in the summers, the issue presented here likely is made moot or reduced substantially.
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> The Court concludes that *an order nunc pro tunc clarifying these matters is appropriate to clarify and conform to the Court's original intent* and to "enter now for then an order previously made." . . . . The Decree should be considered amended to provide that the right to exercise the first opportunity for care of the children is a right which may be exercised excluding periods of child care necessitated by the parties' regular work obligations.

(Emphasis added.).

We conclude the district court's order meets "the test for *nunc pro tunc* orders: to show Now what was done Then." *State v. Steffens*, 282 N.W.2d 120, 122 (Iowa 1979). "A *nunc pro tunc* order is proper to . . . make the record conform to an adjudication actually or inferentially made but which by oversight or evident mistake was omitted from the record." *Jersild v. Sarcone*, 163 N.W.2d 78, 80 (Iowa 1968). The procedural history of this case and the "words used" show the court's *nunc pro tunc* order "is not for the purpose of correcting judicial thinking, a judicial conclusion, or a mistake of law" and is not an order reflecting a "subsequent determination." *See Weissenburger*, 740 N.W.2d at 434. Rather,

the *nunc pro tunc* order here "make[s] an order conform to the judge's original intent." *See Graber*, 410 N.W.2d at 229. Accordingly, we affirm.

Kyle requests appellate attorney fees. Appellate attorney fees are discretionary. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We decline to award appellate attorney fees and tax costs one-half to each party.

AFFIRMED.