IN THE COURT OF APPEALS OF IOWA

No. 1-118 / 10-0945
Filed April 27, 2011

IN RE THE MARRIAGE OF RANDALL CHARLES KREAGER AND AMI DEEANN KREAGER

Upon the Petition of
RANDALL CHARLES KREAGER,
Petitioner-Appellant,

And Concerning
AMI DEEANN KREAGER n/k/a
AMI DEANN RAYER,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, John D. Lloyd, Judge.

Randall Kreager appeals the modification of the child custody provisions of the parties' dissolution decree. **AFFIRMED.**

Matthew J. Hemphill of Bergkamp & Hemphill, P.C., Adel, for appellant.

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

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Randall (Randy) Kreager appeals the district court's modification of the parties' 2007 dissolution decree. The original decree awarded Randy and Ami Kreager (now Ami Rayer) joint legal and physical custody of their two children. The district court modified the decree, awarding Ami primary physical care[1] of the children, setting visitation, and ordering Randy to pay child support. Upon our de novo review, and giving proper deference to the district court's credibility findings, we affirm the district court's well-reasoned modification ruling.

I. Background Facts and Proceedings.

Randy and Ami are the parents of a son, born in 1998, and a daughter, born in 2003. On September 5, 2007, their marriage was dissolved. The dissolution court did not find a history of domestic violence, but found that an admitted incident in which Randy pointed a shotgun at Ami and stated he knew how to end the argument the parties had just had, was "an incredible display of poor judgment" at best, and constituted an assault, even if Randy knew the gun was broken and unloaded. Nonetheless, the court found the single incident during an eleven-year marriage "occurring when the parties' relationship was at its most strained" did not negate its consideration of joint physical care.

The dissolution court found:

> These children would find a stable, loving, home with either of these parents. Each is capable and willing to provide for their care and nurturing. Each parent is supportive of the children's relationship with the other, and the parties have demonstrated an ability to communicate with each other when necessary. The court expects that the parties' ability to communicate and reach

[1] Although the term "primary physical care" is not defined in Iowa Code Chapter 598 (2009), we nevertheless use the term in this opinion because it was used by the parties and the district court.

> agreements regarding the children will improve substantially after the strain of these proceedings has ended.

The dissolution court awarded Randy and Ami joint legal custody and joint physical care. The physical care arrangement was unique: Randy had physical care from December 26 through the Friday of the third full week in March, and from the second Friday in July to the last Friday of September. Ami had physical care from the Friday of the third full week in March through the second Friday in July, and from the last Friday of September to the Wednesday before Thanksgiving. The parties alternated physical care from the Wednesday before Thanksgiving through December 26. The parent who did not then have physical care was awarded visitation on alternate weekends and overnight on Tuesdays.

Ami filed a petition to modify the dissolution decree on May 9, 2009, asking that the children be placed in her physical care.

Following a February 2010 trial, the district court modified the custody, visitation, and support provisions of the decree. The court found Ami had proved a substantial change of circumstances warranting modification and that she was able to provide "superior care." The court ordered primary physical care of the two children be placed with Ami, set a minimum visitation schedule, and ordered Randy to pay child support in the amount of $775.05 per month. Ami was awarded $5000 in attorney fees.

Randy now appeals, contending there has not been a substantial change of circumstances and the district court did not consider Ami's inability to support his relationship with his children.

II. Standard of Review.

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006). However, we give weight to the trial court's findings because it was present to listen to and observe the parties and witnesses. *In re Marriage of Zebecki,* 389 N.W.2d 396, 398 (Iowa 1986); *see also* Iowa R. App. P. 6.904(3)(*g*).

III. Modification of Joint Custody.

When making physical care determinations, we seek to place children in the environment most likely to advance their mental and physical health and social maturity. *In re Marriage of Hansen,* 733 N.W.2d 683, 695 (Iowa 2007). Our prime concern in fashioning physical care arrangements is the best interests of the children. *Id.* at 690. To determine the children's best interests, we weigh all relevant conditions affecting physical care. *In re Marriage of Thielges,* 623 N.W.2d 232, 237-38 (Iowa Ct. App. 2000).

Once a physical care arrangement is established, the party seeking to modify it bears a heightened burden, and we will modify the arrangement only for the most cogent reasons. *See Dale v. Pearson,* 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). Generally, the party requesting modification must make two showings: (1) a substantial change in material circumstances that is more or less permanent and affects the children's welfare and (2) the requesting parent is able to provide superior care and minister more effectively to the children's needs. *In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983); *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Where the existing custody arrangement provides for joint physical care, as is the case here, the court

already has deemed both parents to be suitable custodians. *See Melchiori v. Kooi,* 644 N.W.2d 365, 368-69 (Iowa Ct. App. 2002). Under this joint physical care scenario, where the applying party has proved a material and substantial change in circumstances, the parties are on equal footing and bear the same burden as the parties in an initial custody determination; the question is which parent can render "better" care. *Id.* at 369. In addition to assessing the parties' respective parenting abilities, courts should consider whether the joint physical care arrangement remains in the children's best interests. *See id.* "The significance of an award of physical care should not be minimized. Children are immediately, directly, and deeply affected by the kind and quality of home that is made for them." *Frederici,* 338 N.W.2d at 160-61.

A. Ami has proved "conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change."[2] The district court issued a well-reasoned and extensive ruling on March 25, 2010. We agree with the district court that the following changes were not contemplated by the dissolution court; are more or less permanent; relate to the welfare of the children; and fully support a modification of the dissolution decree. *See id.* at 158.

First, the issue of Randy's "volatility in his personal relationships has become much more apparent." The first trial included evidence of an assault committed by Randy on Ami. "Since then, however, other incidents have arisen." One of Randy's three fiancées he has had since his divorce from Ami testified at trial that there was physical abuse in her relationship with Randy while the

[2] *Frederici*, 338 N.W.2d at 158.

children were present in the home. There was also evidence presented that indicated "[s]omething similar happened involving" Randy and another of his fiancées. While the trial court did not conclusively find this relationship involved abuse,

> the court is left with the obvious conclusion that [Randy] exercised incredibly poor judgment in moving this woman into his home with his children. If no abuse occurred, she is then a person who is so unstable and irrational as to make up total lies to get him arrested and then to totally reverse herself later.

We agree the evidence is a cause for concern.

Second, Randy has shown an "inability to maintain a stable personal life." In less than three years since his marriage to Ami was dissolved, he has been engaged three times and has a fourth girlfriend who spent considerable time at his home with his children.[3] As observed by the district court, these relationships are "brief and intense flings followed by break ups" involving frequent conflict to which the children were exposed. Both children described to child custody evaluator, Dr. Steven Dawdy, their "exposure to conflict between their father and his girlfriends that was frightening and confusing."[4] We agree with the district court that this pattern of relationships evidences Randy's inability to put his children first and protect them from an unstable home life.

In contrast, Ami has remarried and her new husband impressed the district court with his "supportive[ness] of the children and their relationship with both of their parents."

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[3] Two of the three fiancées temporarily moved in with Randy during this same time frame.

[4] We acknowledge Randy's concern for Dr. Dawdy's evaluation methodology but find no reason to disregard this finding.

Third, we now have over two and a half years of the present parenting schedule, and it is not working for the children. As the district court noted:

> There is a remarkable symmetry in the observations of the child custody evaluator, Dr. Steven Dawdy, and Bernard Wiesemann, the therapist who has been seeing both children . . . . Both agree that these children simply have not adapted to the schedule imposed in the decree. [The son] has struggled with the need to adjust to very different sets of household rules and life styles between the parties' homes, so much so that his adjustment disorder, usually a short-lived diagnosis, has now become chronic. [The daughter] increasingly has begun to struggle with these differences as well.

Fourth, the record amply supports the modification court's finding that Randy restricts the children's access to their mother when the children are with him. The district court noted Randy is "actively hostile" toward Ami, which is supported by the evidence and testimony presented at trial. The child custody study noted both children "independently, described patterns of restriction from their mother on the telephone and feeling hurt by their father's control."

In addition, we note the dissolution court's expectation that "the parties' ability to communicate and reach agreements regarding the children will improve substantially after the strain of these proceedings has ended" has not come to pass.[5] The custody evaluator found that Ami and Randy did not communicate:

> Conjoint interview with Ami and Randy was revealing. Communication between the couple was highly strained despite their ability to maintain a fairly civil conversation throughout our interview. Ami maintained a more emotionally controlled and focused style throughout, orienting in a significantly more realistic and child-focused manner in discussing various dynamics and issues. Randy appeared far more defensive, emotional, and resistant to ownership of specific issues. The parents appeared quite incapable of negotiating compromises on even simple points.

[5] This court also expected the parties' communication to "rebound" and conflict to subside after the conclusion of the initial dissolution proceedings. *In re Marriage of Kreager*, No. 17-1587 (Iowa Ct. App. Oct. 15, 2008).

> Ami's positions consistently appeared motivated by the children's needs while Randy's positions, quite consistently, appeared motivated by maintenance of the rules, the custody arrangement, and his rights as a custodial parent. There was little to no evidence, through the interview, of a capacity by either parent to maintain the level of cooperation, give-and-take, or motivation to maintain a friendly relationship needed to successfully manage a shared custody arrangement.

Ami has met her burden to "establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change." *Frederici*, 338 N.W.2d 158.

B. Ami has proved "an ability to minister more effectively to the children's well being."[6] Randy argues the trial court ignored Ami's inability to support his relationship with the children, pointing to statements she has made to third persons. The trial court did note that Ami "is obviously not a fan of her ex-husband and would have been delighted if his prosecution for domestic abuse had been successful." However, her statements made to third persons or personal animosity does not appear to impact upon Ami's ability to support a relationship between the children and Randy.

Our review of the record shows Randy is reluctant "to recognize any problems either in his own life or the lives of his children." He has restricted their access to their mother on occasion. He argues that "[a]ny issues [he] had in his personal life or in his relationships . . . had no effect on the children's academic performance, social or emotional development, or ability to make friends and progress in school." Even though the children are doing in well in school, both their therapist and the custody evaluator noted the children are affected by their

[6] *Frederici*, 338 N.W.2d at 158.

father's tumultuous personal life and his limiting access to their mother. Randy unfortunately gives no credence to the children's continued need for counseling and refuses to participate in it notwithstanding his initial cooperation.

In contrast, Ami does not restrict the children's contact with their father when they are in her care; she attempts to keep Randy informed about the children's lives while they are in her care; and she works to ease the children's transitions between homes, all of which support a finding that she supports Randy's relationship with his children. Ami and her husband are "invested in raising these children and promoting a relationship between them and their father." The children feel safe and secure in their mother's home. Randy and Ami are both good parents, but we agree with the district court that Ami has proven an ability to minister more effectively to the children's needs and well-being and is the "better" parent.

IV. Appellate Attorney Fees.

Ami requests an award of appellate attorney fees. Such an award rests within our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). "Factors to be considered in determining whether to award attorney fees include: 'the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.'" *Id*. (citation omitted). Because Ami was required to defend the trial court's findings, which we affirmed in their entirety, we conclude Randy should pay Ami $1000 in appellate attorney fees.

V. Conclusion.

Ami has proved a substantial change of circumstances since the decree was entered and an ability to minister more effectively to the children's well-

being, which warrants modifying the dissolution decree. We affirm the award of primary physical care to Ami and award her $1000 in appellate attorney fees. Costs are assessed to Randy.

AFFIRMED.