IN THE COURT OF APPEALS OF IOWA

No. 1-830 / 11-0744
Filed March 14, 2012

**IN RE THE MARRIAGE OF ANGELA M. ECK
AND PETER V. ECK**

Upon the Petition of

**ANGELA M. ECK, n/k/a
ANGELA M. KOPPES,**

And Concerning

PETER V. ECK,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt (injunction and motion to quash) and Thomas A. Bitter (trial), Judges.

Peter Eck appeals the denial of his request to modify the custodial provisions of his divorce decree and other related district court rulings. **AFFIRMED.**

Bradley T. Bofelli of Kurt Law Office, P.C., Dubuque, for appellant.

Darin S. Harmon of Kintzinger Law Firm, P.L.C., Dubuque, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Peter Eck appeals from a district court ruling denying his request to modify physical care of his two children after his ex-wife, Angela Koppes, relocated out-of-state. Peter also appeals several other rulings arguing the district court erred in denying his request for a temporary injunction, in denying his request to hold Angela in contempt, in quashing the subpoenas he issued to have his children testify at the modification proceeding, and in denying his request for trial attorney fees. We affirm all of the rulings of the district court.

I. Background Facts and Proceedings.

Peter and Angela's six year marriage was dissolved in 2002. They had two children together: Mason (born February 1999) and Carter (born March 2000). Pursuant to the stipulated 2002 dissolution decree, Peter and Angela had joint legal custody of their children with Angela having physical care. Peter was granted liberal visitation consisting of every other weekend from 6:00 p.m. Friday to 6:00 p.m. Sunday, two uninterrupted weeks over the summer, and alternating holidays. Peter was also to pay child support of $606.51 per month.

In 2004, Peter remarried to Christine. Peter and Christine met while obtaining their masters degrees from the University of Dubuque. Peter and Christine have had two daughters together, born in 2005 and 2009 respectively. Peter testified that around the time he married Christine, he gave the boys, then ages four and five, the choice of what they wanted to call her. He testified that they boys chose to call her "mom," while calling Angela, "Angela."

In 2006, the dissolution decree was modified by stipulation to provide Peter increased visitation. Peter's visitation increased to every other weekend from Friday after school until return to school on Monday and in the week proceeding Angela's weekend from Thursday after school until Friday's return to school. At this time, child support was also modified to $890 per month.

In 2008, Peter began to struggle financially. Peter owned and operated Equitable Builders LLC, a real estate development company. Peter testified that he had been making $120,000 per year on average, and had five employees working at the company. But, due to the collapse of the housing market and the subsequent tightening of credit, Equitable Builders LLC eventually lost everything and is now worthless. Peter estimates that the company has a negative net worth of almost one million dollars. Peter was still working through bankruptcy at the time of the trial.

As a result of his financial struggles, Peter fell behind on his child support payments, and in May 2008, was found in contempt for nonpayment of child support. His child support was then amended to seventy-five dollars per month pursuant to an administrative review by the child support recovery unit. Peter currently pays one hundred dollars per month in support with seventy-five dollars going to his current obligation and twenty-five dollars toward his arrearage. Peter was more than $8000 in arrears on his child support obligation by the time of the trial.

The lack of support compounded Angela's financial difficulties. Angela was employed part-time as a project manager at Becker and Becker Stone

Company, as well as a waitress at a local casino. Angela also rented out a room in her house for additional income.

In the summer of 2008, Peter moved to Barrington, Illinois, a suburb of Chicago. Peter lived in a house the family rented for $2500 per month. Peter planned to start an inflatables business with his father, but it never materialized. In late-2008, Peter's father invested in and became a minority shareholder in a company called Freezer Products. This investment eventually led to the formation of Chartwell Brands, a limited liability company owned entirely by a trust in Peter's mother's name and managed by Peter's father. Chartwell Brands owns the master franchise agreement in Iowa and Illinois for YogenFruz, a frozen yogurt and smoothies franchise company. Peter claims he has no ownership interest in Chartwell Brands. Peter also testified that he is an independent contractor for Chartwell Brands working in the sales of franchises. Peter testified that he is paid in commissions, but currently makes no income because he had not made a single sale. However, Chartwell Brands does pay for Peter's cell phone, vehicle, gas, car insurance, and health insurance. Christine also works for Chartwell Brands in marketing. She testified that she is paid approximately $41,000 per year. According to Peter, he has no savings, no investments, and no retirement accounts, and literally fifty-eight dollars cash to his name. Peter further testified that Christine has a bank account, but only keeps a balance of one hundred dollars. Peter and Christine seemingly live paycheck-to-paycheck.

While residing in Chicago, Peter continued to exercise his weekend visits, but no longer exercised his overnight visits on Thursdays. To make up for this time, Angela provided Peter additional time over the summer.

In February or March 2010, Peter and Angela met for coffee, and Angela informed Peter that she was considering going back to school. On July 29, 2010, Angela notified Peter by email that she had been accepted to an interior design graduate school in Savannah, Georgia, and that she was going to move there at the end of August. Angela testified that she picked this school due to its high national rankings and because the program could be completed in two years, as opposed to three years at other graduate schools. Angela and Peter communicated with several emails in the following weeks. Included in the email exchange is recognition by both parties that the visitation schedule would need to be changed. In one email, Angela mentioned providing Peter with five weeks over the summer.

After Peter discovered that Angela was moving, he decided to relocate back to Dubuque. Peter and Christine moved into a four-bedroom house located on The Meadows golf course in Asbury that they rented for $2500 per month. Despite prior knowledge that Angela had already arranged for the children's schooling in Georgia, when Peter returned, he registered both children in the Dubuque school district where he was residing. Peter then took Mason to school in Dubuque the day before Angela was planning to move to Georgia.

On August 10, 2010, Peter filed an application for modification asking that physical care of the children be transferred to him. Peter also separately filed an

emergency motion for stay or temporary injunction seeking to prohibit Angela from leaving Iowa with the children while the modification proceedings were pending. The district court considered the ex parte emergency motion immediately, but denied it and set it for hearing on September 1. Following the hearing, the district court denied Peter's request for injunction determining that Angela's move was not motivated by a desire to prevent visitation, Angela would do what she could to facilitate visitation and communication between Peter and the children, and that Peter had failed to show the move would result in irreparable injury.

On October 20, 2010, Peter filed an application for rule to show cause. Peter argued that Angela willfully and wantonly failed to comply with the visitation provisions of their divorce decree by moving to Georgia.

On March 16, 2011, Peter subpoenaed both of his children to testify at the modification trial. Five days later, Angela filed a motion seeking to have the subpoenas quashed. These motions came to an emergency hearing on March 21, 2011. Following the hearing, the district court held, "the issue of whether or not the children should be removed from school and forced to travel from a great distance to attend this trial is one that could have been raised and should have been resolved earlier in this litigation." The court then granted Angela's motion to quash, but took no position on whether the children would be allowed to testify by telephone.

The modification trial was held on March 23-25, 2011. During the trial, Peter sought to have the children testify by telephone. The district court denied the request finding:

> Eleven and twelve is probably of an age that is right on the border as to where I'd let them testify even if they were here in person, and they're not here in person so to do it by telephone where I can't evaluate what they look like, I can't evaluate their facial expressions, I can't evaluate how comfortable they are when they're being asked certain questions, I think that's a tremendous part of what the Court needs to look at when taking testimony from young kids.
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> In addition to that, it's very clear to me that the animosity that exists here is very serious, and it seems to go both ways, at least to a fairly significant extent, and I think both attorneys understand that even if I were to let the kids testify, I'm not going to let the attorneys ask the kids any questions about things like who would you rather live with. That stuff is not going to come up. Because of that, the very limited information that I'd get from these kids a lot of would have to do with their appearance and how I evaluate them by seeing them, and I wouldn't get that over the telephone. I'm not very comfortable putting an eleven-year-old and twelve-year-old on the phone from 1,200 miles away and asking them questions after they've supposedly taken an oath that I'm not sure they understand all that kind of information.
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> For those reasons I'm not going to allow the kids to testify by telephone. I agree with [Angela] that there could have been a guardian ad litem appointed. I know [Peter's] aware of that possibility because in reviewing the court file, that's been done in the past, and a guardian ad litem is somebody who would at least speak to the children on the phone, speak to both parties and could give a limited representation about the situation here, so I'm going to deny the request to have the children testify by telephone.

On April 15, 2011, the district court denied Peter's request for physical care, but modified the visitation schedule and increased child support to $375 per month. In the same order, the district court denied Peter's application for rule to show cause. Peter now appeals.

II. Modification of Physical Care.

Peter first argues that the district court erred in not changing physical care upon Angela's move to Georgia. We review the modification of child custody de novo. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 476 (Iowa 1993).

> To change a custodial provision of a dissolution decree, the applying party must 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

Angela's move of nearly 1200 miles is clearly a material and substantial change in circumstances. *See* Iowa Code § 598.21D (2009). Nonetheless, "[c]ustody is ultimately changed only if it is in the child's best interest and the parent seeking the change is better able to minister to the child's well-being." *Dale v. Pearson*, 555 N.W.2d 243, 246 (Iowa Ct. App. 1996); *see also In re Marriage of Thielges*, 623 N.W.2d 232, 235-37 (Iowa Ct. App. 2000). We find Peter is unable to meet his "heavy burden" in making these showings. *Frederici*, 338 N.W.2d at 158.

Peter puts a great emphasis on Angela's new boyfriend, Rafael, who was in the process of moving in with Angela. *See In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003) (stating "if a parent seeks to establish a home with another adult, that adult's background and his or her relationship with

the children becomes a significant factor in a custody dispute"). In particular, Peter argues Rafael is unsuitable based upon an email where Rafael "threatened" Peter. However, we believe the district court properly gave the message no significant weight. The email was sent in response to Peter's unsolicited Facebook message to Rafael's fourteen-year-old nephew where Peter requested the nephew have Rafael contact him so he "can help prevent him the pain and issues I have been put through by Angela!" The record shows no credible evidence Rafael is unsuitable or presents a danger to the children. Although the trial court made no specific credibility findings, it is clear that it gave greater weight to Angela's testimony. The evidence shows the children are healthy and that Angela provides appropriate care for the children in their new home in Georgia. Taking into account all the considerations of this case, we believe the district court correctly found that Peter failed to meet his "heavy burden" to show the ability to provide superior care.

III. Temporary Injunction.

Peter contends the district court erred by not granting him a temporary injunction to prevent Angela from removing the children from Iowa while the modification proceeding was pending. "'The issuance or refusal of a temporary injunction rests largely in the sound discretion of the trial court, dependent upon the circumstances of the particular case.'" *Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005) (quoting *Kent Prods. v. Hoegh*, 245 Iowa 205, 211, 61 N.W.2d 711, 714 (1953)). Accordingly, our review is for an abuse of discretion. *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011). We will not

overturn such a decision unless there has been an abuse of discretion or violation of a principle of equity. *Id*.

> In determining whether removal should be prevented, the trial court must consider all of the surrounding circumstances. They include the reason for removal, location, distance, comparative advantages and disadvantages of the new environment, impact on the children, and impact on the joint custodial rights of the other parent.

Frederici, 338 N.W.2d at 160.

Angela was moving to Georgia to pursue higher education, not as a means to undercut Peter's visitation or undermine his relationship with the children. Angela is attempting to better herself and her ability to provide for her children. Obviously, this move is of a great distance, will limit the children's access to Peter, and will require adjustment by the children. However, these negative factors inhere in any long-distance move by a custodial parent. *Id*. Moreover, the district court found that Angela provided credible testimony that she would do what she could to facilitate visitation and communication between Peter and the children. Although Peter testified that Savannah is more populous and has "an inner-city element," the record does not support a finding that Savannah would present such a comparative disadvantage to Dubuque. In considering all of the surrounding circumstance, we find the district court did not abuse its discretion in refusing to issue a temporary injunction.

IV. Contempt.

Peter further argues the district court erred in dismissing his application to show cause, and in not finding Angela in contempt for preventing him from exercising his visitation under the decree when she moved to Georgia. When an

application for contempt is dismissed, a direct appeal is permitted. *In re Marriage of Ruden*, 509 N.W.2d 494, 496, (Iowa Ct. App. 1993). Our review in such cases is not de novo, but on assigned errors only. *Id*.

"In order to find a person guilty of contempt, a court must find beyond a reasonable doubt that the individual willfully violated a court order or decree." *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995).

> In order to show willful disobedience there must be evidence of conduct which is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Ruden, 509 N.W.2d at 496.

As stated above, Angela's move was not a willful act done to undercut Peter's visitation or undermine his relationship with the children. She moved to further her education and her economic prospects. Accordingly, Peter has failed to show beyond a reasonable doubt that Angela willfully disobeyed a court order. *See Frederici*, 338 N.W.2d at 159-60 ("[T]he parent having physical care of the children must, as between the parties, have the final say concerning where their home will be. This authority is implicit in the right and responsibility to provide the principal home for the children. The right would mean little if the other custodian could veto its exercise."). Furthermore, although we certainly agree that Angela could and should have allowed Peter more participation in the decisions regarding the children's schooling and religion classes, the evidence is insufficient to support a finding of contempt.

In addition, we note there is substantial evidence showing good faith by Angela regarding visitation. When Peter moved to Chicago, Angela provided

additional time over the summer to make up for the lost overnights on Thursdays. Angela also notified Peter prior to moving to Georgia, and attempted to enter into discussions to amend the visitation arrangement prior to leaving. When these discussions failed, Peter filed the application in this case. Peter's request for a temporary injunction was denied by the court, and Peter did not request a temporary hearing to amend the visitation arrangement pending resolution of his application. Nonetheless, the parties were able to work out visits over the Thanksgiving and Christmas holidays. Peter has not shown willful disobedience in this case.

V. Children's Testimony.

Peter further argues the district court erred in granting Angela's motion to quash the subpoenas thereby preventing the two children from testifying at the modification proceeding, and by denying his request to have the children testify by telephone. The district court decision to quash a subpoena as well as its ruling on the admission of telephonic testimony is reviewed for an abuse of discretion. *See In re Estate of Rutter*, 633 N.W.2d 740, 745 (Iowa 2001) (reviewing telephonic testimony); *Morris v. Morris*, 383 N.W.2d 527, 529 (Iowa 1986) (reviewing court's "wide discretion" in ruling on a motion to quash). An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Rutter*, 633 N.W.2d at 745. A ground or reason is untenable when it is not supported by substantial evidence or is based on an erroneous application of the law. *Id*.

Peter cites to an April 2010 Iowa Children's Justice Newsletter authored by Senior Judge Joe Smith to support his argument that the children should attend court proceedings. The newsletter speaks of the benefits of having children present at *juvenile* court proceedings. The idea is that attendance at juvenile proceedings empowers the child by providing them knowledge about their case, the juvenile court process, and our courts in general. It also enhances the child's sense of fairness because they have a better understanding of how decisions were made on their behalf. These benefits are lessened in *custody* cases, where parents often attempt to present themselves in the best light while raising all possible negative features of the other parent. Placing a child into the middle of a heated debate over which parent is the better parent can confuse the child and damage their relationship with either parent. This concern is personified by this case. Even with our cold record, the animosity between Peter and Angela is readily apparent. The following finding of the district court finds ample support within the record:

> The level of discord between Peter and Angela is abundantly clear, and neither party makes much attempt to hide their feelings in this regard. Peter is critical of nearly every choice Angela makes and every aspect of her life. He criticizes the location of her long-time residence at 440 Loras Boulevard as being in a "rough" neighborhood, even though that was the marital home where the parties lived together prior to their divorce. He criticizes her decision to move to Savannah for (hopefully) future better employment, even though Peter moved to Chicago for the same reason. Peter even hesitates to say that Angela loves the boys, and that the boys love her. Even the May 27, 2008, report issued by Lynne Lutze says that "(Peter) and (Christine) explained a long history of animosity between them and (Angela)." And the hard feelings obviously run much deeper than just Peter and Angela. Peter's mother, Priscilla Eck, described Angela as "a very cold mother to the children." Priscilla admits she called Angela a "selfish

> bitch" as the two passed each other in the hall at the courthouse during a break from trial. Angela says she is tired of being watched, criticized, and scrutinized excessively by Peter. She seems to welcome the opportunity to move to Georgia to avoid Peter's scrutiny.

We find that placing the children in the middle of this controversy would not be in the children's best interests, and the district court did not abuse its discretion in denying Peter's motion to have them testify. In making this determination, we further note that Peter did not request the appointment of a guardian ad litem to represent the children's best interests or to make an independent investigation into the children's best interests. *See* Iowa Code § 598.12; *Fenton v. Webb*, 705 N.W.2d 323, 327 (Iowa Ct. App. 2005).

VI. Attorney Fees.

Peter also asserts the district court erred in not awarding him trial attorney fees. In modification proceedings, "the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court." Iowa Code § 598.36. However, Peter was not, and still is not, "the prevailing party." Therefore, we affirm the district court's decision denying him trial attorney fees and additionally decline his request for appellate attorney fees. *See In re Marriage of McCurnin*, 681 N.W.2d 322, 332 (Iowa 2004).

In our discretion, we grant Angela's request for appellate attorney fees and award her the sum of $1000. *See In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999) (indicating that appellate courts have "discretion to award appellate attorney fees under section 598.36"). In making this determination, we have considered the need of the party seeking the award, the ability of the other

party to pay, and the relative merits of the appeal. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005).

VII. Conclusion.

We conclude that the district court did not error in the multiple rulings appealed, and therefore affirm.

AFFIRMED.