IN THE COURT OF APPEALS OF IOWA

No. 2-405 / 11-1912
Filed July 11, 2012

IN RE THE MARRIAGE OF PATRICIA E. WILKES AND STEVEN J. WILKES

Upon the Petition of
PATRICIA E. WILKES,
Petitioner-Appellant,

And Concerning
STEVEN J. WILKES,
Respondent-Appellee.

Appeal from the Iowa District Court for Allamakee County, John J. Bauercamper, Judge.

A mother appeals the district court's order modifying the visitation provisions of the parties' dissolution decree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.**

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Parrish, P.L.C., Decorah, for appellant.

Jeffrey L. Swartz of Jacobson, Bristol, Garrett & Swartz, Waukon, for appellee.

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

DOYLE, J.

Steven and Patricia Wilkes were divorced in June 2011 pursuant to a stipulated dissolution decree. They agreed to share joint legal custody of their minor child, with primary physical care[1] and placement of the child with Patricia, subject to Steven's "reasonable visitation rights." The decree further stated:

> [Steven] shall enjoy reasonable visitation rights with the child to be agreed upon by the parties. In the event the parties are unable to agree, [Steven] shall have visitation as follows:
>
> Forty-eight hours of visitation per week. [Steven] agrees to attempt to avoid Wednesdays when exercising his visitation rights as this is [Patricia's] day off from work. Also [Patricia] shall enjoy the child at least one-half of the weekends per month. Attached is a schedule for the months of April through September 2011. Once [Steven] obtains . . . the balance of his 2011 and 2012 [rotating deputy sheriff] schedule the parties will confer and establish a schedule similar to that already in place with the months of April through September 2011. . . . Morning pickup and return times shall be at 7:30 o'clock a.m. Evening exchange times shall be at 6:00 o'clock p.m.
>
> . . . .
>
> Both parties agree to encourage visitation rights and shall at all times attempt to communicate with regard to visitation, keeping in mind the best interests of the child and the respective schedules of the parties and the child.

The decree also set forth holiday and summer visitation.

Attached to the decree were calendar pages for April through September 2011. The pages clearly set forth Steven's visitation schedule for those months, showing forty-eight hours per week of visitation, considering the time of the custody exchanges. Steven was also allowed visitation on a few Wednesdays.

On September 12, 2011, Patricia filed her "Motion to Construe Court Order Regarding Visitation and/or in the Alternative Motion for Order to Show

[1] "Primary physical care" is not defined in Iowa Code chapter 598 (2011); nevertheless, we recognize the term is commonly used by parties, their counsel, and the courts.

Cause." Her motion asserted Steven refused to share his latest work schedule with her, claiming it was confidential, despite her offer to have the schedule be the subject of a protective order. Patricia requested the court

> establish a visitation order which will allow for maximum continuing contact of the child with [Steven], however [also] provide for [her] to enjoy her weekends with the child when not working, and her Wednesdays that she has off from work with the child. This would be consistent with the intention of the parties . . . .

She alternatively requested the court find Steven in contempt for failing to comply with the decree.

Steven resisted Patricia's motion, stating he was not required by the decree to disclose his work schedule to Patricia. Steven stated he provided Patricia with proposed visitation schedules in an effort to follow the decree and to coincide with his days off work. He stated no work schedule was provided to him by Patricia "in order to determine which dates were mutually convenient." He further stated, "The stipulation is merely an agreement to agree and the parties have been unable to agree." He requested the court provide a visitation schedule because the parties could not agree.

Following a hearing, the district court entered its order concerning the visitation provisions in the parties' decree. The court found the "parties have not been able to agree on visitation for weekdays, weekends, and holidays, and the minimum specified visitation schedule has also been unworkable, because it requires them to agree on the details, and they have failed to do so." The court then set forth a consistent rotating visitation schedule, providing Steven have visitation on alternative weekends Friday to Sunday, in addition to alternating weekly visitation on Wednesdays to Friday one week and Monday to Wednesday

the next week. All visitation was to start and end at 6:00 p.m. The court also set forth an alternating holiday schedule, merely designating what year the parties received visitation with the child. The court also found Steven not guilty of contempt of court.

Thereafter, Patricia filed a motion to enlarge and amend the court's order. She requested the court abide by the parties' agreed stipulation that Steven receive forty-eight hours of visitation per week unless the parties otherwise agreed. Based upon the court's order, Steven would receive ninety-six hours of visitation on the weeks when weekend visitation alternated to him. Additionally, the court's set schedule interfered with Patricia's requested Wednesday visitation, which she argued was not the intent of the parties.

Following a hearing, the court denied Patricia's motion, explaining:

> Substantial evidence was presented at the prior hearing regarding the work schedules of the parties and the inability of the parties to amicably work out child visitation issues. Instead, they quibbled about technicalities of the language in their stipulated decree.
>
> The court made detailed findings of fact and conclusions of law regarding these issues.
>
> The parties granted the court authority to resolve their disputes. The court applied the best interests of the child standard, rather than contract law to this problem. Accordingly, the prior agreement of the parties about the amount of time spent with the child was given less importance by the court, which instead chose to promote the child's best interests, in terms of maximum continuing contact with both parties and the reduction in the atmosphere of conflict between the parties.

Patricia now appeals.[2] We review a proceeding to modify or implement a marriage dissolution decree subsequent to its entry de novo. *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006).

There is a distinct difference between a request for a modification of a decree and a request to interpret a decree. *See In re Marriage of Morris*, 810 N.W.2d 880, 882 (Iowa 2012). "[A] district court retains jurisdiction after a final order to enforce the judgment, but 'does not have the authority to revisit and decide differently the issues concluded by that judgment.'" *Id*. at 885 (quoting *Franzen v. Deere & Co.*, 409 N.W.2d 672, 674 (Iowa 1987)).

> A stipulation and settlement in a dissolution proceeding is a contract between the parties. The parties' stipulation, however, is not binding on the court, as the court has the responsibility to determine whether the provisions upon which the parties have agreed constitute an appropriate and legally approved method of disposing of the contested issues. Accordingly, if the stipulation is unfair or contrary to law, the court has the authority to reject the stipulation. Consequently, once the court enters a decree adopting the stipulation, the decree, not the stipulation, determines what rights the parties have.

Id. at 886 (internal citations, quotation marks, and quotation formatting omitted).

Here, the district court, in entering its decree, expressly found that "[e]ach and all of the terms, provisions, and agreements set out and contained in [the parties' stipulated agreement] and filed herein, are proper and should be approved and made a part of the decree to the same extent as though fully set out herein." The stipulation to which the parties agreed explicitly provides that if the parties are unable to agree upon visitation, Steven is to receive forty-eight hours of visitation per week, inclusive of any weekend time. The stipulation

[2] Steven did not file an appellate brief in response. Patricia makes no argument concerning the court's finding that Steven was not in contempt of court.

incorporated into the decree is not ambiguous. Awarding Steven alternating weekend visitation, in addition to weekday visitation, awards him hours of visitation in excess of the parties' stipulated agreement for those weeks that include both weekday and weekend visitation.

We sympathize with the district court in trying to fashion a schedule that met the parties' demands and the best interests of the child. Nevertheless, this is not an action for modification of the decree, though we note the parties still have that avenue of relief available to them, provided they demonstrate the requisite conditions are present. *See, e.g.*, *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (stating the applying party is generally required to show (1) a material and substantial change in circumstances not contemplated by the decree that is essentially permanent and (2) an ability to provide superior care in seeking modification of a custodial provision of a dissolution decree).

We fully trumpet the district court's reflections upon the parties' situation and recite them here again for parties' benefit:

> [T]he courts of this state cannot continually micromanage the lives of divorced parents to administer child visitation schedules in . . . situations [where work schedules rotate]. There are too many variables for a court to anticipate without holding regular monthly hearings to referee disputes.
>
> The decree calls upon the parties to communicate and cooperate with each other to promote the best interest of the parties. When the parents fail to do so, the court cannot substitute its judgment for theirs. Instead, the court must fashion . . . a schedule for them, and hope the parents will realize the folly of their failure to communicate and later resolve their differences by cooperation, or request the assistance of a neutral mediator.

It is quite time the parents act as grownups and think about what is truly in their child's best interests, not their individual interests. Communication of schedules

is encouraged. Liberal visitation, including additional visitation by agreement, is encouraged.

But because the district court was asked to construe the decree, not modify it, we reverse the ruling of the district court. We remand for further proceedings.[3] We affirm the court's ruling that finds Steven not guilty of contempt of court.

On appeal, Patricia requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rest in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id*. Upon consideration of these factors, we decline to award Patricia appellate attorney fees. Court costs should be assessed to Steven.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

[3] If Patricia seeks an interpretation of the decree, rather than to enforce or implement the decree, the further proceedings are guided by *Morris*, 810 N.W.2d at 881–88.