IN THE COURT OF APPEALS OF IOWA

No. 2-683 / 11-2016
Filed September 19, 2012

Upon the Petition of

KENNETH KRAMER,
Petitioner-Appellant,

And Concerning

KATIE KRAMER,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Greg W. Steensland, Judge.

Kenneth Kramer appeals from the order modifying the child custody provisions of the parties' dissolution decree. **AFFIRMED.**

C. R. Hannan of Chuck Hannan, Attorney, P.L.L.C., and Ryan A. Glen of Deborah L. Petersen, P.L.C., Council Bluffs, for appellant.

Michael J. Winter, Council Bluffs, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

Kenneth Kramer asked the Iowa district court to modify the physical care provision of a Missouri decree dissolving his marriage to Katie Kramer. The Kramers have three children who are all in elementary school. The district court agreed Katie's move with the children from Iowa to North Dakota constituted a substantial change in circumstances. The court awarded physical care of the children to Katie with visitation to Kenneth. Kenneth now contends the Iowa district court failed to accord the Missouri decree full faith and credit and argues he should be granted physical care of the children.

Because Kenneth did not advance an argument regarding full faith and credit in the district court, we will not consider that issue on appeal. Our de novo review of the record convinces us Katie can offer the children better care. Accordingly, we affirm.

I. Factual and Procedural Background

Kenneth and Katie were married in April 2002. They divorced in June 2009 in Greene County, Missouri. The divorce decree provided for the parties to have "joint physical custody" of their three children, then aged seven, six, and five. In August 2009, Kenneth took the three children to Texas where he had relocated with his girlfriend, Charity. When Kenneth did not return the children as agreed, Katie filed a petition for writ of habeas corpus. After nearly a month, the children were returned to Katie's custody pursuant to a Texas court order.

In June 2010, the Missouri court filed a modified decree that provided for "joint physical and joint legal custody of the minor children." A parenting plan

incorporated into the modified decree awarded Kenneth "residential time" with the children during the school year, summer break, and holidays. The modified decree was entered as a foreign judgment in Pottawattamie County, Iowa, where Katie was then residing. Kenneth moved to Council Bluffs in March 2010 with his new wife, Ann. Kenneth and Ann have one child together.

In July 2010, Kenneth filed an application to modify the dissolution decree in Pottawattamie County. The application indicated Katie intended to move from Council Bluffs to Devils Lake, North Dakota. Kenneth alleged the proposed relocation was "an attempt to thwart" his relationship with the children. He asked the district court to award him physical care of the children. On July 15, 2010, the court enjoined Katie from changing the children's residency pending a hearing on the modification. In January 2011, Kenneth filed a motion asking for a guardian ad litem (GAL) to be appointed for the children. *See* Iowa Code § 598.12(2) (2009) (allowing the court to appoint a guardian ad litem to represent the minor children's best interests). The court appointed attorney Tricia McSorley to serve as GAL.

In June 2011, Katie sought court permission to move with her children to North Dakota, where her father and stepmother resided. The district court lifted the previous order restricting Katie from changing the residency of the children.

On June 21, 2011, the GAL issued her report. She interviewed Kenneth, Katie, and their three children, as well as Kenneth's first wife, Rainy.[1] The GAL opined it was in the best interest of the three children to stay in Katie's care. The

[1] Kenneth and Rainy had a daughter together. Kenneth did not maintain regular contact with his daughter and his parental rights to that child were terminated.

GAL report also asserted that Kenneth "needs to work on building a relationship with these children that is grounded in trust, unconditional love and security." The GAL wrote:

> The kids are skeptical of Ken and Ann and only time can heal those wounds. Throwing these children into a new home environment with a parent they have these misgivings about and taking them from the person they've always known to be their full-time caregiver would likely prove to be more than detrimental.

On September 16, 2011, the district court held a hearing on Kenneth's motion to modify the decree. The witnesses included Katie and Kenneth, as well as Kenneth's wife, Ann, and Katie's mother, Mary. On September 29, 2011, the district court ruled on the motion, finding Katie's move to North Dakota constituted a material and substantial change in circumstances justifying modification of the physical care arrangement in the decree. The court also decided: "Ken has not established that he should be the primary caretaker." Kenneth filed a motion for further findings under Iowa Rule of Civil Procedure 1.904(2), challenging the reduction in his visitation time and attacking the court's reliance on the GAL report.

In response to the rule 1.904(2) motion, the district court modified Kenneth's summer visitation schedule. The court also found:

> To the extent Petitioner's Motion suggests that this Court should use a different standard to determine the appropriateness of modification in this case because the Missouri Decree provided for joint physical care, this Court disagrees. While the Missouri decree uses the term joint physical care, it is clear from the actual make-up of the parenting plan as regards custody and visitation is not joint physical care as determined by the State of Iowa.

The court went on to say that it "would have entered the same Decree under either standard." Kenneth now appeals.

II. Scope and Standard of Review/Preservation of Error

Kenneth's challenge to the district court order modifying the dissolution decree calls for de novo review. *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006).

In his first assignment of error, Kenneth argues the Iowa district court "did not accord Missouri's Court Order the full faith and credit that is required under both Article II and the Iowa Code."[2] Katie contends Kenneth did not raise the constitutional issue of full faith and credit in the district court. Kenneth's preservation-of-error statement does not include any citations to the record. *See* Iowa R. App. P. 6.903(2)(g)(1) (requiring the argument section of appellant's brief to include "[a] statement addressing how the issue was preserved for appellate review, with references to the places in the record where the issue was raised and decided"). We agree with Katie that Kenneth did not preserve error on the full faith and credit issue. On appeal, we cannot review an issue that the district

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[2] Iowa Code section 598B.313 states:

> A court of this state shall accord full faith and credit to an order issued by another state and consistent with this chapter which enforces a child-custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under article II.

This statutory provision refers to article II of the Uniform Child-Custody Jurisdiction and Enforcement Act (codified at Iowa Code §§ 598B.201-210). The full faith and credit doctrine is located at Article IV, section 1 of the United States Constitution.

court did not have a chance to consider; this rule of error preservation includes constitutional claims. *Prell v. Wood*, 386 N.W.2d 89, 92 (Iowa 1986).

III. Modification of Physical Care

Iowa courts may modify the physical care provisions in a dissolution decree only when the record reveals a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered, which is more or less permanent and relates to the welfare of the child. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). Kenneth asserted in his application that Katie's then-planned move with the children to North Dakota was a "substantial and material change of circumstances" that required the Iowa court to modify the Missouri decree. The district court concurred:

> The evidence indicates that there has been a substantial change in circumstances. The parties no longer reside in the same place. There is approximately 9 hours difference between homes. Along with all the other factors that exist in this case, it is clear that the parenting plan currently in place must be changed to accommodate current circumstances.

We agree Katie's move constituted a material change in circumstances warranting modification. *See* Iowa Code § 598.21D (stating court may consider relocation of one-hundred-fifty miles or more to be a substantial change in circumstances).

After finding a substantial change in circumstances, our next task is to determine what physical care assignment is in the best interests of the children. "[T]he parent seeking to change the physical care from the primary custodial parent to the petitioning parent has a heavy burden and must show the ability to

offer superior care." *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The heavy burden exists because the court has already decreed the parent with primary care be the better parent. *Id*. But where the parents share equally the physical and primary care of the child under the initial decree, the court has found them both to be suitable custodians and they are on equal footing in the modification action. *Id*. at 368-69. The question then is which parent can render "better care." *Id.*

The district court did not read the Missouri order as providing joint physical care as envisioned under Iowa law and placed the burden on Kenneth to show he should be the "primary caretaker." But the court noted in deciding the rule 1.904(2) motion that, under either standard, it would have placed physical care of the children with Katie. We reach the same bottom line as the district court.

Katie has been the children's primary caretaker over the years. The district court's decision properly accounted for the past practices of this family. *See In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007) (describing the "approximation principle" as an objective factor to consider in making physical care decision).

In deciding the modification question, the district court placed "great weight" on the GAL's report, finding it was "thorough, thoughtful, and well-written." Kenneth, who asked for the GAL to be appointed, complains on appeal the modification order "elevated" attorney McSorley "to the status of an expert witness without proper qualifications." He notes the GAL did not appear at trial

and argues the court erred in relying on her report.[3] Katie's attorney filed the GAL report with the district court. Kenneth did not object to its consideration. In fact, both Kenneth and Katie included the GAL report on their exhibit list filed in the district court, though the trial transcript does not reflect that the report was actually offered as an exhibit.

We do not find the district court's reliance on the GAL report cause for disturbing the award of physical care to Katie. It appears that the parties agreed, or at a minimum did not object, to the court's consideration of the GAL report before the modification hearing. *See generally In re Marriage of Joens*, 284 N.W.2d 326, 329 (Iowa 1979) (explaining one of the factors listed in *In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974) ("The report and recommendation of the attorney for the child or other independent investigator.") may be considered by court if parties agree or stipulate).

Even if we were to exclude the GAL report from our de novo consideration of the record, we would still find Katie to be the parent better able to minister effectively to the long-range interests of the children. We agree with the district court's assessment that Kenneth's failure to return the children from Texas "created a significant trust issue" between him and his children. Kenneth's "domineering" conduct and his efforts to record conversations with Katie to use against her signals his unwillingness to support the children's relationship with their mother. The goal of the children maintaining a positive bond with both

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[3] On appeal, Kenneth cites to portions of the GAL report that are favorable to his position, specifically that he had a "clean, spacious and comfortable home" in a "great, family friendly neighborhood."

parents will be best advanced if Katie has physical care. *See In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa Ct. App. 1988) (explaining that denial by one parent of the child's opportunity for maximum contact with the other parent, without just cause, is "a significant factor" in determining custody).

Katie asks for attorney fees for this appeal. We have the discretion to award attorney fees in a reasonable amount to the prevailing party under Iowa Code section 598.36. In addressing Katie's request we may consider her financial needs, Kenneth's ability to pay, and whether Katie was obligated to defend the trial court's decision. *See In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). After considering these factors, we order Kenneth to pay $2000 toward Katie's appellate attorney fees. The costs of this appeal are taxed to Kenneth.

AFFIRMED.