IN THE COURT OF APPEALS OF IOWA

No. 2-723 / 12-0638
Filed September 6, 2012

IN RE THE MARRIAGE OF JUSTIN ANDERSON AND SANDI ANDERSON

Upon the Petition of JUSTIN ANDERSON,
Petitioner-Appellee,

And Concerning SANDI ANDERSON, n/k/a Sandi Bunch
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, John D. Telleen, Judge.

A mother appeals from the denial of her application for modification of physical care. **AFFIRMED AS MODIFIED.**

M. Leanne Tyler of Tyler & Associates, P.C., Davenport, for appellant.

Jennifer Olsen of Olsen Law Office, Davenport, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, J.

Sandi Anderson (n/k/a Sandi Bunch) appeals from the denial of her application for modification of physical care and child support, as well as the ruling on applications for rule to show cause. She contends the district court erred in its handling of discovery noncompliance by Justin Anderson, finding no material or substantial change in circumstances, and in modifying the right of first refusal in the dissolution decree. She also requests appellate attorney fees. We affirm the district court on all issues except for the modification of first refusal of time with the child, which we vacate.

I. Facts and Proceedings

Justin and Sandi Anderson were married in November 2006. Their daughter A.A. was born earlier that same year. Sandi is highly organized and works in the military. Justin is self-employed in the media industry and sometimes struggles to keep his finances in order. The petition for dissolution of marriage was filed in January 2009 with a temporary order for joint physical care entered in August 2009 upon agreement of the parties. The dissolution decree entered November 2009 upon agreement of the parties provided for joint physical care. The decree also provided that neither party would allow a third party to care for A.A. for a period longer than four hours without first offering the other the opportunity to provide for A.A.'s care and supervision.

From November 2009 until April 2010, the arrangement set forth in the dissolution decree continued without major difficulty. In April 2010, Justin was scheduled to be on a business trip during his normal custody time. Sandi agreed to care for the child during this time. When this trip was cancelled, he arrived at

Sandi's house to pick up A.A. for his scheduled visitation time. Sandi refused to allow him to take A.A. and police were called to the scene. After this event, the relationship between Justin and Sandi regarding the joint care of A.A. became strained. In January 2011, Sandi denied Justin visitation for four weeks. A friend apparently reported to Sandi that A.A. had been sitting alone in a massage chair at a store for over ten minutes. That same month, Sandi reported to Justin that she was going to take A.A. full time and he would have to take her to court to alter the arrangement.

Justin filed an application for rule to show cause on January 31, 2011. Sandi filed an application for rule to show cause in response, along with an application to modify custody. Sandi contended Justin's conviction for operating while intoxicated and driving while revoked, his urban living arrangement, panic attacks, and failure to file his tax returns constituted a substantial change in circumstances to warrant awarding her full-time custody of A.A. Further, she alleged her right of first refusal as given in the dissolution decree was violated by Justin allowing his parents to care for A.A. for extended periods of time.

After her filings for rule to show cause and modify custody, Sandi took A.A. to a counselor and sought to change A.A.'s preschool. Justin struggled to respond timely to discovery requests and was warned by the judge that, should he continue to inadequately respond to discovery, he would be prevented from presenting evidence. After trial, in a comprehensive ruling the district court found both Sandi and Justin to be capable parents. The district court found Justin's convictions and panic attacks were isolated instances; his urban living arrangements were adequate to raise a child; his financial irresponsibility did not

adversely affect his parenting abilities; and, taken together, these problems did not constitute a material change of circumstance. The court sanctioned Justin for his discovery violations by charging him with some of Sandi's attorney fees. The court also modified the parties' dissolution decree to provide that any right of first refusal would not apply to visits with grandparents. In response to Justin's application for rule to show cause, the district court held Sandi in contempt for withholding A.A. from time with Justin. Sandi appeals.

II. Analysis

A. Standard of Review

We review the district court's ruling de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). "We examine the entire record and adjudicate anew the parties' rights on the issues properly presented." *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50–51 (Iowa 1999).

B. Discovery Sanctions

Sandi contends the district court did not fully consider Justin's delinquency in responding to discovery requests, and that the court should have made good on its threat to prevent Justin from presenting evidence at trial. Instead, Justin was charged with attorney fees.

A district court's order imposing discovery sanctions will not be disturbed unless the court abused its discretion. An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds. *In re Marriage of Williams*, 595 N.W.2d 126, 129 (Iowa 1999). The district court has the power to "make such orders in regard to the failure [to comply with discovery] as are just," including "[a]n order refusing to allow the disobedient party to support or oppose

designated claims or defenses, or prohibiting such party from introducing designated matters in evidence." Iowa R. Civ. P. 1.517(2)(b)(2). We find no abuse of discretion in the trial court's decision to sanction Justin's behavior by taxing attorney fees against him as opposed to prohibiting him from presenting certain evidence.

Sandi also contends the district court failed to consider the delinquent discovery responses in assessing Justin's credibility. The district court did note Justin's relative irresponsibility in its opinion. Further, as we are unable to observe the witnesses' demeanor, credibility is an area in which appellate courts give district courts especially heightened deference. *Knickerbocker*, 601 N.W.2d at 51. Therefore, we decline to find an abuse of discretion in the district court's handling of discovery sanctions against Justin.

C. Modification of Physical Care

Once a physical care or custody 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. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). 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 has an ability to provide superior care. *Id.* The changed circumstances must not have been contemplated by the court when it established the arrangement. *Id.*

Upon our de novo review, we agree with the trial court that Sandi has not met her heavy burden of demonstrating a material and substantial change in

circumstances as to warrant a change in the joint physical care arrangement. Both parents still live in the same area, work the same jobs, and are able to provide the same amount of care. Certainly, as admitted by Sandi, the parties' personalities and tendencies have not changed. Here, continuing joint physical care provides the best opportunity for stability and continuity of caregiving, as both parents have, for some time now, participated equally in physical care of A.A. *See In re Marriage of Hansen*, 733 N.W.2d 683, 697–98 (Iowa 2007) (stating "joint physical care is most likely to be in the best interest of the child where both parents have historically contributed to physical care in roughly the same proportion").

D. Right of First Refusal

Next, Sandi challenges the district court's modification of the right of first refusal to care for the child contained in the parties' stipulated dissolution decree, after finding no change of circumstances in denying her application to modify care. Justin had been allowing his parents to spend time with A.A. on the weekends in excess of four hours without giving the opportunity to Sandi to watch A.A. instead. Sandi argued in her petition for modification that this violated the right of first refusal in the parties' dissolution decree. The district court disagreed and modified the dissolution decree to provide an exception to the right of first refusal where A.A. is left with her grandparents. Sandi challenges the district court's actions on two grounds: first that her constitutional right to raise her child was violated, and second that her due process rights were violated when the district court improperly raised the issue outside of the pleadings.

First, Sandi asserts her constitutional right to raise her child as she sees fit was violated, citing *In re Marriage of Howard*. 661 N.W.2d 183 (Iowa 2003). We note this argument was not brought in her motion for reconsideration and thus is not preserved for appeal. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Second, Sandi challenges the modification to the dissolution decree by noting the trial court's actions were made unilaterally with no notice to the parties. Sandi thus was not prepared to meet this issue.

"An issue should not normally be considered on appeal in a civil proceeding unless fairly raised by the pleadings." *City of Clinton v*. *Loeffelholz*, 448 N.W.2d 308, 310 (Iowa 1989). A district court may, however, consider an issue not put forth specifically in the pleadings where there is a prayer for general equitable relief. *Jorge Constr*. *Co*. *v*. *Weigel Excavating & Grading Co*., 343 N.W.2d 439, 441 (Iowa 1984) (stating a prayer for equitable relief "often will justify a court in granting relief beyond what is asked in specific prayers"). Such a prayer for general equitable relief will be construed liberally; however, general equitable relief must be consistent with the pleadings and evidence and must not surprise the opposing party. *Id.*

Sandi made a request in her application for modification of the joint physical care arrangement and child support for general equitable relief. Further, the modification cannot come as a surprise where Sandi requested the court modify the decree pursuant to a claimed change in circumstances. While it did not modify the portion of the decree anticipated by Sandi, it was within its equitable bounds and did not deny Sandi due process to do so.

However, we do note that no sufficient change in circumstances existed to modify the dissolution decree in this manner. To support a modification of visitation, a change of circumstances must be shown, though such change may be "much less extensive" than that required to support a change in custody. *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985). The evidence presented at trial shows a longstanding, positive relationship between A.A. and her grandparents predating the dissolution decree. The district court does not point to any change in circumstances to support its unilateral change of the first refusal provision. We accordingly modify the court's alteration of the decree.

E. Appellate Attorney Fee

This court has broad discretion in awarding appellate attorney fees. *Okland*, 699 N.W.2d at 270. An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Given Sandi's stable financial situation and the merits of her appeal, we do not award appellate attorney fees. Costs on appeal are assessed to Sandi.

AFFIRMED AS MODIFIED.