IN THE COURT OF APPEALS OF IOWA

No. 6-138 / 05-1285
Filed April 26, 2006

IN RE THE MARRIAGE OF TERI ANN LAWYER
And STEVEN VERNE LAWYER

Upon the Petition of
TERI ANN LAWYER, n/k/a TERI ANN ISACSON,
Petitioner-Appellee/Cross-Appellant,

And Concerning
STEVEN VERNE LAWYER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Martha L. Mertz, Judge.

The parties appeal and cross-appeal the order of the district court denying their respective petitions to modify certain provisions of the decree, but modifying visitation. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant/cross-appellee.

Leslie Babich and Kodi A. Petersen of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee/cross-appellant.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

VOGEL, P.J.

Steven Lawyer appeals, and Teri Isacson cross-appeals, from the district court's order denying modification of the custody or child support provisions of their dissolution decree, but finding a significant change in circumstances requiring modification of the visitation provisions. We affirm.

Steven and Teri's marriage was dissolved in 1998, incorporating the terms of a stipulation of the parties. They were given joint legal custody of their two-year-old son Matthew with Teri having physical care and Steven having reasonable and liberal visitation. Steven agreed to pay child support of $700 per month, which exceeded the amount required by the child support guidelines. In March 2004, Steven filed a petition to modify the decree, requesting the court grant physical care of Matthew to him due to Teri's move to Florida. Teri resisted and petitioned the court to increase Steven's child support obligation. Following what appears to be a thorough presentation of the evidence advancing each party's position, the district court denied each party's modification request except for setting forth a default visitation schedule and allocating Matthew's travel expenses. The court also ordered the parties to pay their own attorney's fees and pay the court costs equally. Steven appeals the court's denial of modification of physical care, and Teri cross-appeals the court's denial of an increase in Steven's child support obligation, denial of trial attorney fees, and allocation of courts costs. She also seeks appellate attorney fees and costs.

Scope of Review. We review modification rulings de novo. Iowa R. App. P. 6.4 *In re Marriage of Sojka*, 611 N.W.2d 503, 504 (Iowa 2000). Although not bound by the district court's factual findings, we give them weight, especially

when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*). A party who seeks a modification of a dissolution decree must establish by a preponderance of the evidence that there has been a substantial change in circumstances since the entry of the decree or its last modification. *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 331 (Iowa Ct. App. 2005). The party seeking a change in custody must also prove he or she has an ability to minister more effectively to the child's well-being. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). This heavy burden "stems from the principle that once custody of a child has been fixed it should be disturbed only for the most cogent reasons." *Id*. (quoting *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983)).

Burden of Proof. Steven asserts that prior to Teri's move to Florida, the parties enjoyed a *de facto* shared physical care of Matthew. Because of this, Steven contends the district court erred by treating the issue as to whether physical care should be *changed* from one parent to the other, thereby requiring Steven to prove he could minister more effectively to Matthew's needs. Steven claims that he and Teri were on "equal footing" and the district court should have only sorted out with which parent Matthew should "remain." While Teri admits that Steven cared for Matthew six out of fourteen nights for several years, we find no basis for converting a very liberal visitation or even informal shared care arrangement into a trap for the unwary for a later modification action. *See generally In re Marriage of Jacobo*, 526 N.W.2d 859, 867 (Iowa 1995) (recognizing the strong public policy precluding enforcement of private agreements in a child support context, as courts are loath to sort through

numberless disputed claims of undocumented private agreements concerning support obligations because a matter so important should be clearly fixed and authorized by court order); *In re Marriage of Von Glan*, 525 N.W.2d 427, 430 (Iowa Ct. App. 1994) (noting the enforceability of extra-judicial agreements made by the parties in dissolution proceedings is generally dependent on acceptance or approval by the court). One of the legislature's stated statutory goals in dissolution cases is to assure a child the opportunity for maximum continuing physical and emotional contact with both parents after they have dissolved their marriage. *See* Iowa Code §§ 598.1(1), 598.41(1)(a) (2003). A parent who is responsible for the child's physical care may be reluctant to allow the other parent greater access to the child if there is a perceived threat to his or her status as primary caregiver with attendant negative legal consequences. Therefore, we find no error in the district court ruling requiring Steven to prove he could minister more effectively to Matthew.[1]

Physical Care. Steven seeks physical care of Matthew, pointing to the disruption in Matthew's life since Teri's decision to move to Florida. He claims that the education Matthew receives in the Florida schools is substandard when compared to the education he received in the West Des Moines school system. Steven also claims that Teri is not following the medication regime recommended by Matthew's doctors. The district court found that, although Matthew's new school may have some heightened security issues from his former school in Iowa, Steven failed to show any direct concerns for this particular school or

[1] We also note that the burden of proof issue was not specifically addressed by the district court's modification ruling, and Steven did not file a motion to enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2), whereby error is not preserved.

Matthew's safety or that Matthew's academic performance had suffered in the new school environment. The district court also found that the parties' disagreement over Matthew's medication regime had been resolved by the cooperation of Teri and Steven in procuring additional medical advice and treatment for Matthew.[2] We agree with the district court on both of these findings.

Steven also sought physical care of Matthew by asserting that Teri's personal life demonstrated her lack of stability. The evidence adduced at trial detailed that Teri started dating Jeff Isacson in August 2004 and shortly thereafter, Jeff revealed to Teri that he was being accused in Minnesota of sexually abusing his thirteen-year-old daughter. Before ascertaining whether criminal charges were pending, Teri married Jeff on September 21, 2002. In February 2003, under a stay of prosecution, Jeff consented to the entry of a protective order giving up any custody, visitation, and contact with his three children. In January 2004, a child, "J.J.," was born to Teri and Jeff. The couple separated just two months later and in August 2002, the marriage was dissolved. The district court found that Teri's relationship with Jeff Isacson was irrelevant to the modification action in light of the dissolution of that marriage, Jeff's move to Vermont, his infrequent contact with Teri, Matthew, or J.J., and the absence of a conviction or active prosecution against Jeff at the time of trial. Although we disagree with the district court's characterization that Teri's relationship with Jeff is of little consequence to the modification action, we agree that it does not rise to

[2] Steven argues that the district court's findings in this respect are mistaken, but he did not file a motion to enlarge findings under Iowa Rule of Civil Procedure 1.904(2) to challenge this. We conclude Steven has waived error as to this finding.

such a level as to impact Teri's current abilities as a parent. While Teri's seemingly impulsive, and now failed marriage, does not speak well of her choice in partners, the record does not disclose a negative impact on Matthew. We therefore agree with the district court's findings that these grounds do not satisfy Steven's heavy burden to require modification of physical care.

The distance that now separates Steven in Iowa from Matthew in Florida is naturally of great concern to Steven as he clearly had close and regular contact with Matthew while he lived in Iowa. The district court appointed a custody evaluator, Dr. Stephen Charles Dawdy, who traveled to both homes and met with both Steven and Teri. After observing Matthew with each parent and administering a series of psychological tests, Dr. Dawdy recommended that Matthew remain in the physical care of Teri. Dr. Dawdy testified as follows:

> Q. When you observed Teri's parenting skills and Steven's parenting skills, when you saw them one-on-one with each other, how would you compare and contrast those? A. Teri represents the essence of caretaking, focused, calm, reasoned, perceptive mother. It's obvious being around her that she knows what she's doing. Anyone observing her I believe would conclude that they would be completely trusting of her with a child, in my case observing her of her with her child. Observing Steve with his son, it's different. I did not conclude at all that there was danger or inappropriateness or anything negative along that line, but it doesn't have the essence of that type of deep caretaking to that level. It's more interest in activities, interest in event, ideas, certainly watchfulness and certainly supervision to some level but not to the same level.

Concurring with Dr. Dawdy's recommendation, the district court noted:

> Placing Matthew's physical care with Steven will not shorten the distance between Iowa and Florida. Nor can this court restore Matthew's former life in Iowa. Changing Matthew's custody now will require Matthew to make yet another adjustment to an absent

> parent, this time his primary caregiver. The court concludes this is not in Matthew's best interests.

We also agree with the district court's finding that modifying physical care would not be in Matthew's best interests. It is not ideal for a parent to move such a great distance with a child, but it happens frequently and is contemplated by both Iowa case and statutory law. *Frederici*, 338 N.W. 2d at 159-160. *See also* Iowa Code § 598.21(8)(a) (2003) *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). The Iowa legislature has not prohibited such moves, but has determined that relocations exceeding one hundred fifty miles may be considered a substantial change of circumstances. Iowa Code §598.21(8)(a). After a close inspection of the record, it is clear that Matthew has two very caring and attentive parents. As the judicially-designated physical care parent, Teri significantly reduced Matthew's contact with Steven by seeking employment and relocating in Florida. Nonetheless, the record supports that Matthew has adjusted to the move and that Teri should remain the physical care parent. We agree with the district court that Steven did not carry his heavy burden of proving he could more effectively minister to Matthew's well-being than could Teri. We therefore affirm the district court's denial of modification of physical care of Mathew. The district court did find that the new living arrangements required a modification of visitation. Neither party appeals the modification of visitation or division of travel expenses.

Child Support. On cross appeal, Teri argues that the district court erred when it denied her request to increase Steven's child support obligation. Under the parties' original dissolution decree, Steven agreed to pay $700 per month in

child support. At the time of the modification trial, the district court found that according to Steven and Teri's average annual incomes, Steven's monthly support obligation would be $780.98 under the guidelines.[3] However, the district court concluded, and we agree, that a deviation was necessary in this case due to the expenses Steven would be incurring on a regular basis to maximize visitation with Matthew. The court also discounted the $19,200 in annual child care expenses submitted by Teri for her employment of a nanny, due to Teri's failure to detail what portion of the household chores and care of Teri's other child may comprise that expense. Strict application of the guidelines, if unjust or inappropriate, may cause a court to adjust the guideline support amount upward or downward if such adjustment is "necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case." *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006) (quoting Iowa Ct. R. 9.4). We agree with the district court's reasoning and conclusions. Therefore, we affirm the district court's denial of Teri's request to modify Steven's child support obligation.

Attorney Fees. Teri also appeals the district court's denial of her request for trial attorney fees and that costs were not assessed solely to Steven, and she requests attorney fees on appeal. An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761,

[3] We note that it appears both the district court's Exhibit 1 and Teri's Exhibit 24, which are child support guideline worksheets prepared using the Iowa Support Master software program, are erroneous as to Teri's state income tax liability because Florida does not require its residents to pay state income tax. This results in an additional $6,214.19 in annual income for Teri, or $518 per month.

765 (Iowa 1997). Given the financial position of both parties, we cannot say the district court abused its discretion in ordering the parties to pay their own attorney fees and share the court costs.

An award of appellate attorney fees is within the discretion of the appellate court. *Spiker v. Spiker*, 708 N.W.2d 347, 360 (Iowa 2006). Whether such an award is warranted is determined by considering "the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal." *Id.* (quoting *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996)). Again, considering the evidence presented regarding the financial situation of each party, we award no appellate attorney fees and assess one-half the costs of this appeal to each party.

AFFIRMED.