IN THE COURT OF APPEALS OF IOWA

No. 7-789 / 07-0740
Filed January 16, 2008

IN RE THE MARRIAGE OF STANLEY A. LAMOUREUX AND CAROL A. LAMOUREUX

Upon the Petition of
STANLEY A. LAMOUREUX,
Petitioner-Appellee,

And Concerning
CAROL A. LAMOUREUX,
Respondent-Appellant.

Appeal from the Iowa District Court for Pocahontas County, Gary L McMinimee, Judge.

The respondent appeals from the district court's order modifying custody and physical care of the parties' children. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Jill Davis of Cornwall, Avery, Bjornstad & Scott, Spencer, for appellant.

Dan McGrevey, Fort Dodge, for appellee.

Heard by Huitink, P.J., and Vogel, J. and Robinson S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

PER CURIAM

Carol Lamoureux appeals from the district court's order granting Stanley Lamoureux's petition to modify the child custody provision of their dissolution decree. We affirm in part and reverse in part.

Carol Lamoureux and Stanley Lamoureux's marriage was dissolved in September 2003. They have three children: Christian (born 1993), Lucas (born 1995), and Emily (born 1998). At the time of the dissolution, Carol was dating John LeWallen. The district court found Carol's relationship with John troubling because John was a potential threat to the three children. However, the district court also credited Carol's testimony that she had no "current plan" to marry or cohabitate with John. Carol was granted physical care of the children and Stanley was granted liberal visitation.

In February 2004, Carol and the children moved in with John. In March 2006, Iowa Department of Human Services (DHS) began investigating reports that the children had been abused by Carol and John. On March 30, 2006, DHS filed an application for the emergency removal of the children from Carol and John's home. The district court granted the application and transferred physical care of the children to Stanley. The children were all adjudicated in juvenile court to be children in need of assistance. On April 25, 2006, Stanley filed his petition for modification, requesting that he be granted physical care of the children.[1] In May 2006, Carol and John married. Subsequently, DHS confirmed some of the allegations of abuse against Carol and John. In February 2007, the district court

[1] The juvenile court granted concurrent jurisdiction for Stanley to pursue the modification in district court. *See* Iowa Code § 232.2(2) (2005).

granted Stanley's petition, giving him physical care of the children and visitation to Carol. Additionally, the district court restricted Carol's visitation to prohibit John from being alone with the children. Carol appeals from this order.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). Our overriding consideration is the children's best interests. *Ford*, 563 N.W.2d at 631.

Custody and Visitation

A party who seeks a modification of a dissolution decree must establish by a preponderance of the evidence that there has been a material and substantial change in circumstances since the entry of the decree or its last modification. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Additionally, the party seeking a change in custody must prove that he has the ability to minister more effectively to the children'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 *Frederici*, 338 N.W.2d at 158).

The district court found:

> [T]he children's best interests make it expedient to change the custody provisions of the decree to provide for Stanley to have responsibility for the children's physical care. Between the dissolution decree and the removal of the children in March 2006, Carol chose to live with John and permitted him to create an environment of abuse. Her home became a place where slapping, shoving, head carrying, threats, abusive language, name calling,

> and spousal abuse all existed . . . . With respect to Stanley's ability to administer to the children, it has been determined that he provides proper supervision, that he provides for the children's needs, and that the children are safe in his home.

We find little merit in citing all the instances of abuse that are detailed in the record as we agree with the district court in its findings and defer to its credibility assessments. The primary concern is the safety of the children. *See In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the court considers the previous pattern of caregiving and the safety of the children, among other factors, in determining what physical care arrangement is in the best interests of the children). Because Stanley has met the heavy burden necessary to justify a modification of custody, we affirm.

Carol also argues that visitation should not have been restricted to prohibit John from being alone with the children. Again, the record contains the evidence of the incidences of abuse not just against these children but also against John's son from a former relationship. There was mixed testimony by the various professionals involved with the family as to the safety of the children in John's care. We agree with the district court's assessment of the evidence, including the credibility of the witnesses, that the visitation restriction for the protection of the children is in their best interests and affirm.

Retroactive Modification of Child Support

The district court's order and amended order of February and March 2007 retroactively modified child support. The district court awarded Stanley "unreimbursed child support" for April and May 2006 in the amount of $1221.12

and entered a judgment against Carol in the amount of $277.80.[2] The district court calculated the judgment amount based upon other debts the parties owed to one another. Additionally, the district court also awarded Stanley child support retroactive to September 2006. This resulted in Carol owing a child support amount of $2781.72, which was characterized as a "delinquency".

Carol first contends the district court erred in awarding Stanley "unreimbursed child support" for April and May 2006 when the petition for modification was not filed until April 2006. Iowa Code section 598.21C(4) (Supp. 2005) provides that child support may be "retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party." Consequently, the award of "unreimbursed child support" is reversed as it was a retroactive modification before three months from the date the petition was filed. We remand to the district court to determine the amount due to each party in light of the reversal.

Carol next contends that characterizing the debt of $2781.71 as a "delinquency" was in error. Both parties agree that the delinquency description is prohibited. *See* Iowa Code § 598.21C(4). ("A retroactive modification shall not be regarded as a delinquency unless there are subsequent failures to make payments in accordance with the periodic payment plan."). Therefore, we reverse and remand to strike the delinquency description from the district court ruling.

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[2] The amount of the judgment against Carol was "the difference between what [Stanley] owes Carol and what Carol owes [Stanley]." The judgment amount against Carol was the "unreimbursed child support" in the amount of $1221.12 minus a $350 payment Carol had previously made to Stanley and a $593.32 debt that Stanley owed to Carol for the children's prior medical expenses.

Trial and Appellate Attorney Fees

Finally Carol argues that the district court erred in awarding Stanley $9000 in trial attorney fees. 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 Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Awards of attorney fees must be fair and reasonable and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994). In addition to arguing the unreasonableness of the award, Carol claims that some of the fees incurred in the juvenile proceeding were inappropriately included in the dissolution court's award. The timesheets submitted by Stanley's attorney do not tally the two court proceedings. However, the descriptions of the work preformed indicate what was billed for the juvenile court proceeding and what was billed for the district court dissolution work. Stanley's request was for $12,615 in fees and the district court's award of $9000 strongly suggests the juvenile court fees were not included in the district court fee award. Upon review of the record, we find no abuse of discretion in the award of attorney fees.

Stanley requests attorney fees on appeal in the amount of $4000. Appellate attorney fees are also discretionary and are determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). Having considered the proper factors,

we award Stanley appellate attorney fees in the amount of $2000. Costs on appeal assessed to Carol.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.