

IN THE COURT OF APPEALS OF IOWA

No. 8-408 / 07-0537
Filed July 30, 2008

Upon the Petition of
CORY ALAN NORRIS,
Petitioner-Appellee,

And Concerning
KAREN ALICE KNOCK,
Respondent-Appellant.

Appeal from the Iowa District Court for Grundy County, Todd A. Geer,
Judge.

A mother appeals from the district court's ruling denying her application to modify the physical care and child support provisions of a prior custody decree, and declining to award her attorney fees. **AFFIRMED.**

Bruce Toenjes of Nelson & Toenjes, Shell Rock, for appellant.

Cory Norris, Deer River, Minnesota, pro se.

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

ZIMMER, J.

Karen Knock appeals from the district court's denial of her petition to modify the parties' prior custody decree to place physical care of the parties' child with her instead of with the child's father, Cory Norris. She also contends she should have been awarded child support and attorney fees. We affirm.

I. Background Facts and Proceedings.

Cory Norris and Karen Knock are the parents of Cole Norris, born in April 1996. Cory and Karen never married, but lived together for a short period of time following Cole's birth with Cory's parents in Parkersburg, Iowa. The parties' turbulent relationship ended in September 1996, and Karen moved with Cole to Karen's grandmother's home in Ackley, Iowa, just west of Parkersburg. Thereafter, Karen and Cole moved from Karen's grandmother's house to Prairie du Chien, Wisconsin.

Cole lived with Karen for a little over a year. During that time, Karen initially denied Cory any visitation with his son. On September 6, 1996, Cory filed a petition for custody and visitation with Cole. Karen later allowed Cory visitation with Cole through Cory's mother, because Karen had concerns about Cory's drinking. In August 1997 Karen gave custody of Cole to Cory's parents because Karen determined she was unable to provide a stable home for her son.

In September 1997 the district court entered an order by agreement of the parties. The order awarded temporary custody of Cole to Cory's parents for one year. Karen was awarded liberal visitation with Cole on forty-eight hours' notice, and the court established criteria for Karen to retain custody of Cole after a year, including requirements that she be employed in the same job for at least six

months, that she reside full time at the same address for at least six months, and that she be able to provide for Cole financially and emotionally as well as provide clean and adequate housing for him.

Karen did not seek to regain custody of Cole after the one-year period expired. Instead, the parties entered into another stipulation, which the court approved in a decree entered on April 26, 1999. The new stipulated decree awarded Cory and Karen joint legal custody of Cole and provided for physical placement of their son with Cory. Karen was awarded visitation with Cole, which included split holiday visitation, alternating weekends, and multiple weeks visitation during the summer, provided Karen was exercising visitation consistently. Additionally, Karen was given deadlines to notify Cory of the weeks she intended to exercise her summer visitation. The stipulation further required Cory and Karen to provide each other with their current home and work addresses and telephone numbers.

Although the stipulation granted Karen regular visitation with Cole, Karen never exercised regular visitation. Karen would sometimes go for a couple of months without exercising any visitation with Cole. Karen was not involved in Cole's schooling or school activities. Karen was deployed as a member of the United States Army National Guard to Iraq from February 2003 to May 2004 and was unable to exercise visitation during that period of time. However, she did not exercise any visitation with Cole during the 2004-05 school year, after her return from Iraq. Though Karen claimed Cory often prevented her from seeing Cole, Cory insisted that Karen regularly failed to give adequate notice of when she wished to exercise her visitation, if she exercised visitation at all. It is undisputed

that Cory allowed Karen's mother, who also lived in Ackley, Iowa, regular visitation with Cole.

Since 1999 Cory has been Cole's primary caretaker. Cory acknowledges that he continued abusing alcohol after Karen agreed that Cole would be placed in his physical care. Despite Cory's alcohol abuse, he regularly attended Cole's school games and met with Cole's teachers.

Cory has been involuntarily committed twice for his alcoholism by his family members. In January 2002 Cory's brother-in-law filed an affidavit in support of commitment alleging that Cory was "a threat to himself and others." In September 2005 Cory's sister filed a similar affidavit, which led to Cory's commitment to an inpatient substance abuse treatment program. During Cory's commitments, Cory's parents or siblings cared for Cole. Cory never informed Karen of his commitments.

During Cory's 2005 commitment he decided to move from Iowa to Deer River, Minnesota, where his parents had recently moved, to seek employment. On October 24, 2005, the chief medical officer of the county where Cory was committed filed his report of Cory's substance abuse evaluation. He opined that Cory was a substance abuser who was in need of treatment, but did not require full-time placement in a facility. The report noted that Cory would enroll in a voluntary outpatient treatment program near Deer River, Minnesota upon release. Additionally, the chief medical officer stated in the report that, in his judgment, Cory was not likely to physically injure himself or others or inflict severe emotional injury on those unable to avoid contact with Cory.

After his discharge from treatment on October 14, 2005, Cory informed Karen and her mother that he was thinking about moving to Minnesota, but he did not tell them when or where he and Cole would be moving. On October 16, 2005, Cory moved with Cole to Cory's parents' apartment in Minnesota. Cory never contacted Karen afterward to provide his and Cole's new address or phone number.

Cory and Cole continue to reside with Cory's parents in Minnesota. Cory and his parents testified that Cory has remained sober since his 2005 commitment. Cory acknowledged that he did not complete an outpatient treatment program or participate in any support groups recommended by his doctors, but testified he has gained a support system through coworkers at his current job. Cory is currently employed full-time with a construction company and was recently promoted to the position of crew foreman. Cory's employer provided a letter stating "Cory has exemplified the type of professional [sic] that his crew can look up to for leadership." Cory remains involved in Cole's schooling and activities.

Karen owns her home in Prairie du Chien, Wisconsin, where she lives with her son from a later marriage whom has special needs. Karen continues to serve in the National Guard. In addition, she works part-time for the guard in an administrative capacity.

Karen experienced some bumps in the road after returning from her deployment. She was charged with public intoxication, disorderly conduct, and operating a vehicle while intoxicated in 2004. She was also charged with driving while her license was suspended in 2005. Karen is currently a junior at Upper

Iowa University working towards her degree. At the time of trial, Karen was also in the process of obtaining her license for in-home foster care.

On July 3, 2006, Karen filed her modification petition, seeking to modify the parties' April 1999 stipulation. Karen contended that Cory had absconded with or concealed Cole from her, and that Cory has had health and substance abuse problems that have prevented him from properly caring for Cole. Karen asserted there had been a substantial change in circumstances and it was in Cole's best interests that she be awarded permanent physical placement of Cole. Additionally, Karen requested the court modify the decree to award her child support. She also requested the court award her attorney fees. On August 3, 2006, Cory filed his answer and counterclaim, generally denying Karen's assertions and requesting Karen's child support obligation be modified and that Karen should provide medical support for Cole.

After trial, the district court entered its order on February 15, 2007, denying Karen's petition to modify. The district court noted that the parties' testimony conflicted in several respects, but ultimately found Cory's testimony to be more credible than Karen's. Though the court disapproved of Cory's taking Cole to Minnesota without informing Karen, the court found that Karen had requested very infrequent visitation with Cole over the years and had only seen Cole at most a couple of times over the twelve to fourteen months preceding the move. The court further found that Cory and Cory's parents had been actively involved with Cole throughout Cole's life, and that though the court was concerned by Cory's past abuse of alcohol, Cory's situation regarding his consumption of alcohol had improved. Additionally, the court found Cole to be

well-adjusted socially and emotionally, and that Cole was adequately clothed, fed, and sheltered.

Based upon Cory's move to Minnesota, the court determined that there had been material and substantial changes of circumstances which warranted a modification of the original decree. The court considered a shared placement arrangement, but concluded that such arrangement was not practical in light of the geographic distance between the parties. Ultimately, the court concluded that physical placement should remain with Cory. The court then modified the visitation schedule to afford Karen the maximum possible contact with Cole under the circumstances. The court determined the parties' earnings had changed and that the child support provisions needed to be modified, and also denied each party's request for attorney fees, finding that each party was responsible for his or her own attorney fees.

Karen has appealed. She contends she should be awarded physical care of Cole and that the child support provisions should be modified accordingly.¹ She further asserts she should be awarded trial and appellate attorney fees. Cory filed a pro se brief on appeal resisting Karen's contentions, but did not cross-appeal.

¹ Karen has not asked us to modify the parties' visitation schedule or the modified child support award if her application to modify physical care is denied.

II. Scope and Standards of Review.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We give considerable weight to the factual findings of the district court, especially when considering the credibility of witnesses as the district court had the benefit of hearing and observing the parties and witnesses first-hand, but we are not bound by those findings. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). Prior cases have little precedential value, so we will predominantly base our decision on the facts and circumstances unique to the parties before us. See *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Merits.

A. Physical Placement.

In support of her application to modify, Karen asserts that the court's order leaving physical placement with Cory was in error because she has proved she has a superior ability to minister to Cole's well-being.² Karen contends the district court erred in not according proper weight to Cory's absconding and concealing Cole from her. For the reasons which follow, we conclude the district court's decision should be affirmed.

² The district court found a substantial change of circumstances existed sufficient to warrant modification of the original decree based upon Cory's move with Cole to Minnesota, but not based upon Cory's alcohol use. Karen does not take issue with the court's finding regarding the former, but argues on appeal that the latter did constitute a substantial change of circumstances. We find the issue to be moot considering the court did find a substantial change of circumstances existed and Cory has not cross-appealed.

As the parent seeking to modify physical placement, Karen bears a heavy burden. She must prove conditions affecting Cole's welfare have so materially and substantially changed that it is in his best interests to alter his physical care. See *In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). The change cannot have been contemplated by the district court when the order was entered, and must be more or less permanent in nature. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). We agree with the district court's conclusion that Cory's move to Minnesota constitutes a substantial change in the parties' circumstances.

Additionally, Karen must also prove she has a superior ability to minister to Cole's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). She faces such a heavy burden because "once custody of children has been determined, it should be disturbed only for the most cogent reasons." *Id.* Before we address whether Karen proved she can offer Cole superior care, we address a challenge made by Karen to the trial court's consideration of certain evidence.

Karen contends that because Cory moved with Cole to Minnesota, the district court should not have considered testimony from Cory regarding his and Cole's current living and school arrangements, as well as Cory's testimony regarding his sobriety. Karen maintains she was unable to discover evidence to test Cory's credibility on these issues. We disagree. Karen filed her petition to modify on July 3, 2006. Cory filed an answer and counterclaim one month later. Trial was held on January 26 and February 14, 2007. Karen had ample time to discover evidence regarding Cory and Cole's current living and school

arrangements. The record also reveals that Karen filed a motion to compel before the district court requesting that Cory be compelled to provide a signed medical release to Karen so she could obtain records regarding Cory's involuntary hospitalization. The court granted the motion in part, requiring Cory's attorney to provide the involuntary hospitalization records to the court for an in camera inspection, which Cory's attorney did. Upon inspection, the court found the records to be discoverable and provided them to Karen. Karen was able to cross-examine Cory regarding these issues at trial. We find no merit in Karen's argument and find the court properly considered the evidence before it.

We now turn to the merits of Karen's claim. It is undisputed that Cory moved with Cole to Minnesota without properly notifying Karen. We agree with the district court that Cory's move with Cole without informing Karen was inappropriate, even though she was not regularly exercising visitation with Cole. At minimum, Cory should have advised Karen of their new address and telephone number. Cory's actions weigh against Cory in our de novo review of the evidence. See Iowa Code § 598.41(1)(c) (Supp. 2005) (the denial by one parent of the child's opportunity to have meaningful contact with the other parent is a significant factor in determining the custody or physical care arrangement); *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992).

Karen also argues that the district court should have placed more weight on Cory's alcohol dependency and abuse and Cory's past inability to care for Cole.

The record in this case establishes that neither Cory nor Karen has been an ideal parent to Cole. Both parents have abused alcohol and have had

criminal charges filed against them as a result. Cory's past abuse of alcohol left him unable to care for Cole at times; however, Karen still agreed to Cole's physical placement with Cory and rarely visited her son. For example, Karen only saw Cole twice in the preceding year before Cory's move after returning from Iraq and very minimally before her deployment to Iraq.

Fortunately, both parents currently appear to have their lives moving in the right direction, and both parents are becoming better parents to Cole. That said, neither parent has demonstrated a superior ability to minister to the needs of their child. Consequently, we conclude Karen has not met her heavy burden and physical placement should remain with Cory. In reaching this conclusion, we recognize the court had the parties before it, was able to observe their demeanor, and was in a better position to evaluate them as caregivers than we are. See *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993).

B. Child Support.

Because we find that physical placement should remain with Cory, we conclude that Karen's request for child support is moot.

C. Attorney Fees.

Karen also requests trial and appellate attorney fees. An award of appellate attorney fees rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). Whether attorney fees should be awarded depends on the needs of the party making the request and the respective abilities of the parties to pay. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). We also consider whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of*

Gaer, 476 N.W.2d 324, 330 (Iowa 1991). We find the trial court correctly ordered each party to pay his or her respective attorney fees, and we decline to award appellate attorney fees in this case.

IV. Conclusion.

Because Karen has not met her burden of proof, we conclude the court did not err in failing to modify the parties' prior custody decree to place physical care of the parties' child with Karen, or in declining to award Karen child support and attorney fees.

AFFIRMED.