IN THE COURT OF APPEALS OF IOWA

No. 8-623 / 08-0128
Filed August 27, 2008

IN RE THE MARRIAGE OF NANCY A. CAPPER AND DWAYNE T. CAPPER

Upon the Petition of
NANCY A. CAPPER n/k/a/ NANCY VAN OSS,
Petitioner-Appellant,

And Concerning
DWAYNE T. CAPPER,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Nancy Van Oss f/k/a Nancy Capper appeals from the trial court's modification ruling granting Dwayne Capper's application to modify the physical care and alimony provisions of the parties' dissolution decree. **REVERSED AND REMANDED.**

John Hayek of Hayek, Hayek, Brown, L.L.P., Iowa City, for appellant.

Randall Willman, Iowa City, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

HUITINK, P.J.

Nancy Van Oss f/k/a Nancy Capper appeals from the trial court's modification ruling granting Dwayne Capper's application to modify the physical care and alimony provisions of the parties' April 11, 2003 dissolution decree.

I. Background Facts and Proceedings.

The trial court's April 11, 2003 decree granted the parties joint custody of their children, Emily, Erin, and Allison. Nancy was awarded physical care. Dwayne was awarded "periods of liberal visitation as mutually agreed upon by the parties" including at a minimum "every other weekend with one mid-week overnight during weeks he had weekend visitation and two midweek overnights during weeks when he did not have weekend visitation, in addition to every Monday from 4:30 p.m. until 7:30 p.m." as well as alternating holidays and school vacations. Dwayne was ordered to pay $4000 monthly child support. Dwayne was also ordered to pay Nancy $4166.67 monthly alimony for five years unless earlier terminated by the death of either party.

On July 18, 2006, Dwayne filed a petition to modify the 2003 decree by awarding the parties joint physical care with an incidental reduction in his child support obligation. Dwayne also requested termination of his alimony obligation, citing Nancy's remarriage. Dwayne subsequently amended his modification petition to request an award of physical care instead of joint physical care.

The trial court's January 10, 2008 modification ruling entered after a trial on the merits of Dwayne's petition provides:

> The court finds that there has been a substantial change in circumstances since the entry of the parties' original Dissolution based on the fact that the parties implemented a shared care

> arrangement for over two years. The court further finds that it is in the children's best interests for there to be a consistent shared care schedule. This is a case where the parents, Dwayne and Nancy, are intelligent, highly educated, have their children's interests at heart, and have proven their ability to communicate in a beneficial manner for the betterment of their children. During the over two year period when they shared physical care of their children, there were little or no problems with matters involving routine care. In short, the court does not see any substantial obstacles to a shared care arrangement, given that each parent is a superior parent. The court will require, however, that the parties consult with each other prior to either parent signing up the children for extracurricular activities so that the parties can consistently reach mutual decisions regarding the girls' activities and schedules. The court will also implement a consistent joint physical care schedule, as suggested by counselors.

The court, based on Dwayne's income, declined to reduce his child support obligation. The trial court's ruling additionally provides:

> Dwayne also asks the court to order the end of alimony payments to Nancy because Nancy is remarried and now has the addition of her current husband's income. Nancy argues that her current husband's income does not replace the money which she receives from Dwayne through payment of alimony. Alimony, in her opinion, is necessary for her to continue to work part-time and to stay in the family home. In any event, alimony ends in May 2008. It can be assumed that Dwayne provided Nancy with alimony for a period of five years in order to ensure she could continue to work part-time and maintain the family home. The court finds that since the entry of the Decree, Dwayne has proven a substantial change in circumstances which warrants ending alimony after the January 2008 payment. The changes are that Nancy has remarried, her income has increased, and she is additionally receiving the benefit of Dan's income. The court declines to require Nancy to reimburse alimony to Dwayne, as requested by Dwayne, because Nancy's husband's income did not immediately benefit Nancy. It has only been recently that Dan's income has truly been added to the family coffers.

The trial court accordingly granted Dwayne's request to modify the April 2003 decree by awarding the parties joint physical care of their children. Dwayne's

alimony obligation was terminated as provided, and neither party was awarded trial attorney fees.

On appeal, Nancy contends the trial court erred by modifying the April 11, 2003 decree to award the parties joint physical care. She also contends the trial court erred by terminating Dwayne's obligation to pay alimony. Nancy additionally requests an award of appellate attorney fees.

II. Scope of Review.

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. Because the district court has a firsthand opportunity to hear the evidence and view the witnesses, we give weight to its findings of fact, but we are not bound by them. *In re Marriage of Will*, 49 N.W.2d 394, 397 (Iowa 1992).

As a reviewing court in an equity case, we review both the law and the facts de novo. We do not reverse upon separate assignments of error in the findings of fact by the trial court, but draw our own conclusions as we deem appropriate. *Lessenger v. Lessenger*, 156 N.W.2d 845, 846, 261 Iowa 1076, 1078 (1968).

III. The Merits.

Child custody should be modified only when there has been a material and substantial change in circumstances since the original child custody order. *In re Marriage of Erickson*, 491 N.W.2d 799, 801 (Iowa Ct. App. 1992). The change in circumstances must be ongoing and must not have been contemplated by the trial court when the original order was entered. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The parent requesting the modification must establish by a preponderance of the evidence that the condition since the original

order was entered has so materially and substantially changed that it is in the child's best interests to change custody. *Id.* When we determine physical care, our primary concern is the best interests of the child, not the perceived fairness to the parents. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). The party seeking modification has a heavy burden because once custody has been established, it should be disturbed only for the most cogent reasons. *Frederici*, 338 N.W.2d at 158.

Dwayne contends the parties' physical care arrangement has evolved over time into de facto joint care physical care and the decree should be modified to reflect this reality. We disagree.

Even if we, like the trial court, accept Dwayne's version of the time the children spend with him and his increased participation in decisions affecting routine physical care, neither amounts to a material and substantial change in circumstances beyond the contemplation of the trial court at the time the original decree was entered. The physical care and visitation provisions of the original decree were presumably intended to assure the children the opportunity for maximum continuing physical and emotional contact with both parents and encourage the parties to share the rights and responsibilities of raising the children. *See* Iowa Code § 598.41(1)(a). As joint legal custodian, Dwayne's rights and responsibilities include participation in decisions affecting the children's legal status, medical care, education, extracurricular activities, and religious instruction. *See* Iowa Code § 598.41(5)(b). Nancy, as the parent responsible for the children's physical care, is obliged to support Dwayne's relationship with the children. *Id.*

When considered in light of the foregoing, Dwayne's case for modification is premised on no more than the parties' mutual exercise of their rights and responsibilities as joint legal custodians, as well as Nancy's faithful discharge of her duties as the parent responsible for the children's physical care. For the same policy reasons underlying Dwayne's heavy burden of proof and our reluctance to change custody once established, we decline to hold parental compliance with statutorily mandated custodial duties and responsibilities is a material or substantial change in circumstances beyond the trial court's contemplation at the time the decree was entered. Neither the facts of this case nor the equitable principles that guide our decision support the requested relief.

Lastly, we note our concern for the propriety of Dwayne's motives for initiating these modification proceedings. At trial Dwayne testified:

> What I really want to do is modify the alimony, and when she wouldn't settle on the alimony, then I included modification for the care schedule, and that's because I just wanted to call it what it was and that was in 2005 and in 2006, we were doing shared care, and I just wanted the Court to state that it is shared care.

At best Dwayne's motives for demanding physical care are ambiguous, and at worst punitive. In any event, his testimony casts serious doubt on the sincerity of his physical care demands. His testimony also reflects adversely on his parental judgment and substantially compromises the joint custodial objectives of the trial court's original decree. The children's best interests are not served by granting Dwayne joint physical care under these circumstances. We accordingly reverse on this issue.

IV. Alimony.

Generally in Iowa, although "the subsequent marriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient to show extraordinary circumstances exist which require the continuation of alimony payments." *In re Marriage of Cooper*, 451 N.W.2d 507, 509 (Iowa Ct. App. 1989) (citing *In re Marriage of Shima*, 360 N.W.2d 827, 828 (Iowa 1985)). Subsequent remarriage creates a prima facie case for the elimination of alimony. *Shima*, 360 N.W.2d at 829. The question of whether the recipient's remarriage will terminate alimony depends in part on the purpose of the original award. *In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998). We have also found extraordinary circumstances justifying continuing alimony when the current spouse's income is not sufficient to support the recipient's standard of living or lifestyle sought to be established by the original decree's alimony award. *In re Marriage of Gillilland*, 487 N.W.2d 363, 366 (Iowa Ct. App. 1992) (citing *In re Marriage of Boyd*, 200 N.W.2d 845, 854 (Iowa 1972)).

The original decree does not specify the purpose of the alimony awarded. However, the duration of the award as well as the parties' child care preferences suggest the award was intended to allow Nancy to remain at home with the children and limit her employment for the duration of the award. There is nothing in the record to suggest that the purpose of the award can be accomplished within a shorter time period than contemplated by the trial court, and termination of the award would frustrate its intended purpose.

We also find continuation of Nancy's alimony is necessary to sustain the lifestyle and standard of living contemplated by the amount and duration of the award. Her husband's $35,000 annual salary is $15,000 less than Nancy's annual alimony, and the resulting loss of income would additionally frustrate the earlier noted purpose of the award. Because Nancy has met her burden to show extraordinary circumstances justifying continued alimony, we reverse on this issue.

V. Appellate Attorney Fees

Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id.* Considering these factors as applied to the facts of this case, we find an award of appellate attorney fees is appropriate. We accordingly remand the case to the district court to determine the amount of appellate attorney fees paid by Nancy and to enter judgment against Dwayne in a reasonable amount. *Markey v. Carney*, 705 N.W.2d 13, 26 (Iowa 2005) ("[U]nder our current practice, the issue of appellate attorney fees is 'frequently determined in the first instance in the district court because of the necessity for making a record.'" (quoting *Lehigh Clay Prods., Ltd. v. Iowa Dep't of Transp.,* 545 N.W.2d 526, 528 (Iowa 1996)).

REVERSED AND REMANDED.