IN THE COURT OF APPEALS OF IOWA

No. 3-147 / 12-1381
Filed April 24, 2013

IN RE THE MARRIAGE OF DANETTE LIEN KENNEDY AND MICHAEL STEPHEN KENNEDY

Upon the Petition of
DANETTE LIEN KENNEDY,
Petitioner-Appellant/Cross-Appellee,

And Concerning
MICHAEL STEPHEN KENNEDY,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dallas County, Paul R. Huscher, Judge.

Danette Kennedy appeals from the district court's ruling denying her application to modify physical care of the parties' children and granting Michael Kennedy's counterclaim requesting modification of the child support order. Michael cross-appeals from the district court's order denying an award of attorney fees. **AFFIRMED ON BOTH APPEALS.**

Kevin Collins and David T. Bower of Nyemaster & Goode, P.C., Des Moines, for appellant.

Matthew R. O'Hollearn, Thomas J. Levis, and Maria E. Brownell of Brick & Gentry, P.C., West Des Moines, for appellee.

Heard by Doyle, P.J., and Danilson and Bower, JJ.

DANILSON, J.

We consider whether the district court properly denied Danette Kennedy's application to modify decree regarding the physical care of the parties' children, and properly granted Michael Kennedy's counterclaim requesting a modification of the child support order. The parties presently have joint custody and joint physical care of their two minor children. On cross-appeal, we consider whether the court properly denied an award of attorney fees. Michael also seeks an award of appellate attorney fees. We affirm. We conclude Danette has not proven a substantial change of circumstances warranting a modification of physical care. The modification of child support was supported by Danette's substantial increase in income. We also conclude the district court did not abuse its discretion in failing to award Michael trial attorney fees, but we grant Michael's request for appellate attorney fees.

I. Background Facts and Proceedings.

Danette and Michael were married in 1993 in Cedar Rapids, Iowa. The parties have two minor children, born in April 1999 and September 2003. The district court entered a dissolution decree on June 4, 2008. Pursuant to the decree the parties were awarded joint legal custody and joint physical care. The court awarded no child support based on the parties' comparable incomes (approximately $60,000 each).

At the time of the dissolution Danette was employed by Gorilla Marketing, Inc. Gorilla remains an active organization but has not been profitable. Danette is Gorilla's sole shareholder and president. Prior to the dissolution, Gorilla

acquired a $750,000 business loan from AmerUS Annuity Group. When the parties' marriage was dissolved, they agreed Danette would be solely responsible for the loan.

AmerUS was later purchased by Aviva USA Corporation. In 2009, Danette accepted employment with Aviva as the vice president of field training and development. When Danette began working for Aviva, they agreed to an amended and restated promissory note setting forth new terms of repayment of the Gorilla loan via a direct payroll deduction. Danette reports a portion of these amounts as business losses to herself for tax purposes. She claimed losses of $41,805 in 2010 and $45,843 in 2011.

Danette's income has increased in her new position at Aviva. She currently earns $148,526 plus bonuses. Michael's salary has not changed since the dissolution decree was entered.

On June 14, 2011, Danette filed an application to modify the dissolution decree, asking for physical care of the parties' two children.[1] She highlighted her role as the de facto primary care parent and communication breakdowns with Michael as substantial and material changes warranting modification of the joint physical care arrangement. Michael filed a counterclaim for child support modification.

The district court denied Danette's application for modification of the physical care arrangement and granted Michael's request to modify child

[1] Michael argues that Danette's application to modify was filed in retailiation for his contempt action initiated against Danette for her failure to provide him a copy of her tax return as required by the decree.

support. The court ordered Danette to pay $657.25 per month to Michael in child support, to be reduced to $463.63 when support is payable for only one child. Danette appeals. Michael cross-appeals the court's denial of his request of trial attorney fees

II. Scope and Standards of Review.

Actions to modify child custody or physical care are tried in equity and reviewed de novo. Iowa R. App. P. 6.907; *In re Marriage of Hynick*, 727 N.W.2d 575, 577 (Iowa 2007). We give weight to the trial court's findings of fact but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Prior cases have little precedential value, as decisions regarding custody or physical care are based on the particular circumstances of the parties to the case. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

We review the district court's decision regarding attorney'fees for abuse of discretion. *In re Marriage of Roerig*, 503 N.W.2d 620, 622 (Iowa Ct. App. 1993).

III. Analysis.

A. Physical Care. Once a physical care 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. *See Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). 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 is able to provide superior care and minister more

effectively to the children's needs. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Where the existing custody arrangement provides for joint physical care, as is the case here, the court already has deemed both parents to be suitable custodians. *See Melchiori v. Kooi*, 644 N.W.2d 365, 368–69 (Iowa Ct. App. 2002). Under this joint physical care scenario, where the applying party has proved a material and substantial change in circumstances, the parties are on equal footing and bear the same burden as the parties in an initial custody determination; the question is which parent can render "better" care. *Id.* at 369. In addition to assessing the parties' respective parenting abilities, courts should consider whether the joint physical care arrangement remains in the children's best interests. *See id.* "The significance of an award of physical care should not be minimized. Children are immediately, directly, and deeply affected by the kind and quality of home that is made for them." *Frederici,* 338 N.W.2d at 160–61.

"Physical care" means the right and responsibility to maintain a home for the minor child and provide for the routine care of the child. *Hynick*, 727 N.W.2d at 579. "The main distinction between joint physical care and primary physical care with liberal visitation rights is the joint decision making on routine matters required when parents share physical care." *Id*. at 580. A critical question in deciding whether joint physical care is appropriate is "whether the parties can communicate effectively on the myriad of issues that arise daily in the routine care of a child." *Id*.

During Danette's testimony, she expressed concern that their son continues to have trouble with math and that Michael is not as attentive to homework supervision as she is. Danette is a better planner of activities for the children, be it religious instruction, camps, and so forth. She sees herself as more responsible for the children's clothing needs. She appears frustrated by Michael's lesser attention to detail and planning. She believes that communication between herself and Michael is worse since she remarried.

Michael defends the current joint physical care arrangement, believing it is working fine. He maintains that any communication difficulties are minimal. For example, Michael testified that he confers with Danette and her mother, Joyce, a former RN, when deciding how to treat health issues he may encounter with the children.

The district court made certain findings on the record at the conclusion of the trial, immediately after observing the demeanor of the parties and their witnesses. The court found that Danette and Michael had done a good job parenting, have communicated, have worked together, and have avoided placing the children in the middle for the most part. The court noted that the children are bright, energetic, and well-liked by their peers.

The district court properly concluded that the parties' disagreements are a product of different parental philosophies and that it is not the court's role to determine which viewpoint is best. While the parties have different parenting styles and have had differences regarding the activities in which the children should be involved, they have nevertheless consistently placed the best interests

of the children above their own. The facts do not show a discord between the parents having an effect on the children's lives sufficiently disruptive to warrant modification of the decree. *See Melchiori*, 644 N.W.2d at 368. The parties will likely always have differences, but they have largely worked together and communicated in their parenting roles.

The district court found there had not been a substantial and material change in circumstances sufficient to warrant a change in the joint physical care arrangement provided in the parties' dissolution decree, and we agree. We acknowledge Danette's claims that she is serving as the de facto primary care giver and that Michael has abdicated his role as parent. She may well be performing more parental duties than Michael. However, we suspect in every joint physical care case there is not an exact division of the caretaking duties. We decline to compare ledgers of parental duties performed but acknowledge that a parent could abdicate his or her role as a joint caretaker to the extent that a substantial change of circumstances may exist. However, here the circumstances do not require a modification of the physical care arrangement.

B. Child Support. The person seeking modification of the decree with respect to child support has the burden to show a substantial change in circumstances not contemplated by the trial court when it made its original decision. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). The burden includes showing that continuation of the current order would create an injustice because the change in circumstances is permanent or continuous. *Id*.

In calculating child support, the court uses the "net monthly income" of each parent. *In re Marriage of Wade*, 780 N.W.2d 563, 566 (Iowa 2010). Net income is identified by subtracting certain deductions from gross income. Iowa Ct. R. 9.5; *Wade*, 780 N.W.2d at 566. "Our guidelines specifically do not allow a deduction for voluntary savings or payment of indebtedness." *State ex rel. Nielsen v. Nielsen*, 521 N.W.2d 735, 737 (Iowa 1994).

Danette's income has increased from approximately $60,000 per year at the time of the decree, to its current level of $148,526 per year, plus a bonus. The district court valued her bonus for child support calculation purposes at $10,000. Danette does not contest the child support award in its entirety, but argues the district court erred by failing to subtract from her gross income the business losses related to her Gorilla business loan payments. The district court concluded that deducting these loan payments from Danette's gross income would have the effect of requiring Michael to contribute additional child support for the purpose of retiring a debt allotted to Danette in the dissolution proceeding.

The child support guidelines outline a series of deductions that may be taken from a party's gross monthly income to reach that party's net monthly income. *See* Iowa Ct. R. 9.5. The "guidelines clearly and expressly render the reduction of debt a priority status inferior to the needs of . . . children." *In re Marriage of Nelson*, 570 N.W.2d 103, 109 (Iowa 1997). There is no deduction in rule 9.5 for payments on a business loan for past business ventures. Further, the

loan in question was a debt the dissolution decree allocated solely to Danette.[2] Accordingly, the district court properly calculated the parties' child support obligations pursuant to the child support guidelines, and the court's modification was proper.

C. Attorney Fees. Michael argues the trial court erred in failing to award him attorney fees. He also requests we award him appellate attorney fees. We conclude the district court did not abuse its discretion in refusing to award him trial attorney fees, but grant his request for appellate attorney fees.

1. Trial Attorney Fees.

In modification proceedings "the court *may* award attorney fees to the prevailing party in an amount deemed reasonable by the court." Iowa Code § 598.36 (emphasis supplied); *see In re Marriage of Rosenfeld,* 668 N.W.2d 840, 849 (Iowa 2003). The decision to award attorney fees rests within the sound discretion of the court, and we will not disturb its decision absent a finding of abuse of discretion. *In re Marriage of Maher,* 596 N.W.2d 561, 568 (Iowa 1999). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay. *In re Marriage of Guyer,* 522 N.W.2d 818, 822 (Iowa 1994).

Although Danette had greater income than Michael at the time of trial, we may properly consider the fact that she was making substantial payments for her past business loan in determining if the trial court abused its discretion in denying an award of attorney fees. The payments toward the loan clearly affected her

---

[2] The parties stipulated that if modification is granted for the past business loan payments it should only apply for the period from December 1, 2011, through October 2012, due to the fact that the business filed for bankruptcy.

ability to pay attorney fees. Michael was the prevailing party, but considering the circumstances present in this case, we find the district court did not abuse its discretion and we affirm the court's denial of trial attorney fees.

2. Appellate Attorney Fees.

An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App.1994). In determining whether to award appellate attorney fees, we consider 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 decision of the trial court on appeal. *Id.* Given the circumstances present in this action, we find equity warrants an award of $1500 in appellate attorney fees to Michael.

IV. Conclusion

For the foregoing reasons, we affirm the district court's ruling denying Danette's application to modify physical care of the parties' children and granting Michael's counterclaim to modify the child support order. On the cross-appeal, we affirm the court's denial of Michael's request for trial attorney fees. We grant Michael's request for appellate attorney fees in the amount of $1500. Costs of the appeal shall be allocated to Danette.

AFFIRMED ON BOTH APPEALS.