IN THE COURT OF APPEALS OF IOWA

No. 1-555 / 11-0053
Filed August 24, 2011

IN RE THE MARRIAGE OF KAREN JEAN PREWITT AND TONY ORION PREWITT

Upon the Petition of

KAREN JEAN PREWITT,
Petitioner-Appellee,

And Concerning

TONY ORION PREWITT,
Respondent-Appellant.

Appeal from the Iowa District Court for Lee (South) County, John G. Linn, Judge.

Tony Prewitt appeals the district court's refusal to modify the custody provisions of his divorce decree. **AFFIRMED.**

Curtis Dial of Law Office of Curtis Dial, Keokuk, for appellant.

Carl A. Saunders of Saunders & Johnson, L.L.P., Fort Madison, for appellee.

Heard by Sackett, C.J., and Vogel and Danilson, JJ.

SACKETT, C.J.

Tony Prewitt appeals challenging the district court's refusal to modify the custodial provision of the decree dissolving his marriage to Karen Jean Prewitt. He contends he has shown that shared care is no longer in the children's best interest and he should be the primary physical custodian. He also contends the district court should not have awarded attorney fees to Karen. Karen contends the district court should be affirmed and she should be awarded appellate attorney fees. We affirm.

SCOPE OF REVIEW. We conduct a de novo review of physical care awards. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*). We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). The interests of the children are the primary consideration. *See In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). We focus on the children and whether modifying the current shared care arrangement is in their interests.

Iowa Code section 598.41(5) (2009) provides the court under certain circumstances may award joint or shared care. The legislature enacted these provisions in hopes of assuring a child the opportunity for the maximum continuing physical and emotional contact with both parents and encouraging his or her parents to share the rights and responsibilities of raising him or her. There are a number of factors we consider in assessing the issue of whether there

should be shared care. *See In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007). These same factors are relevant to our determination of whether the shared care arrangement here should continue, as the criteria for determining child custody in original dissolution actions are applied in modification proceedings as well. *See In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa Ct. App. 1996).

BACKGROUND. Tony and Karen's marriage was dissolved on October 31, 2001. The dissolution court approved a stipulation entered into by the parties and incorporated it into the decree. As to the custody of the children, the parties' stipulation and decree provided their daughter, born in December 1995, and their son, born in April 1999, were to be in the physical custody of both parents. The parents were to alternate the physical care weekly. At the time the decree was entered both parties lived in Keokuk, Iowa. They both also earned about $22,000 annually, so no child support was ordered.

Both parties agreed the custodial provisions of the decree worked well for a period. They each appeared willing to make modifications of custody in order to accommodate the other party, and had good communications in matters concerning the children's welfare. Some problems began to surface after Tony remarried. Then in October of 2009, Karen without advising Tony moved in with a man living in Illinois, some forty miles from Keokuk. Karen did not tell Tony of her move, nor did she give him her address. Tony subsequently learned of the move and filed an application to modify custody on February 3, 2010, contending he should be awarded primary physical care. He also asked that the court

modify the child-support and medical support provisions of the 2001 dissolution decree. Karen filed an answer and a counterclaim. She asked that Tony's petition to modify be dismissed. In her counterclaim she sought primary physical care of the children, and asked that an award be made for child support.

The matter came on for hearing in October of 2010. At the time of hearing Tony was forty-six years old, and Karen was forty-four years old. They both were in good health. Tony continued to live in Keokuk where he lived at the time of the dissolution. Karen continued to live in Illinois, some forty miles from Keokuk. She married the man she moved in with earlier. The children appeared to be doing well in the Keokuk schools. Tony's income had increased since the dissolution. Karen's income had decreased. The plant where Karen was working at the time of the dissolution closed in 2009 and she lost her job. At the time of the hearing she was attending an Illinois area community college and studying accounting.

The district court concluded that neither party had proved a permanent substantial change in circumstances had occurred to such a degree that the award of joint physical care of the children should be changed. The court further found the children were thriving by living one-half of their time with Tony and one-half of their time with Karen. The court also determined that Karen's relocation to a small town in Illinois did not justify granting her physical care of the children, nor did it justify granting Tony physical care of the children.

The court determined that child support should be recalculated because the incomes of the parties had changed since the time of their dissolution on

October 31, 2001. The Court imputed earnings to Karen of $15,288 a year. It determined that Tony's annual income was $41,407. Applying the child support guidelines, the court found that Tony should pay Karen child support for the two children the sum of $641.94 a month; and that Karen should pay Tony child support for two children the sum of $258.09 a month. The court offset against Tony's obligation the amount Karen was required to pay him, and found that Tony should pay child support to Karen in the amount of $382.82 a month. The court found when only one child was eligible for support that Tony should pay Karen the amount of $266.12 a month. Tony was ordered to continue to provide health insurance through his employer for the children and uncovered medical expenses were to be paid twenty-nine percent by Karen and seventy-one percent by Tony. The court found that considering the financial condition of the parties and the relative merit of the disputed claims, Tony should pay a portion of Karen's attorney fees and ordered he pay $1000 towards those attorney fees. Court costs were also taxed to Tony.

PHYSICAL CARE. Tony contends here he should have been named the primary custodian. Karen contends that the shared care arrangement should continue.[1]

Modification of the custody provisions of a dissolution decree is only permissible when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). "The

[1] While she initially requested physical care, her request was denied, and she has not appealed this denial.

change must be more or less permanent and relate to the welfare of the child." *Id*. There is no dispute that there are changed circumstances here. Both parties have remarried and Karen has moved from Keokuk. The question is whether the changed circumstances are substantial, and whether it is in the children's best interest that the custodian provisions of the decree be changed.

Tony contends Karen has shown little stability since the dissolution having been in two relationships prior to her current marriage, the relationships both having lasted about three years. He correctly points out that at least one relationship was abusive, and that Karen has exhibited a problem with alcohol, having been arrested for public intoxication. He also is concerned about the children's commute time to school when they are in Karen's care, most particularly on winter roads.

He contends that since the dissolution decree was entered he took steps to ensure he and the children were in a stable environment. Tony said he returned to school and got a degree in the medical field so he would have stable employment. Tony said he has remarried, and he, his wife, and their children have engaged in family counseling. He said he is very active with his family, spending nearly all of his free time with them as well as his stepchildren. He contends he is involved in the children's school, attends parent-teacher conferences and classroom activities, and helps the children with their school work. He contends he has also been active in the children's church events. Tony contends his current wife, Cheryl, also is involved in the children's care, and she has taken the children on trips, to medical appointments, movies,

shopping, as well as sporting and extracurricular events. He notes she has also volunteered in the classroom and was a person who was instrumental in seeing that one of his children was reading at an appropriate level. Tony's wife is for the most part a stay-at-home mother, although she is a substitute for the school's food service.

Tony cites *Hansen*, 733 N.W.2d at 696, noting it sets forth factors to consider in determining whether there should be shared care. Those factors include the suitability of parents, the quality of parental communications, the geographic proximity of the parents, and stability of the parents. *Hansen*, 733 N.W.2d at 696. He argues that when these factors are considered there is no doubt but that the physical care of the minor children should be placed with him.

He contends Karen has not shown stability noting that had since the dissolution she resided with three different men in different locations. He notes that she chose to stay in a relationship with a man who abused her, was a heavy drinker, and had a drug problem. He contends it was not fair to the children to be around this man who broke in and damaged the house where Karen and the children were residing. He argues this shows that Karen has not been concerned about the safety of the children, and he believes that the nature of this relationship also affected the children psychologically. He argues, even if the children were not directly abused, witnessing the abuse had adverse effects on them. He contends her current relationship will most likely end as did her previous relationships. He notes that Karen was arrested for public intoxication and disorderly conduct, and at the time she had a breath test of .162. He notes

that although Karen indicated at the time of trial she did not drink, a witness testified that she was drinking in September of 2010. He notes that Karen's two previous relationships lasted about three years, and while she contends that her current relationship will continue, he asked that we look at her past conduct to predict her future conduct. He argues her past performance may indicate the quality of care she is able to give in the future.

Tony also contends Karen did not maintain adequate communication with him, noting that she moved to Illinois some forty miles from Keokuk without telling him, even though the dissolution decree provided that they should give each other their addresses. We agree with Tony that this a violation of the joint care provisions of the decree. Her deception in this matter weighs heavily against her remaining a joint custodian.

Karen contends the current relationship should continue.[2] She argues the travel time is not difficult, and the children study while they were being driven to their school in Keokuk. She points out that the children have never been late for school, football practice, or extracurricular activities during the weeks they are in her custody. Karen contends she has never had a drinking problem. She contends there is no evidence that the commuting time has affected the children's academic performances. Karen admits Tony is a good father;

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[2] The court found that Karen alleged a substantial change circumstances had occurred and it was in the best interest of the children to award their physical care to her. She believed the children were no longer happy living with Tony half-time because they did not like Tony's current wife, and Karen further asserted that the children would prefer to live with her and her new husband.

however, she testified that the children have told her they have problems with Tony's wife.

Karen also contends she is now in a stable relationship, she has controlled her alcohol problem, and while admitting she was in an abusive relationship, she contends the children did not suffer. She correctly argues that the evidence shows the children have continued to be good students despite their daily commute.

The fact a parent moves for valid reasons does not necessarily mean that the parent loses physical care. *In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983). However a parent who fails to notify a joint custodian that he or she intends to move and moves without the other's knowledge runs a risk of losing custodial care. A remarriage can change the dynamics of a custodial arrangement and it has here. The children have had to adjust to the presence of a stepparent in each home as well as step brothers and sisters. While there is some evidence the children have complained about their stepmother, the district court did not find this to be a problem. It appears that she has done a lot with the children, including taking them on trips when Tony is working. Her children that live in the home are close to the age of Tony's children and it appears the children get along well. We also commend Tony and his current spouse for seeking counseling to assist in making a transition to a blended family.

Tony clearly has shown more stability. While Karen's prior relationships have been fraught with problems, there is no evidence her current relationship is problematic; however, it is of a short duration and as Tony points out Karen has

been involved in prior short term relationships. The commute from Karen's home in Illinois to Keokuk according to the parties takes about an hour one way.[3] While one would hope a child need not be in a car for two hours a day to get to school, this is not a totally unreasonable commute. The children appear to be doing well in shared care and show no serious problems as a result of it. Also they have a half sister in Karen's custody. The child is younger than they are, and was the result of one of Karen's prior relationships. This arrangement allows them a relationship with this child. The children also appear to get along with their stepsiblings in both homes. Their stepfather's children come to the home for visitation. Giving the required deference to the district court, we affirm the district court's refusal to modify the shared care award.[4]

ATTORNEY FEES. Tony contends the district court should not have awarded Karen $1000 in attorney fees. An award of trial attorney fees rests in the trial court's discretion; and therefore, 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). An award of fees should consider the parties' respective abilities to pay, and the amount awarded should be fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). Giving the required deference to the district court we find no abuse of discretion and affirm the award of trial attorney fees.

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[3] When questioned at oral argument Karen's attorney indicated Karen was not seeking to remove the children from the Keokuk school system.

[4] Tony did not challenge the child support or medical support awards and we do not address them.

Karen also requests appellate attorney fees. Her attorney has filed a statement contending that his attorney fees and expenses on the appeal total $8188. Appellate attorney fees are not awarded as a matter of right, but rest in our discretion. *Id*. In deciding whether to award appellate attorney fees, we consider 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). We do not believe an award of additional fees in this case is justified. Karen's failed to follow the provisions of the decree and advise Tony of her move to Illinois. The record supports a finding Tony is and has been the more stable parent. Karen's claim to continue shared care with Tony is not strong. We have affirmed the trial court's award for trial attorney fees. We do not believe that equity warrants Karen receiving additional fees. We deny her request.

AFFIRMED.