IN THE COURT OF APPEALS OF IOWA

No. 1-769 / 11-0508
Filed November 9, 2011

IN RE THE MARRIAGE OF LAURA ANN LOFTIN
AND JEREMY SCOTT LOFTIN

Upon the Petition of
LAURA ANN LOFTIN, n/k/a
LAURA ANN VAN ZANTE,
Petitioner/Appellant/Cross-Appellee,

And Concerning
JEREMY SCOTT LOFTIN,
Respondent/Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Poweshiek County, James Q. Blomgren, Judge.

Laura Van Zante appeals the district court's order modifying the custody provisions of the parties' dissolution decree. Jeremy Loftin cross-appeals the court's assessment of guardian ad litem fees to him. **AFFIRMED AS MODIFIED.**

Jean Pendleton of Pendleton, Zeigler & Herbold, L.L.P., West Des Moines, for appellant/cross-appellee.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, and Deborah L. Johnson of Deborah L. Johnson Law Office, P.C., Altoona, for appellee/cross-appellant.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Laura Van Zante appeals the district court's order modifying the custody provisions of the parties' dissolution decree. Jeremy Loftin cross-appeals the court's assessment of all guardian ad litem fees to him. We affirm the modification of custody, but modify the apportionment of guardian ad litem fees.

I. Background Facts and Proceedings.

Jeremy and Laura were married in 2001. It was Jeremy's second marriage and Laura's first. They had a son, Garrett, born in 2000. Jeremy, Laura, and Garrett resided in a house owned by Jeremy's grandfather on land near Jeremy's family's farm, which was located about eight miles from Grinnell, Iowa. Jeremy worked on the farm for his father. Both Laura and Jeremy had extended family in the area and the families enjoyed good relations.

Jeremy and Laura separated in the summer of 2003 and Laura moved with Garrett to West Des Moines. Jeremy and Laura divorced in January 2004. The stipulated dissolution decree awarded Laura primary physical care of Garrett, and awarded Jeremy "frequent and liberal" visitation. At the time of the dissolution, Jeremy remained in his grandfather's house.

For a few months in 2004, Jeremy resided with a woman with whom he used methamphetamine. His family intervened and Jeremy quit using and ended his relationship with the woman. He moved in with his parents for a few months.

When visiting, Garrett would stay at his paternal grandparents' home with his father. Garrett enjoyed a close relationship with the extended families of both his parents, all of whom lived in and around the area.

In February 2004, Laura and Garrett moved to Altoona and begin residing with Willis "B.J." Iseminger III. Laura and B.J. were married in October 2004. Laura and B.J.'s marriage proved tumultuous: B.J. filed for divorce in 2005, but dismissed that action; Laura was arrested for domestic abuse assault, which was dismissed; they reconciled and lived together in violation of a no-contact order; and, in September 2006, divorced.[1] Laura remained in her and B.J.'s marital home after the divorce and Garrett attended school in Altoona until December 2006. Laura and Garrett then moved back to Grinnell. Laura has had four addresses in Grinnell.

Laura married Eli Van Zante in January 2008. Laura and Eli have a daughter, Keragan, born in July 2008. Laura and Eli lived in Grinnell, as did Eli's extended family. In January 2010, however, Eli moved to Sycamore, Illinois, transferring to a position with his employer that paid somewhat better and provided more job security. Laura remained in Grinnell with Garrett (who was then in fourth grade) and Keragan. Laura is a hair stylist and has flexible hours; her annual income is approximately $13,300. (At trial, she stated she was going back to school "in a week and a half" to study to become a dental assistant.)

Jeremy married Jennifer in July 2008. They have a son together, Owen, born in 2007. Jennifer also has a son, Blake, from a former marriage. She and her former husband share physical care of Blake, who is nine months younger than Garrett. Jeremy and Jennifer reside in Jeremy's grandfather's house, which is provided to them rent free. Jeremy continues to farm with his father and is paid $12,000 per year. In addition to this income and housing, Jeremy's parents

[1] Iseminger, a fire fighter, died in September 2007.

pay Jeremy's child support for Garrett. Jeremy and Jennifer also have access to Jeremy's parents' vehicles. Jeremy stipulated to an annual income of $25,000 for purposes of child support.

On February 24, 2010, Jeremy filed an application to modify the custodial provisions of the dissolution decree or to modify visitation, asserting Laura had "repeatedly interfered with [Jeremy's] visitation rights"; did not foster the relationship between father and son; had been married twice, and the current one was "unstable" and "causing stress on the minor child"; had "failed to cooperate with the minor child's participation in extracurricular activities"; and was planning to move out of state without consulting Jeremy.

In Laura's March 15, 2010 answer, she denied Jeremy's allegations and further "denie[d] that she has made plans to move out of the state" though she acknowledged her husband had taken new employment in Illinois. In a counterclaim, Laura asserted Jeremy had a history of drug usage and was violent, as was his current wife. In an amended answer filed in June 2010, Laura stated Jeremy "has for some time presented a safe situation for Garrett during his visitation." She also stated she and Eli "were able to sell their home and the family . . . will now be able to live together in Sycamore, Illinois." She asserted the distance caused by the relocation was more than 150 miles and "Jeremy's visitation will need to be modified."

Meanwhile, in May 2010, Laura was found in contempt of the visitation provisions of her and Jeremy's dissolution decree for failing to provide visitation during the summer of 2009. The court (Judge Joel Yates) stated:

> Regarding the lack of visitation allegations for 2009, the court is concerned about the testimony that Garrett was left to make the decision as to whether he would go to visits with his father. As parents of the child, both parties are required to see that the terms and conditions of the decree are carried out. By allowing her then nine-year-old son to make the decisions regarding court ordered visits with his father, the court concludes Ms. Van Zante willfully and intentionally violated her obligations under the Decree on three separate occasions in 2009.

On June 7, 2010, Jeremy filed an application for a guardian ad litem (GAL), asserting: "given the facts and circumstances surrounding the application for Modification and the Court's recent findings of Contempt against the Petitioner, it would be in the child's best interest that he be appointed a Guardian Ad Litem." Laura resisted. After a "conference with counsel for both parties," the court "determined a guardian ad litem should be appointed." The order appointing Jami Hagemeier on July 8, 2010 provided only that Hagemeier "should be and she is hereby appointed as guardian ad litem" in the modification.

On June 30, 2010, Laura and her children moved to Illinois to join Eli.

Following the January 2011 modification hearing, the court ordered physical care of Garrett be placed with Jeremy. The court wrote:

> Laura acknowledges the move to Illinois has been hard on Garrett for a variety of reasons. Her extended family, as well as Jeremy's extended family, all live in the Poweshiek County area. Laura's parents reside there as does Jeremy's. Jeremy's parents had a significant relationship with Garrett, and Garrett often stayed at their home. . . .
>
> In addition, Laura has two sisters who reside in Iowa. One lives in Grinnell and one in Altoona. She has four nieces and nephews, and Garrett gets along well with his cousins. Garrett also has a good relationship with her mother and father who live in Poweshiek County.
>
> When Garrett is in the Poweshiek County area, Jeremy makes an effort to have him maintain his relationship with Laura's family and Garrett has significant visits with Laura's extended family. . . . Any direct contact Garrett has with his maternal

> grandparents is generally a result of Jeremy's efforts. In addition, Jeremy has provided Garrett an opportunity to visit with Jeremy's extended family.
>
> It is clear Garrett has a significant and strong support system in Iowa and does not have a similar support system in Illinois. This support system also exists for Jeremy and is evidenced by the assistance he receives from his parents. . . .
>
> Before Garrett moved to Illinois, Jeremy was involved in his athletics and coached baseball and flag football. Currently Garrett also plays tackle football in Sycamore. Jeremy made an effort on several occasions to travel to Illinois to watch football games and on one occasion went to Michigan when there was a game there.

The court observed "there have been occasions when Laura has failed to provide Jeremy with meaningful contact with Garrett," noting the court's earlier finding of contempt for violating visitation provisions of the decree, and later "occasions when Laura would travel to Iowa with Garrett and have visits with her family but would fail to advise Jeremy Garrett was with her, nor did she make Garrett available for visits." The district court also noted Laura's proposed modification of visitation called for one extended weekend per month.

The court found "Jeremy's residential circumstances and marriage are more stable than Laura's and the existence of strong supporting extended family adds to that stability." It concluded:

> When the basis for seeking modification is relocation of the custodial parent, the heavy burden required to modify custody does not change. *In re Marriage of Spears*, 529 N.W.2d 299 (Iowa Ct. App. 1994). In this instance, however, it is not merely relocation of the custodial parent but the stability provided for the child by Jeremy, and Laura's documented efforts to interfere with Garrett's relationship with Jeremy, and the relative stability of the living circumstances, which necessitate a modification of the physical care of Garrett.

The court awarded Laura alternating weekend visitation, and designated holidays. Laura was ordered to pay child support in the sum of ninety dollars per

month. The court further ordered that "the parties shall divide costs in this matter" with "Jeremy paying 65 percent and Laura paying 35 percent," but ordered Jeremy to pay the full amount of the GAL's fees—$5876.41.

Laura now appeals, contending physical care should remain with her despite her move to Illinois; she proposes visitation of one extended weekend per month. On cross-appeal, Jeremy argues the court abused its discretion in ordering him to pay the full amount of the GAL's fees.

II. Modification of Custody.

A. Scope and Standard of Review. We exercise de novo review in actions to modify child custody or physical care. Iowa R. App. P. 6.907; *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). We give weight to the district court's factual findings especially on credibility determinations, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*). Because we must base our decision on the particular circumstances presented by the parties before us, prior cases offer little precedential value. *Melchiori*, 644 N.W.2d at 368. "We recognize that the district court 'has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity.'" *In re Marriage of Walters,* 575 N.W.2d 739, 741 (Iowa 1998) (citation omitted).

B. Merits. To change a custodial provision of a dissolution decree, the applying party is generally required to show (1) a material and substantial change in circumstances not contemplated by the decree that is essentially permanent and (2) an ability to provide superior care. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Pursuant to Iowa Code section 598.21D (2011),

when a parent moves with a child to a location more than 150 miles away, a court may consider the relocation a substantial change of circumstances. A much less extensive change in circumstances is generally required in visitation cases than physical care cases. *See Spears*, 529 N.W.2d at 302; *In re Marriage of Salmon*, 519 N.W.2d 94, 95 (Iowa Ct. App. 1994).

In their filings in the district court, both parents agreed the resulting three and one-half to four hour drive between Grinnell, Iowa, and Sycamore, Illinois, was a substantial change of circumstances. Laura argues it warrants a change of visitation only; Jeremy, a change of physical care. Upon our de novo review, we agree with the district court that Laura's relocation, which meets the statutory presumption of a substantial change of circumstances, in conjunction with Laura's interference with Jeremy's contact with Garrett, and the familial support found in Iowa, warranted a custody modification.

III. Guardian Ad Litem Fees.

Though the motion to appoint a GAL cites no authority, the district court does have authority to appoint a GAL pursuant to Iowa Code section 598.12(2), and both parties agreed that the GAL was appointed under that subsection.[2]

[2] Prior to 2005, section 598.12 did not include this version of subsection two, the guardian ad litem provisions. Section 598.12 currently provides authority to the court to appoint "an attorney to represent the legal interests of the minor child" under subsection (1), and "a guardian ad litem to represent the best interests of the minor child" under subsection (2). The same person may serve as both. Iowa Code § 598.12(3).

> Section 598.12(2), provides:
> The court may appoint a guardian ad litem to represent the best interests of the minor child or children of the parties.
>
> *a.* Unless otherwise enlarged or circumscribed by a court or juvenile court having jurisdiction over the child or by operation of law, the duties of a guardian ad litem with respect to a child shall include all of the following:

Subsection two appears to incorporate the supreme court's description of the role and responsibilities of a GAL outlined in *Estate of Leonard ex rel. Palmer v. Swift*, 656 N.W.2d 132, 139–41 (Iowa 2003) (addressing the differing roles of an attorney and a guardian ad litem in context of an involuntary conservatorship). In *Leonard*, our supreme court stated:

> More specifically, a guardian ad litem serves the court, *advising the court*, after an impartial investigation, of any defense to the action held by the ward. In contrast, the attorney represents the ward and must *advise the ward* of his rights and ensure that those rights are protected by making certain the proceedings comply with the statutory and constitutional requirements of Iowa law. In summary, the guardian ad litem advocates for the best interests of the ward, whereas an attorney advances the wishes of the ward.

> (1) Conducting general in-person interviews with the child, if the child's age is appropriate for the interview, and interviewing each parent, guardian, or other person having custody of the child, if authorized by the person's legal counsel.
>
> (2) Conducting interviews with the child, if the child's age is appropriate for the interview, prior to any court-ordered hearing.
>
> (3) Visiting the home, residence, or both home and residence of the child and any prospective home or residence of the child, including visiting the home or residence or prospective home or residence each time placement is changed.
>
> (4) Interviewing any person providing medical, mental health, social, educational, or other services to the child, prior to any court-ordered hearing.
>
> (5) Obtaining firsthand knowledge, if possible, of facts, circumstances, and parties involved in the matter in which the person is appointed guardian ad litem.
>
> (6) Attending any hearings in the matter in which the person is appointed guardian ad litem.
>
> *b.* The order appointing the guardian ad litem shall grant authorization to the guardian ad litem to interview any relevant person and inspect and copy any records relevant to the proceedings, if not prohibited by federal law. The order shall specify that the guardian ad litem may interview any person providing medical, mental health, social, educational, or other services to the child; may attend any meeting with the medical or mental health providers, service providers, organizations, or educational institutions regarding the child, if deemed necessary by the guardian ad litem; and may inspect and copy any records relevant to the proceedings.

656 N.W.2d at 142. In other words, because of the fundamental distinction between their roles, the appointment of a GAL is not the same as appointing an attorney. *See id.*

Laura objected to the appointment of a GAL, to any testimony by the GAL, and further objected to admission or consideration of the GAL's report. The GAL did meet with interested persons, appear at trial, and question witnesses. The GAL did not testify, but argued it was in Garrett's best interests that physical care be modified. These actions were in accordance with the authority granted in section 598.12(2).

Though the GAL did prepare a report, the district court did not admit or consider it, relying upon *In re Marriage of Gaumer*, 303 N.W.2d 136, 138 (Iowa 1981), and *In re Marriage of Anderson*, No. 07-0159 (Iowa Ct. App. Dec. 28, 2007).[3] Because the court did not admit or consider the report, we need not address whether such a report is admissible.[4]

As for the GAL's fees, section 598.12(5) provides,

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[3] Both cases cited by district court relied upon *In re Marriage of Joens*, 284 N.W.2d 326 (Iowa 1979). In *Joens*, the court stated:

> Significantly the attorney is to investigate and to secure the testimony of witnesses helpful to the cause of the children. There is no provision that he "report" or that he make recommendations. His findings are not made admissible as evidence in the case. It appears the legislature recognized that in the rancor and bitterness of a custody fight parents might well be insensitive to the best interests of their children. It provided that the children have representation separate and apart from either parent.

Joens, 284 N.W.2d at 329. *Joens* predates the 2005 amendment to section 598.12. Thus, both cases cited by the court were addressing the role of an attorney appointed for the child, not a GAL.

[4] It does appear, however, that a GAL report would be admissible only upon stipulation or agreement of the parties. *See Joens*, 284 N.W.2d at 329; *In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974); *In re Marriage of Gravatt*, 365 N.W.2d 48, 49 (Iowa Ct. App. 1985).

> The court shall enter an order in favor of the attorney, the guardian ad litem, or an appropriate agency for fees and disbursements, and the *amount shall be charged against the party responsible for court costs* unless the court determines that the party responsible for costs is indigent, in which event the fees shall be borne by the county.

(Emphasis added.)

After trial, the district court ordered costs apportioned sixty-five percent to Jeremy and thirty-five percent to Laura. However, Jeremy was ordered to pay the full amount of GAL fees in the amount of $5876.41.[5] Because the GAL fees are to be "charged against the party responsible for court costs," the GAL fees here should have been apportioned in the same manner as other costs. Iowa Code § 598.12(5). We therefore modify the court's order and assess to Jeremy sixty-five percent of the GAL fees ($3891.67). We assess to Laura thirty-five percent of the GAL fees ($2056.74).

IV. Appellate Attorney Fees.

Both parties seek an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within this court's discretion. *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991). We consider the parties' financial positions. *Id.* We look to 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 action on appeal. *Id.* Upon our review of the parties' circumstances, including that neither is in much

[5] At trial, the GAL and Jeremy's attorney stated it was their understanding the parties were going to split the GAL's fees evenly. Laura's attorney stated, "I believe that costs were going to be assessed, and then the Court would determine what the cost—you know, what the actual split was going to be at trial." All seem to agree there would be some division of the fees.

better financial position than the other, and the allocation of GAL fees, we find equity does not warrant an award of appellate attorney fees.

The costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.