IN THE COURT OF APPEALS OF IOWA

No. 3-1123 / 13-0862
Filed December 18, 2013

**IN RE THE MARRIAGE OF NIKKI LEE TECH
AND TROY DENNIS TECH**

**Upon the Petition of
NIKKI LEE TECH,
n/k/a NIKKI LEE DAWES,**
Petitioner-Appellee,

**And Concerning
TROY DENNIS TECH,**
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Greg Steensland, Judge.

A husband appeals the district court decision modifying the visitation provisions of the parties' dissolution decree, and refusing his request to modify physical care. **AFFIRMED AS MODIFIED.**

Troy D. Tech, Council Bluffs, pro se.

Scott D. Strait, Council Bluffs, for appellee.

Considered by Tabor, P.J., Bower, J., and Eisenhauer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

EISENHAUER, S.J.

Troy Tech appeals from an order modifying the parties' dissolution of marriage decree. He contends the trial court erred: (1) making in several findings of fact, (2) in making evidentiary rulings, (3) in failing to award joint physical care or in the alternative physical care, (4) in modifying visitation, including a first right of refusal and holiday visitation, (5) in improperly considering the guardian ad litem's report, and (6) in assessing costs and attorney fees.

I. Background Facts & Proceedings.

Troy Tech and Nikki Tech, now Nikki Dawes, were formerly married. They have two minor children, born in 2003 and 2004. A dissolution decree, based on the parties' stipulation, was filed in November 2008. The decree granted the parties joint legal custody of the children with Nikki having physical care. Troy was granted extended visitation. Additionally, the decree provided if either party was unable to care for the children for a period of four hours or longer, the other party would have the right of first refusal to care for the children. The parties stipulated the children would attend a particular school district for at least five years. Troy was ordered to pay child support of $863 per month.

Nikki remarried and moved from Council Bluffs, Iowa, to Gretna, Nebraska. She wished to enroll the children in school near her home. Troy filed a petition for modification on June 15, 2011, seeking physical care of the children, or in the alternative, joint physical care. Troy asserted he had been caring for the children for a greater amount of time than set forth in the dissolution decree. He additionally raised an issue concerning Nikki's mental health. Nikki filed a petition for modification asking to have Troy's child support

obligation increased. She later amended her petition to request Troy's visitation with the children be reduced.

While the modification was pending, the children started counseling with Rodney Burger. Troy became aware that Burger had sent some letters to Nikki's attorney relating negative statements the children had made about Troy. Troy deposed Burger and subpoenaed his records. Troy confronted the children with statements they had made to Burger and videotaped this conversation. The children felt betrayed because they believed their statements to Burger had been confidential.

Troy filed a motion for appointment of an expert and asked to begin family counseling with the children. The court granted the motion. Troy took the children to Dr. Cynthia Topf, a psychologist who conducted a parenting assessment and recommended the children be placed with Troy.

After a modification hearing, the district court entered an order finding Troy had failed to show there had been a substantial change in circumstances and had failed to show he was in a superior position to parent the children. The court concluded the children should remain in Nikki's physical care. The court determined, however, Nikki had met the lesser standard to warrant a modification of visitation. The court determined Troy should have visitation on Wednesday evenings, alternating weekends, alternating holidays, and four weeks in the summer. The court rescinded the right of first refusal for child care. The court also determined Nikki would determine where the children would be enrolled in school. Troy was ordered to pay child support of $934 per month. He was also

ordered to pay the fees for a guardian ad litem (GAL) and $15,000 for Nikki's attorney fees.

Both parties filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2). The court denied these motions. Troy has appealed.

II. Standard of Review.

As an equitable action, we review dissolution proceedings de novo. Iowa R. App. P. 6.907. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Factual Findings.

Troy contends the district court erred in several of its factual findings. As noted above, our review of this equitable action is de novo. Iowa R. App. P. 6.907. While we may defer to the factual findings of the district court, those findings are not binding on us. *See In re Marriage of Kimbro*, 826 N.W.2d 696, 698 (Iowa 2013). In our de novo review, we examine the entire record and adjudicate anew rights on the issues properly presented. *See In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). Thus, we make our own findings based on the evidence as presented in the district court.

IV. Evidentiary Rulings.

A. Troy asserted Nikki had exhibited erratic behavior and it appeared her mental health had deteriorated since the time of the decree. Through discovery in this matter, Troy attempted to obtain Nikki's mental health records. The court directed Nikki to produce all of her mental health or psychiatric medical records since the date of the dissolution decree for in-camera review by the court.

The court reviewed the records and entered a ruling on July 18, 2012. The court found:

> In this case, there is no specific allegation setting forth why [Troy] believes [Nikki's] mental health has deteriorated. In the Court's review of [Nikki's] mental health records, there is nothing relevant for [Troy's] generic claim. Therefore, the Court finds [Nikki's] objection to [Troy's] Request for Production under No. 5 should be SUSTAINED.

The court determined Nikki would not be required to give her mental health records to Troy. The court denied Troy's motion to reconsider, finding her mental health records were not relevant.

Troy claims the district court should have permitted him to have access to Nikki's mental health records. In *Ashenfelter v. Mulligan*, 792 N.W.2d 665, 672 (Iowa 2010), the Iowa Supreme Court held that a party's "[m]ental health and medical records are protected by a constitutional right to privacy." On appeal, Troy claims Nikki waived this right because he had access to some of her mental health records at the time of the dissolution and because, more recently, she discussed her mental health history with the GAL and Burger.

The district court's ruling was not based on a claim Nikki had waived her right to privacy; the court ruled the mental health records were not relevant. We

conclude Troy has not preserved error on his claim that Nikki had waived her right to privacy in her mental health records.[1] *See In re Marriage of Gensley*, 777 N.W.2d 705, 718 (Iowa Ct. App. 2009) (noting that an issue must be raised and decided in the district court before it may be considered on appeal).

B. Nikki filed a motion in limine seeking to prevent Troy from presenting court records from her dissolution proceedings from a marriage prior to her marriage to Troy. There is no specific ruling in the record on Nikki's motion in limine. Additionally, the record does not show Troy offered the court records from Nikki's prior dissolution into evidence.

On appeal, Troy claims the district court abused its discretion by denying him the ability to present this evidence. An offer of proof, however, is necessary to preserve error on a claim the district court improperly excluded evidence. *In re Marriage of Daniels*, 568 N.W.2d 51, 55 n.2 (Iowa Ct. App. 1997). We conclude Troy has failed to preserve error on this issue. *See Strong v. Rothamel*, 523 N.W.2d 597, 599 (Iowa Ct. App. 1994) ("Because no offer of proof was made, the record is not sufficient for us to address plaintiff's claimed error, and we find it was not preserved on this issue.").

V. Guardian ad Litem.

Nikki filed a motion to have a GAL appointed to represent the children. The court appointed Maura Goaley. The GAL presented a written report to the

[1] Even if the issue had been preserved, we determine the district court did not abuse its discretion in concluding Troy should not have access to Nikki's mental health records. *See Ashenfelter*, 792 N.W.2d at 673-74 (finding grandparents' request for visitation could not overcome a parent's constitutional and statutory privilege against production of mental health records); *In re N.N.*, 692 N.W.2d 51, 54 (Iowa Ct. App. 2004) (noting that although scope of review was de novo, evidentiary rulings were reviewed for an abuse of discretion).

court recommending it was in the children's best interests to remain in Nikki's physical care. She also recommended Troy's visitation be reduced to alternating weekends with expanded visitation in the summer.

In the GAL's report she stated the younger child was very adamant she did not want the GAL repeating certain things that were discussed. During cross-examination of the GAL, Troy asked what things she had taken into consideration that had not been included in the report. The district court stated the GAL did not need to repeat the children's confidences. At the end of the GAL's testimony Troy asked for the GAL's report and testimony to be stricken because he was unable to question her about the children's statements. The district court overruled his objection.

Troy contends the district court should not have considered the GAL's testimony or report. A similar issue was considered in *In re Marriage of Joens*, 284 N.W.2d 326, 329 (Iowa 1979), as follows:

> 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.
>
> . . . What the attorney discovers is frequently hearsay, sometimes only rank rumor or gossip. Therefore, those who know the facts should testify in order to provide a reliable basis for the trial court's ultimate decision.
>
> . . . [S]uch matters should be considered when properly before the court by agreement or stipulation, as they frequently are and as was the case in the appeal now before us. The statute does not provide nor did we say in [*In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974)] that the trial court accept untested hearsay in lieu of sworn testimony before deciding an issue as important as child custody.

Unless a report is properly before the court by agreement or stipulation, it should not be considered after a proper objection by a party. *See In re Marriage of*

Williams, 303 N.W.2d 160, 163 (Iowa 1981). On our de novo review of the record, we do not consider the report or testimony of the GAL.

VI. Physical Care.

Troy contends the district court should have granted his petition to modify the physical care provision of the parties' dissolution decree and placed the children in the parties' joint physical care. He asserts he had the children nearly half of the time and asks that the decree recognize the parties' actual practice. In the alternative, Troy asks if we find a joint physical care arrangement is unwarranted, then the children should be placed in his physical care. He claims he is more stable than Nikki and she has not supported his relationship with the children.

A party seeking to modify a physical care provision in a dissolution decree must show there has been a substantial change in circumstances since the time of the decree, not contemplated by the court at the time the decree was entered, which makes it in the children's best interests to modify the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change in circumstances must be more or less permanent and relate to the welfare of the children. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). A party seeking a modification must also show an ability to minister more effectively to the children's well-being. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

"The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons." *Frederici*, 338 N.W.2d at 158. "The trial 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 Erickson*, 491 N.W.2d 799, 802 (Iowa Ct. App. 1992).

The district court first found Troy had failed to show there had been a substantial change in circumstances. We note not every change in circumstances is sufficient to warrant a modification in the physical care of children. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983). The change in circumstances must not have been in the contemplation of the district court at the time when the dissolution decree was entered. *Id*. Additionally, "it must appear that continued enforcement of the original decree would, as a result of the change conditions, result in positive wrong or injustice." *Id*.

On our de novo review, we agree with the district court's conclusion Troy has not shown a substantial change in circumstances sufficient to warrant modification of the physical care provision in the parties' dissolution decree.[2] While Nikki had remarried and moved from Council Bluffs to Gretna, there was little other evidence in the record to show a change in circumstances. The evidence showed the children were doing well in Nikki's physical care. We conclude Troy has not met his heavy burden to show a modification of the physical care provisions of the decree would be in the children's best interests.

[2] We also agree with the district court's determination that even if Troy had shown a substantial change in circumstances, he had not shown he could administer more effectively to the children's needs. *See In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005). The evidence does not show Troy is in a superior position to parent the children. Furthermore, Troy has not shown it would be in the children's best interests to be placed in a joint physical care arrangement. One factor in determining whether joint physical care is appropriate is the degree of conflict between the parents. *See In re Marriage of Hansen*, 733 N.W.2d 683, 698 (Iowa 2007). Here, both parents testified they had a contentious relationship.

VII. Visitation.

A. Troy claims the district court improperly modified the visitation provision of the dissolution decree to reduce his time with the children. Based on the parties' stipulation, the dissolution decree provided Troy had visitation from Wednesday night to Friday night each week, alternating weekends, alternating holidays, and two weeks in the summer. The district court determined the decree should be modified so Troy would have visitation each Wednesday evening, alternating weekends, alternating holidays on a different schedule, and four weeks in the summer.

"A different, less demanding burden applies when a parent is seeking to change a visitation provision in a dissolution decree." *In re Marriage of Brown*, 778 N.W.2d 47, 51 (Iowa Ct. App. 2009). A party must establish only that there has been a material change in circumstances since the time of the dissolution decree and the requested change in visitation is in the best interests of the children. *Id*. at 51-52.

When Troy had the children in his care every Wednesday through Friday, he had them participating in activities every night. Nikki believed the children were involved in too many things so they did not have an opportunity to be at home. She also stated the children needed to know where their home was, so they were not switching back and forth every week. Shifting from household to household every week was causing the children stress. We conclude Nikki presented sufficient evidence to support the district court's modification of the parties' visitation schedule to provide Troy would have the children every Wednesday evening, instead of from Wednesday night through Friday night.

B. Troy claims the district court should not have modified the parties' visitation schedule for holidays. Nikki requested Halloween be removed as a holiday in the parties' visitation schedule. She also requested each party receive one-half of the children's winter break from school, alternating which half each party received each year.

The modification to the parties' visitation schedule did not address either of Nikki's concerns. There was no evidence the parties had any other problems with their visitation schedule. The modified visitation schedule set forth by the district court requires the children to be transferred each year on Christmas Eve and Christmas Day, 1:00 p.m. each Thanksgiving Day, and 12:00 p.m. each Easter Sunday. The revised schedule merely insures the children will not be able to celebrate a complete holiday with either of their parents on these days.

We reinstate the visitation schedule as set forth in the original dissolution decree, which was based on their stipulation. We determine, however, that Halloween should be eliminated as a holiday on the schedule. We do not modify the provision regarding Christmas and the children's winter break from school because there was no evidence the parties had problems with this provision of the schedule.

C. At the time of the dissolution decree, the parties agreed they would each have the right of first refusal to care for the children when the other party was unable to care for them for a period of four hours or longer. This provision proved to be problematic for the parties and was an issue of contention between them. In the modification order, the district court rescinded this provision of the dissolution decree.

Troy contends the district court should not have eliminated this provision. He points out that Nikki travels for her work and states he should be able to care for the children during this time, rather than leaving them in the care of Nikki's current husband. Our review of the evidence shows it was causing the children stress to be moving frequently between Nikki's home and Troy's home. We concur in the district court's decision eliminating this provision from the decree.

VIII. Fees.

A. Troy asserts the district court should not have required him to pay the fees for the GAL. He asks to have the fees split between the parties evenly. Under Iowa Code section 598.12(5) (2011), the fees for a GAL should be assessed against the party responsible for court costs, unless the party responsible for costs is indigent. The modification order taxes the court costs to Troy. Based on section 598.12(5), we affirm the decision of the court making Troy responsible for the fees of the GAL.

B. Troy claims the district court should not have required him to pay $15,000 for Nikki's trial attorney fees. We review the district court's decision granting or denying a request for trial attorney fees for an abuse of discretion. *Kimbro*, 826 N.W.2d at 704.

Nikki's attorney requested attorney fees of $14,595, which did not include the last two days of the hearing or work on the post-trial motions. Based on the facts of this case, we conclude the court did not abuse its discretion in determining Troy should pay $15,000 for Nikki's trial attorney fees.

C. On appeal, Nikki seeks appellate attorney fees. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699

N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We conclude each party should pay his or her own appellate attorney fees.

IX. Summary.

On our de novo review, we make our own findings based on the evidence as presented in the district court. Troy did not preserve error on his complaints about the evidentiary rulings made by the court. The court should not have considered the written report or testimony by the GAL because the evidence was not before the court based on the agreement or stipulation of the parties. We agree with the court's decision not to modify the physical care provision of the dissolution decree. We concur in the court's decision to eliminate Troy's weekly visitation from Wednesday night to Friday night, and instead provide him with visitation each Wednesday evening. We do not agree with the court's decision to modify the parties' holiday visitation schedule; we reinstate the holiday visitation schedule as set forth in the original dissolution decree, except that we eliminate the recognition of Halloween as a holiday. We agree the provision regarding the right of first refusal for child care should be eliminated. We affirm the court's order requiring Troy to pay the fees of the GAL. We affirm the award of trial attorney fees to Nikki. We do not award any appellate attorney fees. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.