IN THE COURT OF APPEALS OF IOWA

No. 3-839 / 13-0260
Filed November 6, 2013

**IN RE THE MARRIAGE OF LINDA SUE FOEGEN
AND MARK C. FOEGEN**

**Upon the Petition of
LINDA SUE FOEGEN,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
MARK C. FOEGEN,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cass County, Jeffrey L. Larson, Judge.

Mark Foegen appeals, and Linda Foegen cross-appeals, from the district court's order denying Mark's application to modify the custody provision of the parties' dissolution decree. **AFFIRMED ON APPEAL; AFFIRMED ON CROSS–APPEAL.**

Andrew J. Tullar of Tullar Law Firm, P.L.C., Des Moines, for appellant.

J.C. Salvo and Bryan D. Swain of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellee.

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

DOYLE, J.

Mark Foegen appeals, and Linda Foegen cross-appeals, from the district court's order dismissing Mark's application to modify the custody provision of the parties' dissolution decree. We affirm on both appeals.

I. Background Facts and Proceedings

Mark and Linda Foegen married in 2000 and divorced eight years later. A temporary order was entered in 2007 following the parties' separation that provided for shared legal custody and physical care of their one-year-old child. The district court ordered Mark to have physical care of the child every week from Monday at 8:00 a.m. through Wednesday at 7:00 p.m., and Linda to have physical care of the child the remainder of the time.[1]

The parties stipulated to the terms of the dissolution decree. The decree established a physical care arrangement similar to the temporary order. Linda was ordered to have physical care of the parties' child, subject to Mark's visitation every week from Monday at 8:00 a.m. through Wednesday at 12:00 noon, as well as alternating holidays and three week-long visits per year.[2]

Nearly three years after the dissolution decree was filed, Mark applied to modify the physical care arrangement. He alleged a substantial and material change in circumstances had occurred, claiming Linda "is unable to properly care for the minor child resulting in conditions that affect the health, safety, and welfare of the child." Linda filed an answer denying a change of circumstances.

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[1] Linda filed a motion to amend the temporary order, which the court overruled.

[2] Mark filed a motion pursuant to Iowa Rule of Civil Procedure 1.904 (2) to enlarge, modify, and amend the decree seeking clarification of the holiday and emergency visitation provisions. The court entered an order clarifying these provisions.

Mark also filed an application for appointment of a guardian ad litem, which the court granted, appointing Jennifer Plumb as the child's guardian ad litem.

Mark thereafter filed a motion requesting a "physical/mental examination" of Linda. Linda resisted an examination, claiming Mark's motion "appears to be the beginning of a 'fishing expedition' . . . ." Following a hearing, the court denied Mark's motion, but stated, "If the guardian ad litem determines that such an evaluation would be necessary in her representation of the child, the Court will reconsider the motion."

The guardian ad litem subsequently filed a motion requesting mental examinations of both parties, stating, "As Guardian ad Litem in this matter, I have obtained knowledge that possible mental health issues exist among the parties and have been alleged by one party against the other on multiple occasions that could potentially interfere with the best interest of the minor child," including "extreme anxiety, paranoia, depression and bizarre [sic] sexual behaviors." Lisa resisted the guardian ad litem's motion for mental examinations.

Following a hearing, the court ordered, "The parties shall submit to a psychological/psychiatric examination." The parties' mental health evaluations, completed by a licensed psychologist, were admitted and received into evidence at trial. These reports indicated the parents were competent parents that were bonded with the child, and did not raise any safety concerns.

The guardian ad litem filed her report with the court on the date of trial. Her report described the child as "a very bright boy," and noted:

> [The child] currently attends first grade at Washington Elementary. He does well in school. Developmentally, [the child]'s social/emotional, physical, cognitive and language skills are on target. [He] is described by his teachers and daycare providers as a typical six-year-old boy who is happy and healthy. Both parents describe [him] as very advanced for a kid his age, cognitively and intellectually.
>
> A review of [the child]'s medical records reflect that he is in overall good health and has no chronic medical conditions. . . .
>
> [The child has been in counseling with two licensed psychologists.] It is my understanding that both have indicated [he] is a healthy, normal kid. . . .

In regard to Mark and Linda, although the guardian ad litem noted deficits in their ability to work together and communicate about the child, her report was complimentary regarding their respective parenting abilities:

> Both parents have job schedules that are conducive to active parenting and supervision of [the child]. I have no safety or parenting concerns with either parent. I have not observed any signs of what I would deem mistreatment of [the child] by either parent. It is evident that [the child] likes being with both of his parents, loves both his parents and his parents love him very much. They both appear to be good caregivers and very firmly bonded with him.

In conclusion, the guardian ad litem opined, "[The child] appears to be pretty well settled and adjusted into the routine both parents have established for him within the guidelines of the Decree. Honestly, I do not see a reason for a change at this time."

Following the hearing, the district court dismissed Mark's application to modify physical care. The court noted it had reviewed the parties' mental health examinations and the guardian ad litem's report. The court stated "Mark has failed to meet his heavy burden" of establishing a material and substantial change of circumstances to warrant modification of the decree, and found the record to indicate "both parties can equally minister to their [child.]"

Mark filed a combined motion to reconsider and motion for new trial, which the court denied. Mark appeals and Linda cross-appeals.

II. Linda's Mental Health Examination

A. Admission of the Examination

Mark claims "Linda's intentional withholding" of her "court ordered" mental health examination "until the day of trial" "prejudiced Mark, the Guardian ad Litem, and the parties' son," because "[t]hey were denied any time to review Linda's mental health examination and . . . provide additional and/or clarifying information to the District Court in support of Mark's request for a change to the physical care" provisions of the decree. Linda claims this issue has not been preserved for our review.

At trial, Linda's attorney provided Linda's mental health examination to Mark's attorney as a proposed exhibit at trial. Mark's attorney stated he had "[n]o objection" to the admission of Linda's examination, and it was admitted.

Following trial, the district court issued its order dismissing Mark's application. One week later, Mark filed a combined motion to reconsider and motion for new trial, alleging in part that Linda "refused to release her evaluation report to [Mark] or the Guardian ad Litem until the day of trial";[3] "[t]he Guardian ad Litem and [Mark] did not have the opportunity to review the mental health evaluation prior to trial"; "[Linda] has been diagnosed with suicidal ideation among other several diagnoses"; and "[s]aid mental health disorders affect

[3] Mark and Linda's mental health examinations were completed by November 9, 2012. Mark authorized the release of his evaluation to the guardian ad litem and Linda's attorney on that day. According to Mark, Linda did not release her mental health examination to the guardian ad litem and opposing counsel until trial.

[Linda]'s ability to properly care for and provide for the needs of the minor child of the parties[.]"[4]

The court denied Mark's motion. Mark claims his motion was sufficient to preserve error on the issue of Linda's "withholding" of her evaluation. We disagree.

"When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). A motion for reconsideration and a motion for new trial can serve to preserve error as a rule 1.904(2) motion. *See id.* at 538. This is only true, however, where the "rule 1.904 motion is necessary to preserve error 'when the district court *fails to resolve* an issue, claim, or other legal theory properly submitted for adjudication.'" *Id*. at 539 (quoting *Explore Info. Servs. v. Court Info. Sys.*, 636 N.W.2d 50, 57 (Iowa 2001)); *see also Estate of Grossman v. McCreary*, 373 N.W.2d 113, 114 (Iowa 1985) ("Such a motion is a condition precedent for preserving the 'skipped' issues for appellate review.").

In this case, however, Mark's attorney specifically stated he had "[n]o objection" to the admission of Linda's mental health evaluation at trial. "Objections should be raised at the earliest time at which error became apparent in order to properly preserve error." *State v. Steltzer*, 288 N.W.2d 557, 559 (Iowa 1980). A motion for new trial "ordinarily is not sufficient to preserve error where

[4] The motion for new trial raised similar allegations, including that Mark "was only allowed access to [Linda's evaluation] on the day of trial"; Mark and his attorney "subsequently reviewed the evaluation fully," and "[i]nformation, unknown to [Mark] at the time of trial and contained in [Linda's] evaluation, constitutes new evidence for the purposes of a new trial in this matter."

proper objections were not made at trial." *See id.* We find Mark's motion for reconsider and for new trial did not preserve error on his claim regarding Linda's "withholding" of her evaluation. *See State v*. *Rutledge*, 600 N.W.2d 324, 326 (Iowa 1999) ("Our cases are legion that hold error is waived unless preserved by a timely trial objection.").

In any event, no error exists here even if the merits of Mark's claim were properly before us. In its ruling, the district court acknowledged it had considered Linda's mental health examination, but stated, "The Court finds that this report . . . is not sufficient evidence to establish a substantial change in circumstances that would persuade this Court to modify custody and visitation." And we further observe the mental health examination itself revealed no specific concerns to support the presence of Linda's alleged mental health issues, other than those issues indicated in the guardian ad litem's report and already before the court.[5] Indeed, the examination described Linda as a competent parent, who is firmly and appropriately bonded to the child.

B. *Fees of the Examination*

In its ruling ordering the parties to submit to mental health examinations, the court noted, "The original examination was requested by [Mark]. [Mark] shall advance the costs for the examinations. The Court, at time of trial, will determine if these expenses should be allocated as costs." Following trial, the court

[5] Although the guardian ad litem did not consider Linda's mental health examination prior to completing her report, the guardian ad litem's report observed Linda's mental health status, indicating: "Linda was diagnosed with depression and post-traumatic stress disorder," "she has been seeing a mental health therapist pretty consistently since the divorce," and "[i]n several of her visits with me in my office, Linda became very emotional, upset and anxious."

entered its order denying Mark's application for modification and assessing "[c]ourt costs" for the proceeding to Mark.

Mark claims the district court abused its discretion in assessing Linda's mental health examination fees to him. He alleges Linda should be assessed the costs for her examination. Linda claims this issue is not preserved for our review.

The court ordered Mark to pay court costs. Although the court did not specifically include the costs of the mental health examinations as court costs, we conclude these costs are included in "court costs." The court therefore addressed this issue and it is properly before us on appeal. *See Meier*, 641 N.W.2d at 537.

The assessment of court costs in equity cases is within the sound discretion of the district court. *See Wymer v. Dagnillo*, 162 N.W.2d 514, 519 (Iowa 1968) ("The rule is well established that in an equity action the trial court has a large discretion in the matter of taxing costs and we will not ordinarily interfere therewith."); *see also* Iowa Code § 625.1 (2011) ("Costs shall be recovered by the successful against the losing party."). Here, the court denied Mark's application and assessed him the costs of the proceeding. The award of attorney fees and court costs in a dissolution action depends upon the relative financial circumstances of the parties. *See In re Marriage of Vrban*, 359 N.W.2d 420, 428 (Iowa 1984). Here, we find the district court was within its discretion in ordering Mark to pay court costs, and we affirm on this issue.

III. Affidavit of Dr. Cottam

Mark contends Linda's offer of the affidavit of clinical psychologist, Dr. Cottam, "on the day of the modification trial was not in the best interests of the parties' son." He further states the affidavit was "not court-ordered" and "Linda did not provide a copy of it to Mark before it was filed with the District Court."

We decline to consider this contention because Mark fails to allege any error made by the district court. At trial, Mark's attorney acknowledged the affidavit "is not part of the record at this time," and stated if Linda "tries to attempt to enter it now, we would object to it as being hearsay because Dr. Cottam is not here to testify." The affidavit was not admitted as an exhibit and the court did not reference it in its order. Mark alleges Linda's mental health examination refers to Dr. Cottam's report on Linda, but that is irrelevant—Mark did not object to the admission of the mental health examination. We affirm on this issue.

IV. Report of the Guardian ad Litem

A. Admission of the Report

Mark claims "[t]he guardian ad litem's representation of the parties' son was deficient and not in the best interests of the parties' son." Specifically, Mark takes issue with the guardian ad litem's filing of a report "instead of appearing and participating in the modification trial." He further alleges the guardian ad litem did not adequately investigate this case and instead "review[ed] what record she [chose]" to arrive at her "decision."

Mark requested the appointment of a guardian ad litem. The district court determined the best interests of the child required appointment of a guardian ad litem and appointed Jennifer Plumb as a guardian ad litem for the child. *See*

Iowa Code § 598.12(2) ("The court may appoint a guardian ad litem to represent the best interests of the minor child or children of the parties."); *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993) ("The recommendation of an independent custodial investigator may be considered in determining primary physical custody, but it is not controlling.").

In general, if a guardian ad litem's report is not before the court on the agreement or stipulation of the parties, it should not be considered after proper objection. *In re Marriage of Williams*, 303 N.W.2d 160, 163 (Iowa 1981). Such reports often contain inadmissible hearsay. *See id.* (citing *In re Marriage of Joens*, 284 N.W.2d 326, 329 (Iowa 1979)).

Here, neither party objected to the admission and the court's consideration of the guardian ad litem's report.[6] In addition, Mark did not take issue with the guardian ad litem's alleged deficient performance until well after the court had issued its ruling on Mark's modification application—when the question of responsibility for the guardian ad litem's fees arose. We find this issue is not preserved for our review. *See Meier*, 641 N.W.2d at 537.

B. *Guardian ad Litem Fees*

Following the court's ruling on Mark's application for modification, the guardian ad litem filed an application for allowance of fees. Specifically, the guardian ad litem requested $5950 in fees, of which $2400 had been paid (Linda had paid $1300 and Mark had paid $1100), leaving $3550 in fees outstanding. Following a hearing, the district court approved the $5950 in fees requested by

[6] The guardian ad litem was not called to testify at the modification hearing.

the guardian ad litem, and assessed the unpaid balance of those fees, $3550, to Mark.

Mark claims "the guardian ad litem should not have been awarded fees."[7] Guardian ad litem fees are to be "charged against the party responsible for court costs unless the court determines that the party responsible for costs is indigent . . . ." Iowa Code § 598.12(5). Here, Mark filed the application for modification and requested the appointment of a guardian ad litem. Linda paid $1300 of the guardian ad litem's requested $5950 fees. We affirm the court's order requiring Mark to pay the balance of the guardian ad litem's fees.

V. Modification of Physical Care

Upon resolution of the preliminary issues raised by Mark, we turn to the heart of this dispute. Mark contends the parties' dissolution decree should be modified to place physical care of the parties' child with him.

This modification action was tried in equity, and review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Johnson*, 781 N.W.2d 553, 554 (Iowa 2010). Although we are not bound by the findings of the district court, we give them deference because the district court was present to listen to and observe the parties and witnesses and evaluate the parties as custodians. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Cupples*, 531 N.W.2d 656, 657 (Iowa Ct. App. 1995); *see also* Iowa R. App. P. 6.904(3)(g).

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

[7] Inasmuch as Mark's claim corresponds to the guardian ad litem's alleged deficient performance, that issue is not preserved for our review, as noted above.

the most cogent reasons. *See Dale v*. *Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996).

> [T]he applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). If the parent seeking physical care has shown a substantial change in material circumstances, then we consider whether the party has also shown "an ability to minister more effectively to the children's well being." *Id.*

In support of his contention that a substantial change in circumstances exists, Mark raises a myriad of claims, including Linda's: denial of "health problems" their child was having, failure to keep Mark abreast of the child's school activities, failure to attend to the child's injuries, inability to communicate with Mark, mental health issues, and throwing away of the child's toys as punishment.

All these issues were brought to the district court's attention at trial. The court considered Mark's concerns, but ultimately found Mark had failed to prove a material and substantial change in circumstances. The court further concluded Mark had failed to prove he could offer superior care for the child. As the court observed:

> The Court does find that it is clear the parties are unable to effectively communicate with each other. Linda refuses to have face-to-face communication with Mark, and Mark responds defensively and angrily to most everything from Linda. This finding

> is based upon the testimony from the parties, [guardian ad litem Plumb's] report . . . and the psychological evaluations of Mark and Linda prepared by Dr. Peterson . . . .
>
> Mark has failed to meet his heavy burden of modifying custody and support in this matter. The Court finds that the parties' failure or refusal to effectively communicate with each other would not be remedied by a change in custody or visitation. The Court finds that both parties can equally minister to their [child], and custody should not change.

In our de novo review, we conclude Mark has failed to prove either a substantial change in circumstances or that he could provide superior care for the child such that modification of the physical care arrangement is warranted. Mark's own testimony reflects his only concern for the child's "welfare" while in Linda's care is "[j]ust [Linda's] anxiety and what it is doing to [the child]." Yet Mark also indicated the child "is adapting pretty good" to the physical care arrangement.[8] And significantly, we observe Mark's allegations regarding Linda's mental health are not founded in the record.

There is substantial evidence in the record of the child's strong bond with both Mark and Linda, and the parties both testified he is thriving physically, mentally, and socially in his current environment. We do not believe a change in physical care is in his best interests. *See In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999) (noting that goal of courts is to select the environment most likely to cultivate a physically, mentally and socially healthy child).

It is clear the majority of the problems between these parties and in turn, any stress relayed to the child, are caused by the parents' own behavior toward each other. Mark and Linda have, in many respects, made mountains out of

[8] Mark also indicated Linda had recently begun adequately addressing the child's "health problems related to bowel movements."

molehills and exasperated the other's arguably ordinary personality traits into "problems."[9] Yet, we do not believe the parents' behavior is a substantial and material change in circumstances not contemplated at the time the decree was entered, and we agree with the district court that "both parties can equally minister" to the child. *See In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994) ("If both parents are found to be equally competent to minister to the children, custody should not be changed."). We affirm on this issue.

VI. Trial Attorney Fees

On cross-appeal, Linda claims the district court abused its discretion in failing to award her trial attorney fees. She takes issue with the court's order for each party to pay their own attorney fees, "[d]espite her overwhelming success in the case and the modest amount of attorney fees requested."[10]

An award of trial attorney fees rests in the sound discretion of the trial court and should not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). Whether attorney fees should be awarded depends on the parties' respective abilities to pay, *see In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006), and fees awarded must be fair and reasonable, *see In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994).

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[9] Given their many admirable qualities, we believe Mark and Linda can choose to see the big picture and set aside their insecurities and animosities to work collectively for their child's best interests.

[10] Linda requested $5138.90 in trial attorney fees and costs.

Here, in light of the fact that Mark was charged with the fees and expenses for the guardian ad litem and the mental health examinations, we find the court exercised its discretion in ordering the parties to pay their own attorney fees. We affirm on this issue.

VII. Appellate Attorney Fees

Linda seeks an award of $12,211.55 in 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 Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). 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 district court's decision on appeal. *Id.* Here, Linda was forced to defend the district court's decision, is successful in her defense, and of the parties, Mark has a greater ability to pay attorney fees. In consideration of these factors, we find it equitable to award Linda $6500 in appellate attorney fees.

VIII. Conclusion

Upon consideration of the issues raised on appeal and cross-appeal, we affirm the modification order entered by the district court. Costs on appeal are assessed three-quarters to Mark and one-quarter to Linda.

AFFIRMED ON APPEAL; AFFIRMED ON CROSS-APPEAL.