IN THE COURT OF APPEALS OF IOWA

No. 8-133 / 07-1527
Filed March 14, 2008

IN RE THE MARRIAGE OF ROBERT G. YOUNG AND TASHA A. ROBERTS YOUNG

Upon the Petition of
ROBERT G. YOUNG,
Petitioner-Appellee,

And Concerning
TASHA A. ROBERTS-YOUNG,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Douglas S. Russell, Judge.

Appellant, Tasha A. Roberts-Young, appeals from the district court's denial of her application to modify the custodial and child support provisions of the 2005 decree dissolving her marriage to Robert G. Young. **AFFIRMED.**

Frank J. Nidey and Mark D. Fisher of Nidey Peterson Erdahl & Tindal, P.L.C., Cedar Rapids, for appellant.

Gregory Epping of Terpstra, Epping & Willet, and Darrell Walters, Cedar Rapids, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Appellant Tasha A. Roberts-Young appeals the district court's refusal to modify the custodial and child support provisions of the 2005 decree dissolving her marriage to Robert G. Young. She also contends the district court erred in interpreting the decree as giving the parties joint physical care. She asks for child support and attorney fees. We affirm.

BACKGROUND. The parties were married in 1992 and have a son who was born in 2001. Robert filed the petition for dissolution in July of 2003. In June of 2005 the parties entered into a stipulation outlining their agreement to all relevant issues including child custody and child support. In dissolving the marriage the district court approved and adopted the stipulation and made it a part of the dissolution decree.

The stipulation provided in relevant part:

> COME NOW, the parties and state that in the event a Decree of Dissolution of granted in this matter they stipulate and agree that their rights shall be settled, subject to the approval of the Court as follows:
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> . . . .
>
> 2. FACTORS CONSIDERED IN DETERMINING TERMS OF THIS STIPULATION. The parties have considered the factors in Section 598.21, Code of Iowa, concerning the issues involved in this case. This stipulation resolves all issues between the parties arising out of the dissolution of their marriage and disposes of all marital assets and liabilities.
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> . . . .
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> 9. CHILD CUSTODY. The parties have joint custody of the minor child. The parties shall have joint primary physical care of the child. The parties shall divide child care responsibilities in a roughly equal fashion with the child being in Petitioner's care as follows:
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> a) Every Sunday from noon until Tuesday at 7:30 pm.
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> b) Every second Saturday of each month from 5:00 pm until Tuesday at 7:30 pm

c) Every August 19th from 9:00 am until 5:00 pm.

d) Every February 19th from 9:00 am until 5 pm.

e) October 31st in even numbered years from 3:00 pm until November 1st at 9:00 am.

f) Thanksgiving Day in even numbered years from 3:00 pm until the following day at 9:00 am

g) In even numbered years December 24th from 6:00 pm until December 25th at 9:00 am. In odd numbered years December 25th from 9:00 am until December 26th at 9:00 am.

The parties agree that they shall each keep the other informed regarding the welfare of the child and especially any health issues that may arise. The parties shall always keep each other informed regarding their addresses and phone numbers.

10. CHILD SUPPORT. Neither party shall pay child support to the other. Petitioner shall maintain health insurance to cover the child. The parties shall each be responsible for one half of any medical bills for the child that are not covered by insurance.

. . . .

18. INDEPENDENT LEGAL ADVICE. The parties acknowledge that each has obtained independent legal advice in this matter.

In November of 2006 Tasha filed an application to modify the dissolution decree, contending there had been a substantial change of circumstances since the dissolution decree was entered and that Robert's visitation schedule should be revised and he should be required to pay child support to Tasha. The district court denied modification, finding that pursuant to the dissolution decree the parties had joint legal custody and shared physical care and Tasha had failed in her burden to show a substantial change of circumstances to support a modification of these provisions. The district court denied her request for child support and determined each party should pay his or her own attorney fees.

JOINT PHYSICAL CARE. Tasha first contends that the district court incorrectly determined that the parties had shared physical care of their son and imposed on her the burden of a parent seeking a change in custody rather than

the lesser burden imposed on a parent seeking to modify visitation. In order to modify the visitation provisions of a dissolution decree, a party must establish by a preponderance of the evidence there has been a material change in circumstances since the decree, and the requested modification is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000). However, the burden in a modification of visitation rights is different from the burden in a child custody change. Generally, a much less extensive change of circumstances need be shown in visitation right cases. *Donovan v. Donovan*, 212 N.W.2d 451, 453 (Iowa 1973); *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985)

Tasha argues here that she believed the stipulation merely provided for Robert's visitation. The district court noted that some of the disagreements the parties have had could have been avoided by clearer drafting but the stipulation provided for joint legal custody and shared physical care. Tasha also argues that she did not have her own attorney and consequently did not understand the legal significance of the phrase "joint physical care." Tasha signed the stipulation stating she had independent legal advice. However, if she represented herself she is judged by the same standard as an Iowa lawyer. *See Metropolitan Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991). The law does not judge by two standards, one for lawyers and another for non-lawyers. *See id.* All are expected to act with equal competence. *Id.* If a non-lawyer chooses to represent herself, she does so at her own risk. *In re Estate of DeTar*, 572 N.W.2d 178, 180 (Iowa Ct. App. 1997); *Kubik v. Burk*, 540 N.W.2d 60, 63 (Iowa Ct. App. 1995).

A decree for dissolution of marriage is susceptible to interpretation in the same manner as other instruments. *Sieren v. Bauman*, 436 N.W.2d 43, 46 (Iowa 1989). The determinative factor is the intent of the court as disclosed by the language of the decree as well as its content. *Id.* Every word should have force and effect, and be given a consistent, effective, and reasonable meaning. *In re Marriage of Lawson*, 409 N.W.2d 181, 182-83 (Iowa 1987).

In addressing Tasha's challenge we look first to the relevant definitions in Iowa Code section 598.1 (2005), which provides in applicable part:

> 3. "Joint custody" or "joint legal custody" means an award of legal custody of a minor child to both parents jointly under which both parents have legal custodial rights and responsibilities toward the child and under which neither parent has legal custodial rights superior to those of the other parent. Rights and responsibilities of joint legal custody include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.
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> 4. "Joint physical care" means an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has physical care rights superior to those of the other parent.

The stipulation the parties signed clearly provides the parties have both joint custody and joint physical care of the child. Robert has periods of three days and two nights every week and in addition in the week beginning with the second Saturday of the month he has the child for part of a fourth day in addition to three nights. He also has the child on other days, which appear to be holidays. Tasha argues, citing *In re Marriage of Hynick*, 727 N.W.2d 575, 579 (Iowa 2007), that this is not shared or joint physical care, because joint physical care anticipates that parents will have equal, or roughly equal, residential time

with the child. Robert clearly shares parenting time, maintains a home for the child, and provides both mid-week and weekend care. The stipulation specifically said "The parties *shall* divide child care responsibilities in a *roughly equal fashion*" (emphasis supplied), before specifying times the child was to be with Robert. The agreement that neither party will pay child support indicates a shared responsibility to meet the child's needs. We find nothing to cause us to disagree with the district court's construction of the decree as providing for joint legal custody and shared or joint physical care. We therefore consider Tasha's petition as one to seek modification of custody, not visitation.

SCOPE OF REVIEW. We review the district court's decision on the balance of the issues de novo. *See In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses. *Id.*

MODIFICATION OF JOINT PHYSICAL CARE. The first issue we need to address is whether the record shows there has been a substantial change of circumstances such as is necessary for a modification of the custody provisions of a dissolution decree. *See In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child. *See Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002). Tasha, seeking to change the joint physical care to her physical care has

a heavy burden and must show she has the ability to offer superior care. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980); *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). Where, as here, parents share the physical custody and care of their son, they both have been established as suitable to be primary care parents. *See Melchiori*, 644 N.W.2d at 368-69; *see also In re Marriage of Frederici*, 338 N.W.2d 156, 160 (Iowa 1983) (finding either parent suitable custodian a predicate to joint custody). Therefore Tasha must show both a substantial change in circumstance and also that she is the superior custodian in order to obtain her requested modification.

Tasha contends she has shown a substantial change of circumstances. The district court found otherwise. The court found little change in the parties' circumstances since the dissolution decree was entered. The district court carefully addressed many of the arguments that Tasha makes in her appellate brief. The court found the parties, since the dissolution, both continue in substantially the same employment and to make similar wages. The court found there have been no changes in the parties' health and they both remain in good health. The court further found no substantial changes in the parties' needs or the needs of the child, finding no basis to modify based on changes in the child's emotional or physical health. The court noted that though Robert has remarried, his current wife is the person he was living with at the time the dissolution decree was entered, and that, while Tasha has not remarried, she also continues to reside with the person she lived with at the time of the dissolution. The court further found both of the parties live where they did when the decree was

entered. The court determined that Robert's remarriage was not a substantial change under the circumstances here.

The court found that the parties did have more problems communicating than they initially did, neither party has been flexible about modifying time the child is with the other parent, and they have not done a good job of keeping each other informed as to situations regarding the child. The district court found both parties would benefit if they increased flexibility and communication, but the court did not find the problem such as would support modification. And while pointing to several times where the court considered Robert unreasonable in not returning the child to Tasha, the court noted that Robert was within his rights as he was strictly following the provisions of the decree.

We recognize that discord between parents that has a disruptive effect on children's lives has been held to be a substantial change of circumstances warranting a modification of the decree to designate a primary physical caregiver if it appears that the children, by having a primary physical caregiver, will have superior care. *See Walton*, 577 N.W.2d at 870. We agree with the district court that the parties' lack of ability to communicate is not of such a serious nature as to justify modification, nor do we find that Tasha has met the burden of showing that she is the superior parent. We affirm on this issue.

CHILD SUPPORT. Tasha next contends because she has the child for the greater period of time that she should receive child support. The district court in addressing the issue of child support, determined that under the guidelines Robert would pay 22.4% of his net income and Tasha would pay 22.5%. The court found using the parties' 2005 income that Robert would have paid $412 a

month and Tasha $474 a month. Using 2007 income, the court found Robert would pay $395 a month and Tasha $435 a month. Then, using the offset method, in 2005 Robert would pay thirty-eight dollars a month and in 2007 Tasha would pay forty dollars a month. The court found the difference between the two figures is seventy-eight dollars it is more than a ten percent variation, and it would support a modification of child support. *See* Iowa Code § 598.21(9). The court declined to modify, contending it was inequitable to have Tasha pay Robert where she has the child the greater percentage of the time. *See State ex rel. Miles v. Minar*, 540 N.W.2d 462, 464 (Iowa Ct. App. 1995) (allowing deviation from the amount calculated under the guidelines if necessary to provide for the children's needs or to effectuate justice between the parties under the special circumstances of the case); *see also* Iowa Court Rule 9.11.

Tasha challenges this computation arguing it appears that the district court erred in following Iowa Court Rule 9.14[1] and that she should be treated as the primary care parent. This is a modification. Robert's income has decreased since the filing of the dissolution decree. The time the child is in each parent's care is in accord with the provisions of the original decree. Tasha has failed to show circumstances that support a modification.

Tasha has requested appellate attorney fees. Robert contends there should be no award of appellate attorney fees. Such an award rests within our

[1] Rule 9.14 provides:

> In cases of court-ordered joint (equally shared) physical care, child support shall be calculated in the following manner: compute the child support required by these guidelines for each party assuming the other is the custodial parent; offset the two amounts as a method of payment; and the net difference shall be paid by the party with the higher child support obligation unless variance is warranted under rule 9.11.

discretion. *In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). Having considered these factors, we award no appellate attorney fees.

AFFIRMED.