IN THE COURT OF APPEALS OF IOWA

No. 2-517 / 11-1985
Filed August 8, 2012

IN RE THE MARRIAGE OF DIANNA LYNNE HOPP
AND GARY ARTHUR HOPP

Upon the Petition of
DIANNA LYNNE HOPP,
n/k/a DIANNA LYNNE GETTLER,
Petitioner-Appellant,

And Concerning
GARY ARTHUR HOPP,
Respondent-Appellee.

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

A mother appeals the district court decision modifying the physical care provision of the parties' dissolution decree. **AFFIRMED.**

David L. Jungmann of David L. Jungmann, P.C., Greenfield, for appellant.

William T. Early, Harlan, for appellee.

Considered by Vogel, P.J., Bower, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

I. Background Facts & Proceedings.

Gary Hopp and Dianna Hopp, now known as Dianna Gettler, were married in 1986. A dissolution decree based on the parties' stipulation was entered by the district court on November 27, 2006. The parties agreed to joint legal custody, with Dianna having physical care of the four children. Gary had visitation with the two youngest children, A.H., born in 1995, and B.H., born in 1998, on alternating weekends, one mid-week overnight, alternating holidays, and two weeks in the summer.[1] Gary was ordered to pay child support of $1535 per month for the four children.

Gary was found to be in contempt for failure to pay child support and spousal support in 2007. Over time Gary substantially met his obligations, and the contempt matter was dismissed in December 2008. In the meantime, through the Child Support Recovery Unit, Gary's child support obligation was reduced on February 18, 2008, to $896 per month for the four children.[2]

On November 10, 2010, Gary filed an application seeking modification of the decree, asking that A.H. and B.H. be placed in his physical care.[3] He asserted the two boys wished to live with him on his farm, instead of remaining with Dianna, who lived in Harlan. Gary submitted affidavits signed by each child stating they wanted to live with him.

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[1] The decree noted the two oldest children were not having visitation with Gary "and that the boys' time with their father is limited at this time."

[2] Gary was required to pay was $678 per month for two children.

[3] The application noted the two oldest children were adults and were no longer subject to the dissolution decree.

Dianna contested Gary's assertions and asked for a modification of Gary's child support obligation. Dianna also filed an application for rule to show cause, alleging Gary had failed to pay child support, pay spousal support, or provide health insurance as required by the dissolution decree.

Gary filed a motion for the appointment of a guardian ad litem pursuant to Iowa Code section 598.12(2)(a) (2009). Dianna objected. The court appointed Sara Thalman, an attorney, as guardian ad litem and ordered Gary to assume the costs. Thalman prepared a report that recommended the children be placed with Gary, with Dianna having extensive and liberal visitation.

A combined hearing on the modification and contempt matters was held September 20, 2011. Gary testified he was fifty-two years old and lived on a farm with his fiancé, Jody, and her two children. He was employed by Performance Grading, which was owned by his aunt. Gary earned $600 per week, plus he had the use of a company vehicle, which he also drove for personal use. Gary stated he and the boys were interested in automobile racing and he owned a race car. He admitted he often had the children more than the specified visitation time in the decree, especially during racing season.

Gary called Thalman to testify. Dianna objected to the report and to testimony by Thalman. The court overruled her objections, stating the report would be admitted and Thalman would be permitted to testify. Thalman testified the children told her they wanted to live with Gary, stating the biggest reason was because he had more things to do at his home. Also, Gary still lived in the marital residence, where the children had lived prior to the dissolution, and they felt at home there.

Gary also called Dianna's current husband, Mark Gettler, to testify. He testified he and Dianna had been married since July 2009. He testified the two boys were covered by his health insurance policy through his employment. Mark stated he had never heard the children say that they wanted to live with their father. He testified Gary could be an intimidating person.

Dianna testified she and the children had lived in a home in Harlan since the parties separated in August 2005. She testified she was employed as a typist by CBS Global and worked from home. Dianna stated she was concerned if Gary received physical care of the children he would not let her see them, and she felt they needed stability in the home.

Both parties presented evidence concerning an incident that occurred on September 6, 2011, when A.H. broke his ankle playing football, and another incident on the next day when he was released from the hospital. Instead of getting into the details of the situation, we will suffice to say that neither party displayed their best characteristics.

The district court entered an order on the application for modification on November 1, 2011. The court determined the report and testimony of Thalman should be given weight. The court found there had been a substantial change in circumstances because the boys had expressed a preference to live with Gary. The court also found Gary was in a better position to administer to the best interests of the children. Dianna was granted visitation on alternating weekends, two evenings per week, alternating holidays, and two weeks in the summer. Dianna was ordered to pay child support of $191.25 per month for the two children.

Dianna filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asking the court to reconsider its ruling modifying physical care. She asserted the court had not specifically found there had been a substantial change in circumstances or that Gary could minister more effectively to the children's best interests. She also noted the court had not ruled on her application for rule to show cause. The court denied Dianna's request to expand on its modification order. On the contempt matter, the court found Gary was behind on his child support obligation by about $28,000, but found Dianna had not shown, beyond a reasonable doubt, this was willful. Dianna appeals the district court's decision.

II. Standard of Review.

In this equity action our review is de novo. Iowa R. App. P. 6.907. In equity cases, we give weight to the fact findings of the district court, especially on credibility issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(*g*). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

III. Motion to Reopen.

The day after the hearing Gary filed a motion to reopen the record asserting that later on the day of the hearing he learned one of the witnesses, William (Joe) Fernandez,[4] had married Alyssa, one of his older children, on September 13, 2011. He attached a copy of their marriage certificate, which Dianna had signed as one of the witnesses. Dianna resisted the motion to

[4] Joe was present during the incident on September 6, 2011, at the hospital and testified to what he observed.

reopen. A hearing was held which was not reported. The court denied the motion to reopen. Despite this, the court discussed extensively in the modification order the fact that at the time Joe testified at the modification hearing Dianna knew he was married to Alyssa, while Gary was not aware of this information. The court admitted it was upset with Dianna for not correcting the record.

On appeal, Dianna contends the court should not have considered the information that Alyssa and Joe were married, or made any inferences about her from that information. She points out that the court denied the motion to reopen the record. Furthermore, the marriage certificate was not admitted as an exhibit.

A district court has broad discretion to reopen the record and consider additional evidence. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 634 (Iowa 1996). In this case, the court denied the motion to reopen, and the parties do not dispute that ruling on appeal. Once the court denied the motion, however, this meant the evidence sought to be introduced by Gary was not part of the trial court record. A court does not consider evidence outside the record. *See In re G.R.*, 348 N.W.2d 627, 632 (Iowa 1984). On our de novo review on appeal, we do not consider the evidence Gary sought to introduce in his motion to reopen. *See Rasmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994) ("Facts not properly presented to the court during the course of trial and not made a part of the record presented to this court will not be considered by this court on review.").

IV. Guardian ad Litem.

Dianna contends the report of the guardian ad litem should not have been admissible as evidence. She points out that the report contains hearsay information. She also contends the court should not have permitted Thalman to testify, especially on matters involving hearsay. Dianna claims there was uncertainty as to whether Thalman was appointed to represent the best interests of the children, or as counsel for the children.

Gary's motion requested the appointment of a guardian ad litem under section 598.12(2). Under section 598.12(2), a guardian ad litem represents the best interests of children. The district court appointed Thalman as a guardian ad litem for A.H. and B.H. She was not appointed as legal counsel for the children, which would have been an appointment to represent their legal interests. *See* Iowa Code § 598.12(1), (3).

As to the guardian ad litem's report, generally if the 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)). Therefore, on our de novo review, we will not consider the guardian ad litem's report. *See id.*; *see also In re Marriage of Reschly*, 334 N.W.2d 720, 723 (Iowa 1983) (finding report of psychiatrist was not admissible because it was hearsay, and would not be considered on appeal).

In this case, not only did Thalman prepare a report, she testified at the modification hearing. Dianna objected to Thalman's testimony prior to the time

Thalman testified, citing *Joens*, 384 N.W.2d at 329, and stating in general that Thalman should not be able to testify. Dianna did not object to any specific statements on the grounds of hearsay (or any other grounds) during Thalman's testimony. We conclude she has not preserved error on her claim Thalman's testimony contained hearsay. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

"The recommendation of an independent custodial investigator may be considered in determining primary physical custody, but it is not controlling." *In re Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa Ct. App. 1993). We determine the district court could properly consider the testimony of Thalman.

V. Physical Care.

Dianna claims the district court used an incorrect standard for the modification of physical care. She asserts the children's asserted preference to live with Gary should not be sufficient to constitute a substantial change in circumstances. She also claims Gary did not meet his burden to show he could minister more effectively to the children's best interests. Dianna contends the court gave too much weight to the children's purported preferences.[5] She asserts the children primarily wanted to live with Gary because he had more videogames and other items for the children. She claims the reasons given were

[5] As an aside, we want to point out that we give no weight to Gary's argument that Dianna's appeal on this issue attempts to demean or denigrate the children by challenging their expressed preference. The weight to be given to a child's expressed preference to live with one parent or the other is an issue often raised on appeal and is a legitimate issue to raise. *See, e.g.*, *McKee v. Dicus*, 785 N.W.2d 733, 738 (Iowa Ct. App. 2010); *In re Marriage of Harris*, 530 N.W.2d 473, 475 (Iowa Ct. App. 1995); *In re Marriage of Sires*, 506 N.W.2d 813, 814 (Iowa Ct. App. 1993); *In re Marriage of Blume*, 473 N.W.2d 629, 631 (Iowa Ct. App. 1991).

not the type of mature, well-thought-out motives that should be given great weight.

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, that 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.

We determine the district court properly applied these principles in addressing the issue of modification of physical care. The court found there had been a substantial change in circumstances due to the children's express preference to live with Gary. The court also found Gary was in a better position to administer to the best interests of the children, which we believe is equivalent to finding he could minister more effectively to the children's well-being.[6]

[6] On appeal, Dianna claims the district court should have granted her motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which claimed the court had not made sufficient findings there had been a substantial change in circumstances or that Gary had proven a superior ability to care for the children. We determine the district court's decision makes adequate findings on these issues.

We turn to the issue of how much weight should be given to the children's expressed preference to live with Gary. Under section 598.41(3)(f), one factor the court considers in determining custody arrangements is the child's wishes, "taking into consideration the child's age and maturity." "When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining child custody rights." *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). We consider: (1) the child's age and education level; (2) the strength of the preference; (3) the relationship with family members; and (4) the reasons for the child's decision. *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987). We give a child's preference less weight in a modification action than in an original determination of physical care. *Thielges*, 623 N.W.2d at 239.

The district court concurred in the opinion of the guardian ad litem that the children were "respectful, well-adjusted, smart teenagers." The court found the children's expressed preference was not due to favoritism or items such as videogames, but was based on real and significant factors that led them to express a preference for living with Gary. The court also noted it was difficult for the children to make their parents aware of this preference because they did not want to hurt their mother. In light of all of these factors, we believe the district court did not give undue weight to the children's preference to live with Gary.

On our de novo review, and considering all of the evidence in the record, we affirm the district court's decision to modify the dissolution decree to place the children in Gary's physical care. In making this decision, we do not find Dianna

has done anything wrong. To the contrary, she has been an excellent parent to the children during the time they were in her physical care. As the children have grown older, however, their interests have become more closely aligned with Gary's, and at this point in time we believe he can better meet their needs. On this basis, we determine there has been a substantial change in circumstances and Gary can minister more effectively to the children's well-being, making it in the children's best interests to modify the decree.

VI. Contempt.

Finally, Dianna claims the district court should have found Gary in contempt for failure to pay child support. She points out that Gary was about $28,000 in arrears on his child support obligation. At the hearing, Dianna attempted to show Gary was spending more money than he admitted to earning, leading her to believe he was under-reporting his income. She asserts Gary does not have any specific financial hardship that would prevent him from paying his child support obligation. She also notes he was previously found to be in contempt for failure to pay child court.

When the district court does not find a party to be in contempt under a statute that allows the court some discretion, such as section 598.23 or 598.23A, our review is for an abuse of discretion. *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995). The district court has broad discretion, and unless this discretion is grossly abused, the court's decision will stand. *Id*.

"In order to find a person guilty of contempt, a court must find beyond a reasonable doubt that the individual willfully violated a court order or decree." *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). A party is in willful

disobedience of a court order by engaging in conduct "that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty or unauthorized, coupled with an unconcern whether the contemnor had the right or not." *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 140 (Iowa 1988).

It is clear Gary was behind on his child support obligation. It is also clear, however, that Gary has been making payments towards this obligation. We determine the district court did not abuse its discretion in determining the evidence did not prove beyond a reasonable doubt that Gary had willfully violated the child support obligation in the parties' dissolution decree. Nonetheless, Gary is responsible for the full amount of child support he had been ordered to pay.

VII. Appellate Attorney Fees.

Dianna requests attorney fees for this appeal. An award of appellate attorney fees is within the discretion of the court. *In re Marriage of Vaughan*, 812 N.W.2d 688, 696 (Iowa 2012). We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED.