IN THE COURT OF APPEALS OF IOWA

No. 2-634 / 11-1704
Filed September 19, 2012

**IN RE THE MARRIAGE OF SHANON ARNDT
AND KEVIN ROBERT ARNDT**

Upon the Petition of

**SHANON MARIE ARNDT, n/k/a
SHANON MARIE GREEN,**
Petitioner-Appellant,

And Concerning

KEVIN ROBERT ARNDT,
Respondent-Appellee.

Appeal from the Iowa District Court for Hamilton County, Michael J. Moon, Judge.

Shanon Green appeals from a ruling denying her petition to modify part of her dissolution decree. **AFFIRMED AS MODIFIED.**

Dan T. McGrevey of McGrevey Law Office, Fort Dodge, for appellant.

Justin T. Deppe of Deppe Law Office, Jewell, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

BOWER, J.

Shanon Green appeals from a ruling denying her petition to modify the custody provisions of the parties' dissolution decree. Upon our review, we conclude Shanon has not proved a material and substantial change of circumstances to warrant modification of the parties' joint physical care of their children. Accordingly, we affirm the district court's ruling denying Shanon's petition to modify the custodial provisions of the parties' decree. We find, however, that the court's child support order should be retroactively imposed from three months after the service of the petition for modification.

I. Background Facts and Proceedings.

Kevin Arndt and Shanon Green are the parents of a son, P.A., born in 1993, and a daughter, S.A., born in 1996. Kevin and Shanon's marriage was dissolved in March 1999. Kevin and Shanon stipulated to the terms of the decree. They agreed to joint legal custody with physical care of the children with Shanon; however, the visitation rights to Kevin essentially established a shared care scheme, where the parties alternated care of the children on a two-week basis.[1] Kevin was ordered to pay child support in the amount of $300 per month. No spousal support was awarded.

In August 2001, the district court entered an order modifying the decree to reflect an increase in Kevin's child support obligation to $338 per month. In May 2003, the court entered another order modifying the decree to reduce Kevin's child support obligation to $218.37 per month. The decree was modified again in

[1] At some point thereafter, the parties began alternating physical care responsibilities on a weekly basis.

August 2003. By that order, the parties agreed to modify the physical care provisions to represent a "true joint custody" arrangement. The parties were ordered to alternate physical care of the children on a weekly basis.[2] Neither party was ordered to pay child support.

Shanon filed a petition to modify the dissolution decree again in December 2009. Shanon requested the children be placed in her physical care, alleging a material and substantial change of circumstances had occurred in that (1) Kevin was not exercising "his sole periods of shared custody," (2) the parties had lost the ability to communicate, and (3) Kevin was "failing to properly guide [P.A.]." Shanon's petition was set for trial in November 2010. The trial was continued due to pending delinquency proceedings regarding P.A.[3]

The matter eventually came before the district court in July 2011. At the commencement of trial, the parties agreed P.A. should be placed in the physical care of Kevin, leaving the custody of the parties' daughter, S.A., as the only issue remaining for the court's consideration. At the time of trial, S.A. was fifteen-years-old and about to begin her sophomore year at Webster City High School.

After hearing testimony from Shanon, Kevin, and S.A., the court entered an order denying Shanon's petition to modify the parties' custodial decree as to S.A. The court concluded Shanon did not meet her burden to establish a material and substantial change of circumstances had occurred to warrant modification of the decree. In reaching its conclusion, the court observed S.A.

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[2] This modification reflected the parties' physical care scheme already in existence at that time and had "no day to day effect on any part of [the children's] care or schedule."

[3] The district court subsequently observed P.A. had been placed on probation for "a series of episodes that were deemed to be delinquent acts."

preferred to be with Shanon during the week "in order to accommodate her scheduled activities," but that S.A. "was clear, however, in stating that she wanted to be with her father when that did not interfere with her activities." The court further observed that S.A. had a school permit and a vehicle to use; therefore, the distance between Shanon's home in Webster City and Kevin's home in Jewell did not "present an impediment to the continued shared care arrangement." The court noted any opposition S.A. had to shared care "seems to be based on convenience and nothing more," and acknowledged Kevin's testimony that when school resumed he fully expected S.A. "to resume the shared physical care arrangement." Shanon now appeals.

II. Standard of Review.

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006). However, we give weight to the trial court's findings because it was present to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986); *see also* Iowa R. App. P. 6.904(3)(g).

III. Modification of Joint Custody.

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 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 to take custody from the other has shown a substantial change in material circumstances, then the court next considers whether the party has shown "an ability to minister more effectively to the children's well being." *Id*. Where the existing custody arrangement provides for joint physical care, as is the case here, the court already has deemed both parents to be suitable custodians. *See Melchiori v*. *Kooi*, 644 N.W.2d 365, 368–69 (Iowa Ct. App. 2002).

As Kevin and S.A. testified, up until "eight or nine months ago" S.A. was spending equal time with her parents.[4] More recently, S.A. chose to spend more time at Shanon's because it made it more convenient for her to participate in extracurricular activities and spend time with friends. S.A. testified she would like to "live" with Shanon, but that she would like to see Kevin one or two days a week and on the weekends. As S.A. stated, "When I'm free I'll go and see him." Kevin testified he believed that when school resumed, S.A. would use her school permit to spend time at both homes. Shanon testified S.A. did not want to spend time at Kevin's home because P.A. lived there. In contrast to Shanon's

[4] In contrast, Shanon testified Kevin had "gone long periods of time without seeing [S.A.]" and "over the course of the last 18 months [S.A.] spent few overnights with Kevin." It is apparent the district court found the testimony of Kevin and S.A. to be more credible on this issue. We also find troubling Shanon's admission that she told S.A. that Kevin "was not fighting for custody of her." There is evidence S.A. understood Shanon's comment to mean that Kevin "doesn't want to have her."

testimony, Kevin and S.A. both testified S.A. and P.A. "get along pretty good" and have a "pretty normal" sibling relationship.

Upon our de novo review of the record, we do not find the evidence in this case supports a finding that the change in the shared care arrangement is more or less permanent and relates to the welfare of S.A. *See Frederici*, 338 N.W.2d at 158. As such, our analysis begins and ends here. Shanon has failed to demonstrate that a failure to effectuate an equal shared care arrangement of S.A. between Shanon and Kevin is a material and substantial change of circumstances making it expedient to S.A.'s best interests to shift her physical care to Shanon. We affirm the district court's ruling denying Shanon's petition to modify the custodial provisions of the parties' decree.

IV. Retroactive Modification of Child Support.

The district court did, however, modify the child support obligation of the parties, ordering Kevin to pay "the sum of $81.17 per month, together with $91.96 per month cash medical support ($173.13), commencing August 1, 2011."[5] Shanon argues, however, that Kevin's child support obligation should be retroactively modified as to the date three months after the service of the petition on Kevin. Iowa Code section 598.21C(4) (2009) provides, in pertinent part:

> Judgments for child support or child support awards entered pursuant to this chapter . . . of the Code which are subject to a modification proceeding may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party . . . .

[5] Prior to the court's modification, neither party had been paying child support.

Kevin was served with the modification petition on December 19, 2009. From the testimony at trial, it is apparent S.A. began to spend more time at Shanon's in 2010. Under the facts of this case, we find Kevin's child support order should be retroactively imposed from March 19, 2010, rather than August 1, 2011, as the district court ordered.

V. Attorney Fees.

Shanon contends the district court abused its discretion in declining an award of her trial attorney fees. We review the district court's award or denial of trial attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Whether attorney fees should be awarded depends on the parties' respective abilities to pay. *Id*. at 255. In addition, the fees must be fair and reasonable. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). An award of trial attorney fees rests in the sound discretion of the trial court and will 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). We find Shanon has failed to show the district court abused its discretion in declining to award her trial attorney fees.

Shanon and Kevin both request an award of appellate attorney fees. Such an award rests within our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). "Factors to be considered in determining whether to award attorney fees include: 'the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.'" *Id*. (citation omitted). In this case, we decline to award any appellate attorney fees.

VI. Conclusion.

Shanon has not proved a material and substantial change of circumstances to warrant modification of the custodial provisions of the parties' dissolution decree. We therefore affirm the district court's ruling denying Shanon's petition to modify the custodial provisions of the parties' decree. We find, however, that the court's child support order should be retroactively imposed from March 19, 2010. We decline to award appellate attorney fees. Costs are assessed to equally to each party.

AFFIRMED AS MODIFIED.