IN THE COURT OF APPEALS OF IOWA

No. 3-075 / 12-1393
Filed April 10, 2013

IN RE THE MARRIAGE OF ADRIAN JEREMY DICKEY AND SHAWNA LYN DICKEY

Upon the Petition of
ADRIAN JEREMY DICKEY,
Petitioner-Appellee,

And Concerning
SHAWNA LYN DICKEY,
n/k/a SHAWNA APPLEGATE,
Respondent-Appellant.

Appeal from the Iowa District Court for Jefferson County, Joel D. Yates, Judge.

Shawna Lyn Applegate appeals from the district court ruling on her petition to modify a dissolution decree. **AFFIRMED.**

Heather M. Simplot of Harrison, Moreland, Webber & Simplot, P.C., Ottumwa, for appellant.

Daniel L. Bray and David M. Cox of Bray & Klockau, P.L.C., Iowa City, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Shawna Lyn Applegate appeals from the district court ruling on her petition to modify a dissolution decree. Shawna contends the district court erred in failing to: (1) grant her "primary physical care"[1] of the two minor children, (2) modify the decree to grant her joint physical care of the two minor children, (3) grant her request for increased visitation, (4) decrease her child support obligation, (5) require that all unpaid medical expenses be paid by the children's father, (6) give proper weight to a guardian ad litem report, and (7) consider certain evidence. We affirm.

I. Background Facts and Proceedings

Shawna Lyn Applegate and Adrian Jeremy Dickey's marriage was dissolved by the court on September 11, 2009. The decree incorporated by reference a settlement agreement between the parties concerning child custody and other issues. The agreement awarded Adrian primary physical care of the children but gave both parents joint legal custody. Shawna was given generous visitation rights, and the children were to be schooled in Adrian's home district.

Shawna filed her petition for modification on June 30, 2011. In the petition, Shawna alleged a number of changed circumstances sufficient to warrant modification of the decree. A guardian ad litem was appointed on behalf of the children. Following a number of discovery disputes, a three-day trial was held.

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[1] The term "primary physical care" is not defined in chapter 598 of the Code of Iowa (2011). We use the term in this opinion since it was used by the parties and the district court.

During trial both parties as well as twenty-four witnesses provided testimony to the court. Shawna testified at great length about her strengths as a parent, the lack of quality in the children's current school district (Pekin) as compared to her school district (Fairfield), and detailed a list of grievances regarding Adrian's parenting style. Adrian rebutted virtually all of Shawna's allegations against him and spoke highly of the Pekin school district. Several teachers testified to the ability of each district to meet the children's special needs.[2] Additional testimony concerning the well-being, and the social and academic progress of the children was presented.[3]

The district court issued its findings of fact, conclusions of law, and ruling on June 6, 2012. The district court found that both parties are excellent parents who have provided significant benefits to their children. The court determined there had been no substantial change in circumstances as all alleged changes were known at the time of the decree. The district court found there was no claim of superiority between the parents, but the problems with communication, trust, and conflict precluded an award of joint physical care. Finally, the district court did find a change of circumstances concerning child support and increased Shawna's child support significantly. Shawna appeals and argues the district court committed error in a multitude of ways.

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[2] Both children are diagnosed with attention deficit-hyperactivity disorder (ADHD).

[3] The appendix and record in this case are voluminous. The appendix itself, appearing in three separate volumes, totals nearly 1500 pages.

II. Standard of Review

Our review of the district court action is de novo. *In re Marriage of Gensley,* 777 N.W.2d 705, 713 (Iowa 2009). Recognizing that the district court was in the best position to physically observe the witnesses and is not constrained, as we are, by reliance on a written record, "we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them." *Id.*

III. Discussion

A. Physical Care

Shawna argues a substantial change of circumstances has occurred since the time of the decree which warrants modification of the child custody agreement.[4] Specifically, Shawna argues Adrian's unsettled romantic life has negatively impacted the children, both of whom want to live with or have more time with her. She claims the children are suffering emotionally in Adrian's home and would have a greater diversity of friends and activities in her home.[5] Shawna argues that Adrian uses physical punishment to discipline the children, and that such forms of punishment negatively affect children with ADHD. A significant portion of Shawna's evidence amounted to a frontal assault on the Pekin school district. Shawna alleged Adrian has used his family's local power

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[4] The district court stated its opinion that "[F]rom the outset [Shawna] pursued this case as if it were an original divorce proceeding as opposed to a modification and as if Iowa is an at-fault divorce state." The animosity between the parties reflected in this statement is found throughout the record in this case.

[5] Adrian lives in Packwood, Iowa. Shawna lives in Fairfield, a larger town located nearby.

and wealth to wall her off from decisions regarding the children's education and that Pekin is ill-equipped to adequately handle the children's special needs.

Our courts modify custodial agreements only when the petitioning party can establish that the "conditions since the decree have so materially and substantially changed that the children's best interests make it expedient to make the requested change." *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005). The petitioning party faces a heavy burden. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213–14 (Iowa Ct. App. 1994). It must be demonstrated to the court, by a preponderance of the evidence, that there has been a substantial change in circumstances. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The petitioner must also show that they have an ability to provide superior and more effective care for the children. *Id.*

Not every change in circumstances warrants a modification. *Maikos v. Maikos,* 147 N.W.2d 879, 881 (Iowa 1967). The changed circumstance must have been outside the knowledge or contemplation of the trial court at the time the original decree was entered. *Id.* "It has been held that, where the children have been so placed and where they are receiving good treatment and moral training, they should not be removed therefrom, except for the most cogent reasons." *Id.* As is always the case in a matter concerning child custody, the overriding concern is with the best interests of the children. *Betzel v. Betzel,* 163 N.W.2d 551, 555 (Iowa 1968). Because this is not an original determination of custody, the question is not which home is better, but whether the original

assessment reflected in the decree remains valid. *See Rosenfeld*, 524 N.W.2d at 213.

As a part of our de novo review, we give little precedential value to past cases and instead focus on the particular circumstances of this case. *In re Marriage of Kleist,* 538 N.W.2d 273, 276 (Iowa 1995). We are additionally mindful of the admonition that custody is not to be awarded or denied to a parent as a reward or punishment for good or bad behavior. *Spotts v. Spotts,* 197 N.W.2d 370, 372 (Iowa 1972).

In the present matter, the district court determined that Shawna had failed to show a substantial change in circumstances warranting modification. Shawna's evidence can be placed into four categories: (1) differences in Shawna and Adrian's parenting styles, (2) education issues, (3) issues with Adrian's lifestyle, and (4) contact and communication issues between the parents.[6]

Shawna testified that she uses a method of parenting called "1-2-3 Magic" in her home. The method focuses on positive reinforcement which she says is particularly important for children with ADHD. Shawna also testified that Adrian uses physical punishment on the children. For his part, Adrian rebutted these allegations with appropriate explanations. Shawna failed, however, to show that differences in parenting style have surfaced since the time of the decree.

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[6] Shawna also contends the children wish to live with her. If proven, this would be an important factor in any modification proceeding. The children did not testify, however, and all remaining evidence on the subject was inconclusive and contradictory. It is clear that the children struggle with their separation from their mother to an extent and occasionally respond to the separation in an outwardly emotional way. The evidence further established, however, that the children are happy and content with Adrian. We are unconvinced that the children wish to change the custody arrangement.

Relying upon the district court's assessment of both parents as credible, we conclude that Adrian rarely, if ever, uses physical punishment on the children and his parenting style remains substantially unchanged from the time of the decree.[7]

The largest portion of the evidence in this case focused on issues surrounding the education of the children. Specifically, Shawna attacked the capacity of the Pekin school district to adequately provide proper care and services to the children. Shawna argued that the Pekin schools have failed to implement a 504 Plan suggested by doctors, failed to provide adequate guidance and counseling services, and the children's school was physically inappropriate for students with ADHD.[8] Shawna also explained that Fairfield offers a significant number of extracurricular activities which are unavailable in Pekin. Adrian produced similarly compelling evidence showing the fitness of the Pekin schools.[9]

If we were to assume, which we do not, that the Fairfield schools are particularly well-suited to educating students with ADHD, there is no evidence in the record which indicates the capacity of either school district to educate students with ADHD has changed since the decree. As the district court correctly

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[7] A significant portion of the trial was directed towards a situation where it is alleged that a grandparent pulled the hair of one of the children. Even assuming the allegations to be true, the probative value of the incident would go towards a modification of grandparent visitation which was not raised in the petition.

[8] Evidence indicated that the Pekin schools lack doors and full walls between classrooms creating a noisy and distracting environment which would be particularly disadvantageous for students with ADHD.

[9] Shawna is a teacher in the Fairfield district, with some experience teaching students with ADHD. Shawna also produced various reports and statistics comparing the academic success of the two districts.

noted, Shawna consented to the oldest child attending the Pekin schools.[10] This is tantamount to an agreement that the Pekin schools were prepared to sufficiently address the needs of the children at the time of the decree. Though Shawna contends she was unaware of the limitations of the Pekin schools at the time of the decree, the capacity of the Pekin schools to properly educate a child with ADHD was certainly within the subjects contemplated by the parties in the original decree.

Shawna also argues Adrian's lifestyle has changed substantially since the time of the decree. She notes a number of failed romantic relationships and that Adrian has had at least one romantic partner cohabit with him. She believes these relationships have negatively impacted the children. Shawna also contends Adrian is disorganized and has failed to provide a stable home for the children.

That the children have a parent seeking romantic involvement after the divorce can amount to a change in circumstances.[11] We do not believe, however, that this mandates a change in custody any more than the fact that Shawna pursued a post-divorce romantic relationship. The evidence establishes that Adrian has provided a stable, loving, and safe home for the children. Testimony showed Adrian takes great care to have family meals with the children, spends independent and together time with each of them on a nightly basis, prepares them for school in a commendable manner, assists them with

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[10] The oldest child was diagnosed with ADHD prior to the decree. The younger child was diagnosed with ADHD after the decree.

[11] Shawna, for her part, has remarried and has a stepdaughter of her own.

school work, and engages in appropriate play and discipline. Though a new relationship could create a substantial change warranting modification, Shawna has not shown that the change in Adrian's home life has substantially changed or is substantially inferior to the care she would provide.[12]

Finally, evidence was produced about the relationship between Adrian and Shawna and their ability to co-parent. Like the district court, we are satisfied that Adrian and Shawna are effective, caring, loving, and devoted parents. It is unquestionable, however, that their personal relationship is far from ideal. Shawna refuses to meet with Adrian absent a third party and prefers to communicate exclusively via text and email. Shawna alleges Adrian has used his family clout and personal relationships with the Pekin school district to exclude her from obtaining information about the children's educational program and that Adrian takes a confrontational posture when discussing additional visitation.[13] Adrian testified that Shawna has threatened him with the prospect of legal action and has engaged in gamesmanship in regards to their co-parenting relationship.

The agreement entered by the parties detailed a custody arrangement which the parties have effectively carried out despite their substantial difficulties. That they have found a way to do so is commendable. The difficult relationship

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[12] We particularly note that Adrian is not in a relationship at present, nor are any unrelated persons living with him.

[13] Shawna testified that Adrian has instructed teachers to communicate only with him in certain instances. She does admit, however, that she has unfettered access to her children's teachers by email and has similar opportunities to visit classrooms and meet with teachers about the children's education. We are unconvinced Adrian has attempted to exclude Shawna in a material way, and less convinced that Shawna has been prevented from participating in the children's education.

between the parties does not, at this time, warrant modification of the custody arrangement. There is no reason to believe the parties' relationship would improve with a different custody arrangement, nor would such a change be better for the children. The evidence that Shawna would be a superior parent is limited, and keeping in mind that a party petitioning for modification carries a heavy burden, we decline to modify primary physical care of the children at this time. We note, however, that additional visitation under the decree is to be by agreement of both parents, not something to be granted by one parent as a reward. Additionally, a parent who interferes with the other's participation in the education or health care of a child could foresee a future modification action. Our decision to retain the current arrangement should not be construed as approval of the strained relationship between these parents.

B. Joint Physical Care

Shawna requests modification of the decree to grant joint physical care to both parents. Each parent, and the district court, correctly point to the non-exclusive list of factors found in *In re Marriage of Hansen,* 733 N.W.2d 683 (Iowa 2007). We have categorized these factors as:

> (1) what has been the historical care giving arrangement for the child between the two parties; (2) the ability of the spouses to communicate and show mutual respect; (3) the degree of conflict between the parents; and (4) the degree to which the parents are in general agreement about their approach to daily matters.

In re Marriage of Berning, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

We agree with the district court that the parties do not get along, do not mutually respect one another, and struggle to communicate in an effective way.

Virtually all communication is through email and text messages. Shawna admits she prefers to meet with Adrian only when there is a third party present. Adrian testified that Shawna refuses to take his telephone calls. Shawna produced a substantial volume of evidence that clearly displayed the near total breakdown of their personal relationship. It is clear the parties are working on these issues, each in their own way, and that improvement has been slow. These improvements are overshadowed, however, by the mistrust between Shawna and Adrian, as well as the deep-seated animosity that permeates their relationship. We cannot see how these two people could effectively manage an award of joint physical care at this time.

C. Visitation

Shawna argues the district court erred in failing to increase her visitation with the children. At the outset, we note that Shawna admits she has the children nearly forty-seven percent of the time. The available increases in time are accordingly slight. We also note that the parties have agreed to additional visitation as contemplated in the decree. Specifically, Shawna asks that the provision in the decree providing her visitation every other Wednesday night be modified to every Wednesday on an overnight basis. She also requests that a provision providing Adrian with a twenty-four hour period of care during the summer be stricken as a method of providing routine and stability for the children, which she notes is especially important for children with ADHD.[14]

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[14] We note that to an extent the request itself undermines the goal of stability, as the children have grown accustomed to the complicated custody provisions of this agreement.

Shawna's arguments on this point center on a desire to strip Adrian of a source of manipulation. Shawna contends Adrian uses the ambiguity of the decree to hold the Wednesday overnight provision as a source of control over her.

For the reasons previously stated, we do not believe there has been a substantial change in circumstances. There is a lack of compelling evidence that Shawna and Adrian's relationship has deteriorated or changed in some material way since the decree. Nor has Shawna's summer schedule changed in a way that would necessitate providing her with additional visitation during the summer. This is not a case where Shawna has little parenting time. Shawna, by her own admission, enjoys extraordinary and substantial time with the children. Maintaining the existing schedule will continue to provide the children with predictability and stability as well as maximizing time with each parent.

D. Child Support

During the modification proceeding, the district court found there had been a substantial change in circumstances and the previous deviation from the child support guidelines was no longer warranted. Shawna's support obligation increased from $350 per month to $518 per month. She argues the court used an inaccurate figure when determining Adrian's income, and that it is inequitable to ask her to pay child support during the summer when she has increased visitation.

In her petition Shawna requested that her child support obligation be modified to reflect an award of primary physical custody of the children. She has

not been granted primary physical custody. However, Adrian's answer also requested a modification of the support obligation; he asked that Shawna's obligation be increased in conformity with the child support guidelines. It was Adrian's request which was granted and therefore it was his burden to prove a substantial change.

Our courts may modify an existing child support obligation when the petitioner has proven a substantial change in circumstances. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992). The change must be substantial, material, and must have occurred since the date of the decree. *Mears v. Mears*, 213 N.W.2d 511, 514 (Iowa 1973). Not every change in circumstances warrants an adjustment to the obligations. *Id.* "The changed circumstances relied upon must be material and substantial, not trivial, more or less permanent or continuous, not temporary, and must be such as were not within the knowledge or contemplation of the court when the decree was entered." *Id.* at 515. The sum awarded should not be adjusted with each fluctuation in the financial condition of the parties. *Jensen v. Jensen*, 114 N.W.2d 920, 923–24 (Iowa 1962). The court is to view the decree as contemplating the reasonable and ordinary changes likely to happen over the course of time. *Id.*

The district court did not state precisely what substantial change it believes supports a modification of child support. Upon a complete review of the record, however, we are satisfied that a modification is appropriate. Both parties requested a modification indicating an agreement that circumstances have changed and that they no longer wish to abide by the deviation from the

guidelines found in the original decree. We find the variation in the amount due under our child support guidelines mandates modification under Iowa law. Iowa Code § 598.21C (2)(a) (2011).

The increase from $350 per month to $518 per month is well in excess of the ten percent threshold to constitute a substantial change.[15] Having reviewed the documents provided during trial, we believe the district court relied on credible evidence when determining Adrian's income. We conclude the district court properly calculated the amount of support in this case.

E. Uncovered Medical Expenses

Shawna argues the district court erred in failing to modify the decree by requiring Adrian to pay all of the children's uninsured medical expenses.

The decree sets out a detailed process for determining payment of all uncovered medical expenses.[16] Adrian is to pay the first $250 per child up to a maximum of $500 for uninsured costs. After that, Adrian is responsible for sixty-four percent and Shawna thirty-six percent of all remaining costs. The record establishes that Shawna has failed to follow these provisions and owes Adrian a substantial sum of money for unreimbursed medical expenses.

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[15] Adrian earned approximately $71,000 per year at the time of divorce and earned approximately $60,000 in 2012. Shawna contends this is an inaccurate figure for 2012 because Adrian works for a family business and has a successful company of his own. We note that Adrian does not have an ownership stake in the family business and no evidence indicated a capacity to control his own salary. We also note Adrian's testimony that his personal company is not doing well, despite statements to the contrary in an online dating profile. It appears the income from this company is minimal and was properly reflected in the income figure used by the district court. Shawna earned approximately $42,000 per year at the time of divorce and earned approximately $48,000 in 2012.

[16] Adrian is required to provide and pay for certain forms of medical insurance on behalf of the children.

Shawna argues that until recently Adrian submitted all unpaid medical bills to his company which reimbursed him for these expenses. She claims that he is no longer doing this and as a result he should pay all unpaid medical expenses. In essence Shawna is asking the court to shift her responsibility for these costs to Adrian's employer. Adrian's refusal to submit such expenses to the company is the substantial change Shawna uses to justify modification.

The decree did not discuss or contemplate reimbursement of these expenses by Adrian's employer. Even if Adrian was submitting all unpaid expenses to his employer, that does not relieve Shawna of her obligation to pay her portion of the expenses. Shawna's argument that at the time of the decree she did not believe she would be required to pay these expenses because of Adrian's work perk is not persuasive. That understanding, if it was sincerely held, is not reflected in the document approved by the district court and made binding on the parties. Even assuming Adrian was to begin submitting these expenses to his company in the future, we are unable to discern a logical or legal basis upon which his action would relieve Shawna's obligation. Nor are we willing to require a child's medical expenses be paid by a parent's employer for the benefit of an ex-spouse. The fact that Adrian's employer relieves him of that burden through compensation does not now make the employer responsible.

F. Guardian Ad Litem

Shawna argues the district court failed to give weight to a report provided by the guardian ad litem. Her argument is simple. She believes that if the report

had been considered it would have mandated joint physical care, if not primary physical care, in her favor. We disagree.

The report of the guardian ad litem recommends joint physical care if the children are provided with counseling services, the parents outline a detailed plan addressing many of the points of conflict between them, and the parents engage in counseling to improve their lack of trust and respect for one another. The recommendation is conditional, and those conditions remain unsatisfied.

Even assuming the conditions were satisfied, Shawna's contention that the report conclusively establishes the best interests of her children is wrong. The report can be important evidence in determining custody. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). It is a factor, however, and not conclusive. More importantly for our purposes, the report does not address the threshold question in this case. The report contains no recommendation as to whether there has been a substantial change in circumstances. The report was of little weight based upon the reasoning of the district court, and we give it little weight today.

G. Evidentiary Issues

Shawna contends the district court erred in excluding the records and testimony of the children's counselor.

The general rule is that mental health professionals are prohibited from revealing confidential information during court testimony absent a waiver of the privilege by the person in whose favor the right to confidentiality is conferred. Iowa Code § 622.10 (2011). Exceptions to the rule exist. For example, chapter

232.96(5) removes confidentiality prohibitions in child-in-need-of-assistance proceedings. Our supreme court has also recognized that parents have a right to authorize the release of otherwise confidential medical records; however that right is not absolute. *Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson & Sanger, L.L.P.,* 764 N.W.2d 534, 538 (Iowa 2009).

> Applying this reasoning to the situation where a parent requests his or her child's mental health records, when a mental health provider claims the release of such information is not in the child's best interest, the court must determine whether the records should be released applying the best-interest-of-the-child test.

Id.

In the present matter, the children's mental health counselor, Suzanna Mullenneaux, strenuously objected to releasing their confidential information. Mullenneaux stated that the release of such information would negatively impact the children and harm her capacity to participate in their ongoing care. Mullenneaux further advised the court that Shawna and Adrian had agreed with her that any information shared during therapy sessions would not be used in a custody proceeding. Her understandable reluctance is tied to a sense that disclosure in court would destroy the cocoon of safety during the therapy sessions and hinder the children's willingness to share openly. We agree. The children in this matter face difficult circumstances and, while showing progress in a multitude of ways, continue to struggle. Disclosure of the confidential information would undermine the important work being conducted during those sessions at a great cost to the children.

H. Close of the Record

Shawna argues the district court committed error when it refused to keep the record open following the trial for the presentation of additional evidence. The evidence Shawna sought to offer came from Dr. William Bainbridge, an independent school evaluator, who is of the opinion that the Fairfield school district is best suited to address the needs of these children. Assuming without deciding that Dr. Bainbridge's report should have been reviewed by the court, it does not remedy the fatal problem with Shawna's argument. The relative quality of the two school systems and their capacity for adequately educating these children remains unchanged since the time of the decree. That one school is quantitatively better than the other would have been a relevant concern when making the initial custody determination. That determination was made long ago. Whether one school out performs the other is relevant today only within the confines of a modification proceeding, which requires proof of a substantial change in circumstances. Having failed to prove a substantial change, we do not reach the school quality assessment. Exclusion of Dr. Bainbridge's report is therefore of no impact.[17]

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[17] We further note that it is within the discretion of the district court to apply limits to the length of trial, provided the decision comported with due process considerations. *See In re Marriage of Ihle,* 577 N.W.2d 64, 67 (Iowa Ct. App. 1998). In the present matter, the district court, having faced a number of evidentiary issues, discovery problems, and delays, made it explicitly clear to the parties prior to trial that the record would close at the end of testimony. The parties had ample opportunity to develop their cases and were given adequate notice of the court's intention. We cannot say the district court abused its discretion.

I. Attorney fees

Adrian requests that Shawna pay both his trial and appellate attorney fees. He argues that Shawna has failed to pay certain medical expenses incurred on behalf of the children, has engaged in discovery in bad faith, increased the cost of litigation, and brought a meritless appeal. The request for trial attorney fees was denied by the district court. We affirm.

An award of attorney fees is discretionary. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Factors to be considered include the needs of the parties, the ability to pay, and the relative merits of the appeal. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005).

In addition to the trial, Adrian has been forced to defend an expensive appeal. We find, as did the district court, with the exception of child support, that no change of circumstances has been shown. We find that Shawna is able to pay a portion of Adrian's appellate attorney fees.[18] Accordingly, Shawna shall pay $2000 of Adrian's appellate attorney fees.

Costs are assessed seventy percent to Shawna and thirty percent to Adrian.

AFFIRMED.

[18] We do caution, however, that the award of attorney fees should not be construed as a method of forcing Shawna to repay Adrian for any past-due medical expenses.