IN THE COURT OF APPEALS OF IOWA

No. 3-157 / 12-1793
Filed April 24, 2013

IN RE THE MARRIAGE OF CYNTHIA E. AUFDENBERG AND PAUL A. AUFDENBERG

Upon the Petition of
CYNTHIA E. AUFDENBERG,
n/k/a CYNTHIA E. BROWN,
Petitioner-Appellee/Cross-Appellant,

And Concerning
PAUL A. AUFDENBERG,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Montgomery County, James S. Heckerman, Judge.

Father appeals a district court order modifying a dissolution decree's physical care, child support, and health insurance provisions. Mother cross-appeals the award of extraordinary visitation to father and seeks attorney fees. **AFFIRMED AS MODIFIED.**

Stephen C. Ebke of Porter, Tauke & Ebke, Council Bluffs, for appellant.

Ann M. Nielsen of Nielsen & Zimmerman, P.L.C., Corning, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Paul Aufdenberg appeals a district court order modifying the physical care, child support, and health insurance provisions of a 2007 dissolution decree. Cynthia cross-appeals the award of extraordinary visitation to Paul and seeks attorney fees. We strike Paul's health insurance premium payment, award Cynthia appellate attorney fees, and affirm as modified.

I. Background Facts and Proceedings.

Paul and Cynthia married in 1994 and are the parents of three children, A.L., A.N., and W.Y. At the time of dissolution, the children were twelve, eight, and five. The stipulated decree provided for joint legal custody and joint physical care, a fifty/fifty shared-expense provision, and a change of households at 8:00 a.m. on Friday. Holiday visitation was not established. Paul was ordered to provide health insurance.

Cynthia is now married to Mark. Mark has two daughters and scheduled visitation. Paul is now married to Adriane, and her son, J.O., has been diagnosed with ADHD and a seizure disorder. Recently, Paul and Adriane qualified as foster parents, and they parented two young sisters for several months.

In 2010, Paul first sought modification of the decree requesting the court set holiday visitation and establish guidelines for phone calls from the non-physical care parent. Paul also sought an order requiring Cynthia to provide orthodontist coverage and to pay some expenses. Cynthia answered and sought physical care of the children. The parties attended mediation. A guardian ad

litem was appointed, and he recommended continuing the existing physical care arrangements.

In the 2010 modification ruling, the court found both parties to be good parents and, based on the guardian ad litem's recommendation, continued joint physical care. The court also found:

> Since the entry of the original decree in this matter, communication between the parties has deteriorated. Matters that require good communication [and] that previously were resolved with satisfactory communication can be resolved now only with difficulty. The failure to properly communicate with regard to the best interests of the children can be attributed to both parties. With the modifications made herein, the Court is optimistic that good communication between the parties, which is necessary for a successful, shared physical care arrangement, can and will be restored.

The court declined to order Cynthia to provide orthodontist coverage, but did require her to pay some expenses. The court ordered: (1) the parties follow the mediator's parenting plan, including the holiday visitation schedule; (2) Paul communicate with Cynthia only by telephone or in person and not by mail, email, or text messages; (3) due to J.O.'s seizure disorder, A.L. is not to babysit him; (4) A.L. should not be allowed to transport her siblings until she has a valid driver's license; (5) the parties will provide the children with cell phones on an alternating three-year basis; and (6) absent an emergency, a non-caretaker parent contacts a child's cell phone no more than two times per day. Further, "due to deteriorating communications . . . [and] to foster . . . improved communication, Cynthia and Paul shall, beginning in August 2010, meet for lunch on the first Sunday of each month with at least one [child]." The court continued the fifty/fifty shared expense provision, but it modified the process:

> [R]equests for reimbursement together with copies of the receipts must be submitted to the other party within 60 days of the date shown on the receipt or reimbursement is waived. Expenses which would result in a reimbursement in excess of $50 shall be pre-approved by the parties. Said approval shall not be reasonably withheld.

Paul filed a motion to amend or enlarge seeking to allow A.L. to serve as a babysitter for J.O. due to financial hardship and seeking written communication with Cynthia. Cynthia agreed to limited written communication. In November 2010, the court ordered: (1) A.L. can babysit J.O. occasionally for no more than three hours at a time; (2) the parties can communicate in writing; and (3) monthly meetings of the parties "will continue if the parties deem same to be beneficial."

After the first modification, communication difficulties and financial disputes intensified. Among many examples, Paul did not follow the expense reimbursement process. Paul's job results in frequent periods of unemployment, and he did not inform Cynthia the children were switching back and forth between State-provided and employer-provided health insurance. Due to these health insurance variations, Cynthia eventually included the children on her employer's family health plan. Both parties failed to inform the other of some medical appointments.

Paul and Cynthia initially agreed A.L., a freshman in high school, should not attend prom as a punishment for a school incident. When Paul unilaterally changed his position, A.L. lived with Paul for several months and attended prom. Paul filed a second modification petition seeking to change A.L.'s physical care to his household. Subsequently, Cynthia and A.L. resolved their differences and A.L. returned to the alternating weekly physical care schedule. Cynthia

answered Paul's petition and sought physical care of the children and a modification of the health insurance provisions. Paul then also sought physical care of all children.

During the two-day modification hearing, the parties both testified a material and substantial change of circumstances had occurred since the prior proceeding requiring a modification of physical care and both requested a more-limited visitation schedule for the non-physical care parent.

The children testified at the hearing. A.L., age sixteen, stated: "I want to go to both houses the same amount of time, but I don't want my parents to fight" over paying for clothes/cell phones or over punishment for infractions. A.L. discussed her parents fighting about the girls attending counseling. She explained mom "wants us to have someone to talk to and dad . . . doesn't think we need it." Further, her parents disagree about A.L.'s boyfriend. A.L. also stated her mom is the stricter parent, but she and Cynthia now agree to steady rules: Sunday night is family night at home while Thursday night the family will go out to eat together.

A.N., age thirteen, testified both parents talk poorly about the other parent in her presence and she would prefer to spend more time at her dad's house. A.N. stated Cynthia took away her cell phone and laptop as a punishment immediately prior to the hearing, while Paul was unwilling to discipline her. W.Y., age nine, testified he gets along fine with both his mom and his dad.

At the conclusion of the July 2012 hearing, the district court stated he was impressed with the children, but:

> When you folks were here two years ago, I was of the opinion [that] Cynthia and Paul could speak to each other and resolve these issues. And I was wrong . . . . And I have tried to make that as clear as I could two years ago, that this was only going to continue as long as you folks effectively communicated with each other.

In its August ruling, the court modified physical care and ordered Paul to pay $758.30 monthly child support, finding:

> The Court finds that a material and substantial change of circumstance has occurred since the entry of the Decree of Modification in that the parties are unable to communicate and reach agreement with each other regarding the children and the children's finances. The parties' ability to communicate was contemplated by the parties at the time of the [2010] modification decree. Their lack of communication and agreement is a substantial change of circumstances justifying modification of the decree as to primary physical care of the children. The children are used to maximum contact with each parent; therefore, Paul is awarded extraordinary visitation. His visitation shall be on the same schedule as . . . his current custody schedule. The Court finds that child support should be set pursuant to the child support guidelines.
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> 1. CHILD CUSTODY. Cynthia and Paul shall retain joint legal custody of their minor children. Cynthia is awarded primary physical care of the children subject to Paul's liberal rights of visitation. The parties are encouraged to inform and discuss important decisions concerning their children and to try to arrive at a rational decision that promotes the children's welfare; provided, however, that if the parties cannot agree as to decisions regarding the best interests of the children, Cynthia's decisions shall control.

The court ordered Cynthia to provide health insurance for the children with Paul reimbursing her by paying three-sevenths of the cost, or $100.12 monthly. The court detailed a holiday visitation schedule. Each party was ordered to pay his or her own trial attorney fees.

Paul appeals and seeks to remove the provision stating "Cynthia's decisions shall control." He argues the court's communication concerns are not supported by the record and Cynthia failed to establish a change of

circumstances and that she is the superior parent. Paul also asserts his payments for child support and health insurance premium reimbursement result in a windfall for Cynthia.

In her cross-appeal, Cynthia argues the court should not have continued the alternating weekly visitation schedule and seeks to reduce Paul's visitation to alternating weekends. She requests both trial and appellate attorney fees.

II. Scope and Standards of Review.

We review the trial court's decision de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). We examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 156 N.W.2d 845, 846 (Iowa 1968). We also "recognize that the district court was able to listen to and observe the parties and witnesses." *In re Marriage of Gensley*, 777 N.W.2d 705, 713 (Iowa Ct. App. 2009). Consequently, we give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009).

III. Physical Care.

Paul agrees the parties have had difficulties in communications, but asserts "much of this fault lies with Cynthia and her inability to discuss items

rationally." Contrary to his position at trial, he now contends for the first time on appeal there is no reason to modify the parties' joint physical care arrangement.

Cynthia argues both parties agreed to a substantial change of circumstances at trial. Additionally, the record shows communication has further deteriorated since the first modification and at the second hearing both parties testified to numerous recent disputes. Further, Paul now accuses her of trying to fight whenever she wants to have a discussion on an issue. In her cross-appeal, Cynthia requests we modify Paul's visitation to every other weekend from Thursday evening to Sunday evening.

Physical care is the right and responsibility to maintain a home for the child and provide for the routine care of the child. *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007) (recognizing the district court's opportunity to observe the witnesses). In seeking to modify the physical care arrangement, a parent must establish "by a preponderance of the evidence, a substantial change in circumstances justifying [the] requested modification." *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, a parent must prove an "ability to minister more effectively to the well-being" of the children. *See id.* at 237. The best interests of the children are the controlling considerations. *See id.* at 235. At trial, both parties agreed there is a substantial change in circumstances, but they differed as to which physical care placement would be in the children's best interests.

In our de novo review, we defer to the district court's impressions of the parties because it "had the parties before it and was able to observe and

evaluate the parties as custodians." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). Specifically:

> A trial court in dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984) (quoting *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974)).

The district court observed the parties during both the 2010 and 2012 modification hearings. The court also had the benefit of listening to the testimony of all three children and observing their demeanor at the 2012 hearing. The court ruled the children's best interests would be served by modifying physical care and maintaining maximum contact with Paul while making Cynthia the final arbiter if the parties' recent and significant communication issues continued to prevent consensus. We recognize the district court has "reasonable discretion" in resolving modification of physical care issues and its "discretion will not be disturbed on appeal unless there is a failure to do equity." *McKenzie*, 709 N.W.2d at 531. We agree with the district court's conclusion the 2010 modification order was unsuccessful in providing a framework for resolving communication issues and financial disputes. We find the court's physical care modification, including Paul's extraordinary visitation, equitable, and we affirm the court's ruling. We likewise affirm the court's award of $758.30 monthly child support.

IV. Health Insurance Premium Reimbursement.

Paul argues the children were never without insurance coverage as they switched between his employer health plan and the State of Iowa Hawkeye health plan, making modification unnecessary. Further, he asserts Cynthia did not present evidence of the amount of the family coverage premium cost she pays in excess of the single coverage premium cost.

On our de novo review, we affirm the district court's modification requiring Cynthia to provide health insurance coverage for the three children. This will insure consistent health coverage. Second, we note Iowa Court Rule 9.14(5)(b) of the Child Support Guidelines provides:

> In calculating child support, the health insurance premium for the child is added to the basic support obligation and prorated between the parents as provided in this rule.
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> . . . .
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> (b) The amount of the premium for the child to be added is the amount of the premium cost for family coverage to the parent which is in excess of the premium cost for single coverage, regardless of the number of individuals covered under the policy.

Due to a failure of proof, we strike the portion of the order requiring Paul to reimburse Cynthia for three-sevenths of the monthly family health plan costs ($100.12).

V. Trial Attorney Fees.

Cynthia argues the court erred in failing to award her trial attorney fees. An award of trial attorney fees is discretionary and "[w]hether attorney fees should be awarded depends on the respective abilities of the parties to pay." *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Cynthia and Paul have nearly identical yearly earnings. We decline Cynthia's request.

VI. Appellate Attorney Fees.

Cynthia requests attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We award Cynthia $1000 for appellate attorney fees and tax costs on appeal one-half to each party.

AFFIRMED AS MODIFIED.