IN THE COURT OF APPEALS OF IOWA

No. 3-302 / 12-1279
Filed May 30, 2013

**IN RE THE MARRIAGE OF LINDA SUE SALURI
AND JOSEPH BRIAN SALURI**

**Upon the Petition of
LINDA SUE SALURI, n/k/a
LINDA SUE ANDERSON,**
Petitioner-Appellee,

**And Concerning
JOSEPH BRIAN SALURI,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

An ex-husband appeals the district court's denial of his application to modify the physical care provisions of a dissolution decree. **AFFIRMED.**

Paul D. Burns of Bradley & Riley, P.C., Iowa City, for appellant.

Leslie Babich and Kodi A. Brotherson of Babich Goldman, P.C., Des Moines, for appellee.

Heard by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Joseph Saluri appeals the district court's denial of his application for modification of the physical care provisions of the dissolution decree, which dissolved his marriage to Linda Anderson, formerly known as Linda Saluri. He asserts, contrary to the district court's findings, he has proven a material substantial change in circumstances that is more or less permanent and that affects the children's welfare, and he contends he is able to provide superior care. He also claims the district court erred in (1) ruling Linda was not in contempt of the dissolution decree for failing to pay or provide an accounting of her parenting expenses on a monthly basis, (2) assessing all court costs to him, and (3) ordering him to pay $25,000 of Linda's trial attorney fees. For the reasons stated herein, we affirm the decision of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Joe and Linda were divorced in 2004. The stipulated decree provided for joint legal custody and joint physical care of the parties four children, who at the time of the dissolution ranged in age from eight to three. The parenting-time schedule articulated in the decree provided for weekly exchanges on Sunday evenings. It also provided that Linda would provide before and after school care for the children on Joe's weeks so long as she remained unemployed.

The parties modified the decree by stipulation in December 2009. The modification reduced Joe's child support obligation, eliminated Linda's child support obligation, provided each parent with the right of first refusal to care for the children in the event the other parent was unable, required the parties to

exchange an accounting of the monthly expenses for the children by the fifth day of the month, and required any amount over and above the other party's expenses to be paid within five days. It also provided for Linda to pay $125.00 per month to Joe for expenses that were in arrears as of December 2009.

Following a difficult year for Linda, Joe filed another application to modify the decree in September 2011. He also filed a separate application to initiate contempt proceedings against Linda. The case went to hearing in May 2012. After two days of testimony, the court issued its decree June 1, 2012.

The court denied Joe's modification request concluding many of the facts Joe relied on to support his assertion that there was a substantial permanent change in circumstances that affected the welfare of the children were well-known to him prior to the 2009 stipulation. In addition, he could not prove the changes alleged were permanent or affected the children's welfare. The court also found that Joe failed to prove he could provide superior care. However, the court did agree with the guardian ad litem that a parenting coordinator should be appointed to facilitate the shared care arrangement and to reunite the oldest child with Linda. The court eliminated the provision for Linda to provide before and after school care for the children and eliminated the right of first refusal. The court also required Linda to obtain the services of a mental health provider.

On the contempt matter, the court concluded Linda had not willfully and intentionally failed to pay or comply with the expense reimbursement provisions of the modification decree as she was in bankruptcy and was unable to pay. However, the court ordered Linda to pay $6192.51 to Joe in expenses. Finally,

the court ordered Joe to pay $25,000 to Linda for her trial attorney fees and ordered him to pay all the court costs.

Joe filed an Iowa Rule of Civil Procedure 1.904(2) motion asking the court to reconsider its ruling on several matters. The court generally denied the motion; however, it did eliminate the appointment of the parenting coordinator concluding it would be a waste of time and money, and unnecessary for continued joint physical care. It also anticipated Linda would obtain the services of a mental health provider without the need for a court order, so it eliminated that requirement. Joe appeals from this ruling.

II. SCOPE AND STANDARD OF REVIEW.

The action to modify a dissolution decree is heard in equity; therefore, our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). We give weight to the factual findings of the district court, especially its assessment of credibility. Iowa R. App. P. 6.904(3)(g). Case precedent has little value as we must base our decision on the particular circumstances of the case before us. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002).

We review contempt rulings to determine whether substantial evidence supports the district court's judgment. *See In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Substantial evidence sufficient to support a finding of contempt is evidence that "could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt." *Id*. We are not

bound by the district court's conclusions of law and "exercise unfettered review of the court's application of the law." *Id*.

III. PHYSICAL CARE.

Courts can modify the custody and care provisions 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." *Melchiori*, 644 N.W.2d at 368. The parent seeking to change the physical care provision has a heavy burden and must show the ability to offer superior care. *Id*. Where there is an existing order for joint physical care, both parents have been found to be suitable primary care parents. *Id*. at 369. If it is determined the joint physical care agreement needs to be modified, the physical care provider should be the parent "who can administer most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives." *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998).

Joe claims the district court erred in concluding there had not been a permanent change that affected the welfare of the children. He points to events in Linda's life in the year leading up to his modification filing as proof of the change and its effect on the children. Linda remarried following her divorce to Joe. Her new husband, Mike, suffered from PTSD from his military service. He was ultimately determined to be disabled and received benefits. There had been prior complaints of violence in Linda and Mike's home with allegations of abuse

being made after Mike struck one of the children. However, this all occurred prior to the 2009 modification action.

In 2010 and 2011, Mike's PTSD and substance abuse worsened. The police were called to the home eighteen times in twelve months. Some of the calls were related to the dogs barking, not being confined, or being neglected. One call related to the theft of Linda's van, and another call was made when Linda thought she saw someone casing her garage to steal an ATV. A couple of the calls were related to disputes or altercations with the neighbors, and a few calls were made as a result of domestic disturbances. In addition, Linda was arrested at the house on September 4, 2011.

The night before her arrest, Linda went to Mike's shooting range to find Mike, who had told her he would be camping there for the evening. When Linda arrived she discovered he was there with another woman. There was an argument, and Mike initially reported to police that Linda pointed a gun at the other woman before leaving the shooting range. There were also threatening text messages that were exchanged between Linda and the other woman. Linda contends she never pointed the gun but argues the gun fell out of her waistband when Mike shoved her down. She also claims she never meant for any of the text messages to be taken as a threat. Linda returned to the shooting range again the next morning, after which Mike and the other woman called police to report the incident.

The police arrested Linda at the family home, though none of the children were present. When she was arrested, the police found marijuana and a pipe on

her person. She was charged with assault with a dangerous weapon, first-degree harassment, carrying weapons, and possession of marijuana and drug paraphernalia.[1] A no-contact order was put into place between Linda, Mike, and the other woman. Ultimately, Linda pleaded guilty to carrying a concealed weapon and possession of marijuana, received a deferred judgment, and was placed on probation for two years.

After her release from jail, Linda, Linda's parents, Joe, and the children had a meeting where Joe agreed to provide care for the children until Linda could work out her living arrangements. Linda was eventually permitted to move back into her house, the no-contact order between Linda and Mike was dropped, Linda filed for divorce from Mike, and she was awarded physical care of the child she shared with Mike.

After filing this current modification action, Joe filed a child abuse complaint against Linda when the district court denied his request for temporary physical care. He asserted the oldest child had seen marijuana in the home and the younger children also had access to it. The report was investigated, and all of the children denied ever seeing marijuana in the home or anyone smoking marijuana. The complaint was closed as not confirmed. Linda maintained she had not smoked marijuana since her arrest in September 2011.

The guardian ad litem (GAL) reported that the children were generally healthy, well behaved, and successful in school. The oldest child was struggling

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[1] Linda admitted to occasionally smoking marijuana in order to alleviate her migraine headaches. This was not new information to Joe as he had supplied marijuana to Linda for this purpose during their marriage.

in her relationship to Linda after the September 2011 incident and refused to return to Linda's home. She was having difficulty sleeping and experiencing nightmares, for which she was receiving counseling and medication. The second oldest child had been diagnosed with ADHD, but was a good student and participated in activities at school. The third child was described as bright and bubbly, and involved in many activities. She did express worry regarding the situation with Mike and the current modification action. She had been diagnosed with depression and prescribed medication. The youngest child was a good student and involved in many activities at school with few disciplinary problems.

The district court was concerned about the oldest child's response to the destructive behavior of Mike, but was confident that with time and therapy she would be reunited with Linda. The court considered all the children to be doing remarkably well, particularly when compared to similarly situated peers. The court also noted the children's preferences with respect to the physical care arrangement: the oldest child preferred to remain with Joe, while the three younger children preferred to maintain the joint physical care arrangement.

Joe points out that both the GAL and the children's counselor agreed that the parties remain as joint physical custodians only if three conditions were implemented: (1) Linda obtain the services of a mental health provider and follow through on receiving those services until maximum benefits are received; (2) a parenting coordinator is appointed to check on Linda's therapy, and implement a structure and plan with the help of the children's therapist for the oldest child to resume living with Linda; and (3) the children continue counseling with their

current therapist. The GAL asserted that if these conditions are not implemented, it would be her recommendation that Joe be awarded physical care.

The court initially incorporated the first and second provisions into its order, but Joe objected to the appointment of a parenting coordinator in his rule 1.904(2) motion. In response, the court removed the parenting coordinator requirement and Linda's therapy requirement, concluding the parenting coordinator would be a waste of time and money in light of Joe's objections and the court anticipated Linda would obtain the necessary therapy without a court order. The court stated it no longer considered the GAL's conditions necessary for joint physical care. Joe asserts because the conditions of the GAL were not implemented, he should have been granted physical care. It is obvious the court was aware of and fully considered the GAL's recommendations, but the court "was certainly under no obligation to adopt them." *See In re Marriage of Short*, 373 N.W.2d 158, 160 (Iowa Ct. App. 1985).

Joe asserts the court erred in finding that because he knew of some of Linda's and Mike's problems before the 2009 modification he could not then assert there had been a change of circumstances. He stresses the court must keep in the forefront the charge that it must place the children in an environment that will promote the children's healthy physical, mental, and social maturity. The hole in Joe's argument is that the children were thriving despite the difficult situation in Linda's home in 2010 and 2011, and with Linda's divorce from Mike, that difficult situation has substantially resolved. Thus, the change that occurred

in 2010 and 2011 did not relate to the welfare of the children and it was not more or less permanent. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (stating that in order to justify a change in the custodial provision of a dissolution decree there must be a change that is more or less permanent that relates to the welfare of the children). The joint physical care arrangement, with only minor adjustments in 2009, had been in place for eight years at the time of trial. "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." *Id*.

Joe also claims he has proven that he will provide superior care for the children. Joe has been a dutiful and loving father to his children, but as the district court found, he has not been without his struggles since the dissolution. He suffers from anxiety and impulse control, for which he receives counseling and medication. He has experienced his own difficulties with his remarriage and the blending of the families. As the district court found, with his income, Joe is more than able to provide for the economic and material needs of the children, though Linda had been the primary caretaker of the children since the divorce due to her ability and willingness to care for the children before and after school while Joe worked.

The district court made detailed findings of fact, clearly assessed the credibility of the witnesses, considered and adopted much of the guardian ad litem's report, and concluded that both parents are suitable custodians. We agree with the district court's decision to not disturb joint physical care.

IV. CONTEMPT ACTION.

Next, Joe claims the district court erred in failing to hold Linda in contempt for failing to pay her share of the parenting expenses, failing to provide a monthly accounting of the expenses she incurred, and failing to hold him harmless on the mortgage on her home. The court found Linda had not willfully failed to comply with the 2009 modification order regarding the parenting expenses because she was having financial difficulty at that time and was unable to pay those expenses. The same held true for the mortgage payments, which by the time of the hearing were up to date.

Joe asserts on appeal that even assuming Linda's failure to pay the expenses was excused by her financial situation, this did not excuse her failure to provide a monthly accounting of expenses to Joe. He claims it was error for the court to allow Linda to submit expenses at trial that she claimed were incurred for the children when she failed to provide those expenses on a monthly basis when incurred. He also contends the court should not have offset the amount he was seeking by the expenses she claimed. He asserts for the first time on appeal that some of the expenses claimed by Linda were for items not allowable under the 2009 modification. He also claims some of the expenses were discharged in Linda's bankruptcy, but he fails to identify which expenses had been discharged.

The court found it equitable to permit the offset of $2016.60 to Linda based on her claimed expenses. At the same time it ordered her to pay Joe the net expenses in the amount of $6192.51.

To prove Linda in contempt, Joe had to prove beyond a reasonable doubt that Linda willfully failed to comply with the decree. *See Jacobo*, 526 N.W.2d at 866. "Evidence establishes willful disobedience if it demonstrates: '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 contemner had the right or not.'" *Id*. (citations omitted).

We agree with the district court that Linda did not willfully fail to pay for the parenting expenses or the mortgage because at the time she was unable to make those payments. We also agree that it was equitable to permit Linda to submit evidence of the expenses she incurred in order to offset the expenses claimed by Joe. Joe's analogy to *In re Marriage of Okland*, 699 N.W.2d 260, 268 (Iowa 2005), is not persuasive. In *Okland* 699 N.W.2d at 267-68, an ex-wife sought reimbursement for uninsured medical expenses after the ex-husband petitioned to modify physical care. The court refused to order the reimbursement finding the timing of her claim suspicious and finding she failed to follow the court-ordered procedure to obtain reimbursement. *Oklund*, 699 N.W.2d at 268. Here, Linda was not seeking reimbursement for the expenses. Instead, Joe was seeking to hold Linda in contempt for failing to pay his expenses, without acknowledging that she had incurred expenses, which would under the prior modification order be an authorized offset or credit against the reimbursement owed to him. The court, in reaching a final number to award Joe, simply applied

the offset provisions of the 2009 decree. We find no error in the district court's actions.

V. ATTORNEY FEES AND COURT COSTS.

Finally, Joe claims it was error for the district court to order him to pay all the court costs associated with the action and to pay $25,000 of Linda's attorney fees. Both Joe and Linda seek an award of appellate attorney fees.

In modification proceedings "the court *may* award attorney fees to the prevailing party in an amount deemed reasonable by the court." Iowa Code § 598.36 (2011) (emphasis supplied); *see In re Marriage of Rosenfeld,* 668 N.W.2d 840, 849 (Iowa 2003). An award of trial attorney fees rests in the discretion of the district court. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Whether attorney fees should be awarded depends on the parties' ability to pay. *Id*. The district court found Joe earned $317,038 in 2011, while Linda had an annual income of $23,400 based on the job she had recently started. Joe clearly had a superior ability to pay both the attorney fees and the court cost. Joe claims the district court's order was in error because Linda never incurred the attorney fees. Instead, her fees had been paid by her parents, and her parents have no expectation to be repaid. The court found that while Linda's parents did not intend to be repaid for the support they have provided her over the past year, they only did so as a loan or advance on her future inheritance. We find no abuse of discretion in the district court's assessment of trial attorney fees and costs.

Linda seeks appellate attorney fees. An award of appellate attorney fees rests within our discretion. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa 1997). We consider the needs of the parties, the ability of the parties to pay, and whether a party was obligated to defend the decision of the trial court on appeal. *Id*. Given the ability of Joe to pay and the fact that Linda was required to incur the appellate attorney fees to defend the district court action, we award $5000 in fees to Linda.

AFFIRMED.