IN THE COURT OF APPEALS OF IOWA

No. 3-381 / 12-1823
Filed June 12, 2013

MEGAN R. HOUSLEY, n/k/a MEGAN R. FRISON,
Plaintiff-Appellant/Cross-Appellee,

vs.

ZACHARY S. HOLMLUND,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton, Judge.

Megan Frison appeals and Zachary Holmund cross-appeals from the order modifying various provisions of the parties' prior stipulated child custody order. **REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.**

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Barbara K. Wallace, Davenport, for appellant.

Harold J. Delange II, Davenport, for appellee.

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

DOYLE, P.J.

Megan Frison appeals and Zachary Holmlund cross-appeals from the district court's order modifying the parties' prior stipulated child custody, child support, and visitation order. Both Megan and Zachary contend the court erred in several respects. Upon our review, we reverse in part, affirm in part, and remand.

***I. Background Facts and Proceedings*.**

The parties are the parents of a child born in 2001. In 2006, the parties entered into a "stipulated order for custody, visitation, child support and tax exemption." The order provided for joint legal custody of their child, with Megan having primary physical care. Additionally, the order set forth a visitation schedule for Zachary and the child based upon Zachary's then work schedule, providing: "Zachary will have visitation on his days off from work, beginning in the morning of his first day off, and ending at 7:00 p.m. on his last day off . . . ."[1] Zachary was ordered to pay child support to Megan in the amount of $590 per month, as well as maintain health and medical insurance for the child. The order also stated, among other things, the parents would alternate years for claiming the child as an exemption on their tax returns.

In 2011, Megan filed her petition to modify custody, visitation, and child support. She asserted there had been a substantial change in circumstances since the entry of the order supporting modification of that order, namely

[1] At that time, Zachary's repeating work schedule provided: work seven days, off two days, work seven days, off two days, work seven days, off three days (a Saturday, Sunday, and Monday). He had one overnight per week for two weeks and then two overnights the third week and then one overnight the fourth week–a total of about five overnights per typical month (in addition to the other visitation provided).

Zachary's income and work schedule. Because Zachary now had more days off each week and alternating weekends off,[2] Megan requested the visitation schedule be tailored to Zachary's new work schedule. Additionally Megan requested Zachary's child support obligation be increased in correlation with the current incomes of the parties.

Zachary answered and generally denied Megan's statements in the petition. He admitted his work schedule had changed, but he did not believe it had changed to such an extent that there had been a substantial change in circumstances not contemplated by the parties at the time of the entry of the original order. Zachary stated that the change of his work schedule now permitted him to share custody equally with Megan, and he asserted shared care was the parties' de facto custodial arrangement at that time. He requested the court modify the original order to formalize their current shared care arrangement.

Thereafter, Megan filed her "Motion to . . . Clarify Visitation." She stated that "it was the intention of the parties in October 2006 that [Zachary] would have visitation with the minor child for one overnight visitation each week due to [Zachary's] rotating work schedule." She asserted it would be in the child's best interest for the court to clarify visitation and allow Zachary visitation with the child on Zachary's first two days off work each week, or in the alternative, temporarily

[2] Zachary's new repeating work schedule provides: work three days, off two days, work two days, off three days, work two days, off two days. In a typical month under this schedule, Zachary is off work for four two-day (either a Tuesday-Wednesday or a Thursday-Friday) non-weekend periods, and two three-day (a Saturday, Sunday, and Monday) weekends.

modify the visitation to permit Zachary visitation on alternating weekends and alternating weekdays.

Following trial on the petition, the district court entered its ruling denying the father's request to change to joint physical care. The court found that both of the parties were "essentially credible," and beginning in June 2011, "Zachary's visitation [had] evolved with Megan's acquiescence into him having [the child] one-half of the time." Nevertheless, it found Zachary had failed to prove a sufficient change of circumstances to modify the physical care arrangement. The court concluded joint physical care was not in the child's best interests, noting "these parents do not trust each other, respect each other, communicate or cooperate sufficiently to successfully raise [their child] in a joint physical care arrangement."

Additionally, the court granted the mother's request to modify visitation and child support. It found Zachary's visitation schedule in the prior order had been designed around his days off from work at that time, and the change in his current work schedule constituted a substantial change of circumstances not contemplated by the parties at the time the original custody order was entered. The court modified the visitation section of the original order as follows:

> Zachary will have visitation with Tyler on each weekend that he is off from work on Saturday through Monday, beginning at 7:00 on Friday night, and ending at 7:00 on Sunday night when Tyler is in school, but extending until 7:00 on Monday when Tyler is not in school.

The court explained:

> This gives Tyler and Zachary visitation for four (when school is in session) to six days (in summertime) and overnights every two

> weeks.[[3]] This takes advantage of Zachary's time off work, Tyler's time off from school, [and] is predictable and less disruptive to Tyler. The parties may agree to any other changes or reasonable visitation terms, granting to them full power to agree to any terms that are convenient to them and in Tyler's best interests, but if they do not agree, these more specific terms should apply.

Concerning Zachary's child support obligation, the court concluded the obligation should be reduced to $520 per month based upon the new visitation schedule and Zachary's change in income. The court found Zachary was entitled to the 15% extraordinary visitation credit as provided in Iowa Court Rule 9.9. It also ordered Zachary to continue to carry the child on his health insurance program, but did not specify how uncovered medical expenses were to be divided. The court found the alternating tax exemption for the child should be modified to allow Zachary to claim the child as an exemption each year so long as Zachary was current in his child support obligation. Finally, the court ordered Zachary to contribute $1000 toward payment of Megan's trial attorney fees.

Thereafter, Megan filed a motion to amend or enlarge the court's findings pursuant to Iowa Rule of Civil Procedure 1.904(2), requesting several changes. Her motion was denied. Megan now appeals, and Zachary cross-appeals.

***II. Scope and Standards of Review*.**

Our review is de novo. Iowa R. App. P. 6.907. We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(g). To the extent that

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[3] Zachary is entitled to two (school) or three (summer) overnights each weekend he is off work on a Saturday through Monday. Zachary is off every other weekend under his new work schedule. As the trial court observed, the overnights occur once every two weeks, thus entitling Zachary to a total of four to six overnights in a typical month (in addition to the other visitation provided); about the same number of overnights he was entitled to under the original decree and old work schedule.

interpretation of the child support guidelines is a legal question, our review is for errors at law. *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). Finally, we review the district court's decision regarding attorney' fees for abuse of discretion. *In re Marriage of Roerig*, 503 N.W.2d 620, 622 (Iowa Ct. App. 1993).

III. Discussion.

On appeal, Megan contends the district court erred in wording the modified visitation schedule "such that a change in Zachary's work schedule can modify the visitation schedule," awarding Zachary an extraordinary visitation credit, awarding Zachary the child tax exemption each year, and failing to modify the division of uncovered medical expenses. Zachary contends the court erred in modifying the visitation schedule at all, denying his request for shared care, and awarding Megan trial attorney fees. We address their arguments in turn.

A. Child Custody and Visitation.

Courts are empowered to modify the custodial terms of a dissolution 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 is more or less permanent and relates to the welfare of the child. *See In re Marriage of Brown*, 778 N.W.2d 47, 51 (Iowa Ct. App. 2009). "The heavy burden upon a party seeking to modify custody stems from the principle that once custody has been fixed it should be disturbed for only the most cogent reasons." *Id.* at 52. However, "[t]he burden to change a visitation provision in a decree is substantially less than to modify custody." *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004).

***1. Substantial Change in Circumstances Concerning Visitation*.**

Zachary contends the district court erred in finding the visitation schedule should be modified. We disagree.

Under the facts of this case, we agree with the district court that Megan established by a preponderance of evidence that the change in Zachary's work schedule since the stipulated order was entered was a material and substantial change not contemplated by the court when the decree was entered, and the child's best interests make it practical to modify the arrangement. Clearly, Zachary's new work schedule does not fit within the parameters of the original visitation schedule set forth in the stipulated order, and the parties' issues have rendered them unable to agree to another schedule outside court interference. Consequently, we find no error in the court's finding of a substantial change in circumstances concerning visitation.

***2. Physical Care*.**

Zachary in turn asserts the district court erred in not modifying the order to grant joint physical care to both parents. Each parent correctly points to the nonexclusive 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 these parents do not trust each other, do not mutually respect one another, and struggle to communicate in an effective

way. It is clear the parties are trying to work on these issues, each in their own way, and that improvement has been slow. These improvements are overshadowed, however, by the mistrust between Megan and Zachary, 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. Accordingly, we find the district court did not err in not awarding joint physical care to both parents.

3. Visitation Language.

Megan contends the district court erred in using Zachary's work schedule in defining the terms of the revised visitation schedule. She complains that use of that language gives Zachary the ability to "unilaterally change the visitation schedule by changing his work schedule" or "effectuate a modification to the visitation schedule without him having to meet the requisite burden." She requests the schedule be changed to simply award Zachary visitation on alternating weekends.

Upon our review, we find no error in the district court's visitation schedule. We note that utilizing Zachary's work schedule for planning visitation is not a new development; the parties' original stipulated agreement, drafted by Megan's attorney, also used Zachary's work schedule.

Finally, as the district court's order provided, "[t]he parties may agree to any other change a reasonable visitation terms." Liberal visitation is generally considered to be in the best interests of children, *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992), and it is readily apparent these parents will be involved in each other's lives for many years, given the age of their child.

We remind the parents that "[e]ven though [they] are not required to be friends, they owe it to [their] child to maintain an attitude of civility, act decently toward one another, and communicate openly with each other. One might well question the suitability as custodian of any parent unable to meet these minimum requirements." *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005). This court expects the parties will follow through with the current court-ordered parenting schedule and facilitate a healthy and nurturing environment for their child. It is time for the parents to put their child first before their petty disputes and work together as grownups for the best interests of everyone.

C. Child Support.

A court may modify a child support order upon a substantial change in circumstances. Iowa Code § 598.21C(1) (2011) (listing factors). A substantial change occurs when the child support order varies by at least ten percent from the amount due under the current child support guidelines. *Id.* § 598.21C(2)(a). The party seeking to modify must prove by a preponderance of the evidence that a substantial change in circumstances occurred since the entry of the decree. *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 331 (Iowa Ct. App. 2005).

Courts use the child support guidelines to determine support obligations. *In re Marriage of Maher*, 596 N.W.2d 561, 565 (Iowa 1999). They also may consider relevant statutory factors when the guideline award would be unjustified or inappropriate, or otherwise require judicial discretion. *Id.*; *see* Iowa Ct. R. 9.11. Courts first determine the net monthly income of each parent at the time of the hearing. *In re Marriage of Wade*, 780 N.W.2d 563, 566 (Iowa Ct. App. 2010).

Net monthly income is gross income minus specifically enumerated deductions. *McKee v. Dicus*, 785 N.W.2d 733, 740 (Iowa Ct. App. 2010).

The district court granted Zachary an extraordinary visitation credit pursuant to Iowa Court Rule 9.9. For a parent that has visitation of between 128 to 147 days each year, the parent is entitled to a fifteen percent reduction in a child support obligation. Iowa Ct. R. 9.9. "For the purpose of this credit, 'days' means overnights spent caring for the child." *Id.* Megan asserts the court miscalculated Zachary's visitation days to apply the credit. Zachary does not challenge Megan's assertion.

Under the visitation schedule as modified above, we agree with Megan that, at most, Zachary would only have 102 overnight visitations. This number falls short of the 128 days needed to apply the extraordinary visitation credit. We conclude the credit should not be applied in this case, and we therefore remand to the district court to recalculate Zachary's child support obligation removing the extraordinary visitation credit.

***D. Division of Uncovered Medical Expenses*.**

An order that provides for temporary or permanent child support must include a provision for medical support as well. Iowa Code § 252E.1A(1). If the district court orders the custodial parent to provide a health benefit plan, it may also order the noncustodial parent to provide reasonable cash medical support payments in lieu of a health benefit plan. *Id.* § 252E.1A(4). Additionally, Iowa Child Support Guidelines rule 9.12(5) provides that "[u]ncovered medical expenses in excess of $250 per child or a maximum of $800 per year for all

children shall be paid by the parents in proportion to their respective net incomes."

Although the district court ordered Zachary to continue to provide a health benefit plan for Tyler, the court did not address the division of the child's uncovered medical expenses between the parties. Megan asserts this was in error, and Zachary does not challenge Megan's argument on appeal. In light of our remand for recalculation of Zachary's child support obligation without the extraordinary visitation credit, we find it appropriate to remand this matter to the district court for a determination of the parties' obligations concerning any uncovered medical expenses.

E. Tax Exemption.

Generally, the parent with physical care of the child is entitled to claim the child as a tax exemption. *See* Iowa Ct. R. 9.6(5). The district court has the ability, however, to award tax exemptions to a non-custodial parent "to achieve an equitable resolution of the economic issues presented." *In re Marriage of Okland*, 699 N.W.2d 260, 269 (Iowa 2005). Exemptions may be allocated to the parent who would receive maximum benefit from them. *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). Factors the court is to consider include whether allocating the exemption to the noncustodial parent would "free up more money for the dependent's care," or whether it would be inequitable to allocate the exemption to the custodial parent when they would benefit the least from receiving it. *Okland*, 699 N.W.2d 260, 269

The district court modified the tax exemption apportionment provision of the stipulated order allowing Zachary to claim the exemption each year for so

long as he is current in his child support obligation. Megan argues the dependency exemption should not have been modified, pointing out the parties had previously stipulated to alternate years for claiming the exemption. However, at the time of the entry of the stipulated order, Megan was employed and earning approximately $20,000. At the time of the modification trial, Megan was not employed at all. Under these circumstances, we conclude the court acted equitably in allocating the exemption to Zachary.

F. Attorney Fees.

Zachary contends the district court erred in ordering him to pay $1000 of Megan's trial attorney fees. We review the fee award for an abuse of discretion. The decision depends on the parties' respective abilities to pay. *Id.* Because the record indicates Zachary's superior ability to pay these legal fees, we find no abuse of discretion.

An award of trial attorney fees is within the considerable discretion of the district court, and will be overturned only if the court abused that discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006); *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). The amount of fees awarded must be fair and reasonable, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay, *Sullins*, 715 N.W.2d at 255. We have reviewed the relevant portions of the record, including evidence of the parties' incomes, and find no abuse of discretion in the court's decision to award Megan $1000 in trial attorney fees.

Megan requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rest within our sound discretion. *Id.* In

determining whether to award appellate attorney fees, we consider “the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.” *Id.* We decline to award appellate attorney fees. Costs of the appeal are assessed to Zachary.

***IV. Conclusion*.**

For the foregoing reasons, we reverse and remand this matter to the district court for calculation of Zachary’s child support obligation without the extraordinary visitation credit, as well a determination of the parties’ obligations concerning any uncovered medical expenses. We affirm the decision of the district court on both appeals in all other respects. We decline to award Megan appellate attorney fees, and we do not retain jurisdiction.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.