IN THE COURT OF APPEALS OF IOWA

No. 3-386 / 12-2251
Filed May 30, 2013

IN RE THE MARRIAGE OF TAMI JEAN BARNHART AND BRADLEY DAVID BARNHART

Upon the Petition of
TAMI JEAN BARNHART,
n/k/a TAMI JEAN LUBBEN,
Petitioner-Appellee,

And Concerning
BRADLEY DAVID BARNHART,
Respondent-Appellant.

Appeal from the Iowa District Court for Delaware County, Lawrence H. Fautsch, Judge.

A father appeals the district court's ruling modifying the physical care provisions of the dissolution decree. **AFFIRMED.**

Daniel H. Swift, Manchester, for appellant.

John M. Carr of Carr & Carr Attorneys, Manchester, for appellee.

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

MULLINS, J.

Bradley Barnhart appeals the district court's ruling modifying the physical care provisions of the dissolution decree and placing the four children at issue in Tami Lubben's care. Bradley asserts Tami failed to prove there had been a material and substantial change in circumstances affecting the welfare of the children since the entry of the decree. He also claims Tami failed to prove she could provide superior care. Finally, Bradley claims the district court erred in ordering him to pay $1000 of Tami's trial attorney fees. Because we agree with the district court that there has been a material and substantial change in circumstances affecting the welfare of the children and agree Tami can offer superior care, we affirm the district court's ruling. In addition, because Bradley has the superior ability to pay, we affirm the district court's award of trial attorney fees and award Tami $1000 in appellate attorney fees.

I. BACKGROUND FACTS AND PROCEEDINGS.

Tami filed for divorce in November of 2010 after eight years of marriage to Bradley. The parties had four children, who at the time of the dissolution ranged in age from eleven to four. The parties stipulated to joint legal custody and shared physical care. The children spent one week with each parent with the exchange on Sundays. The parties also split the holidays, agreed no child support would be paid, and specified that each party would be responsible to transport the children to the other party's residence each Sunday afternoon. The court entered a decree incorporating the parties' stipulation on April 25, 2011.

Tami married Jason Lubben after the divorce and began living with him and his three children. Bradley refused to drop the children off at Jason's home, and Tami became concerned about the younger children's emotional health after the children told her what Bradley had been saying about her and Jason. Tami took the children to see a social worker, Mary Funke. After meeting with all of the children, it was Funke's opinion that the shared care arrangement should not continue and the children should be placed in Tami's physical care.

Tami filed a modification action in February 2012, approximately ten months after the entry of the dissolution decree. The modification action proceeded to trial in October 2012. In November, the court granted Tami's modification petition awarding her physical care of the four children and granting visitation to Bradley on alternate weekends and for five weeks in the summer. It ordered Bradley to pay child support and $1000 of Tami's trial attorney fees. Bradley appeals.

II. SCOPE AND STANDARD OF REVIEW.

We review de novo an action to modify a dissolution decree as it is heard in equity. Iowa R. App. P. 6.907; *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). Because of its ability to see and hear witnesses first hand, we give weight to the factual findings of the district court, especially its assessment of credibility, though we are not bound by those findings. 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).

III. MODIFICATION OF PHYSICAL CARE.

Courts 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." *Id*. 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).

Tami petitioned to modify the shared care arrangement put in place by stipulation in the dissolution decree. On appeal from the district court's modification of physical care, Bradley asserts Tami failed to prove there had been a material and substantial change in circumstances. Bradley claims Tami's chief complaint at the modification hearing was his failure to communicate with her regarding the children. He claims this failure to communicate was not a change in circumstances but had been an issue at the time the decree was entered. In addition, Bradley asserts Tami is complicit in the communication problem as she testified at the hearing that she tries to have as little communication with Bradley as possible.

Tami testified that at the time of the dissolution Bradley promised her they could get along, they would not put the children in the middle of their disputes, and they would not say derogatory things about each other to the children. However, in Tami's opinion, Bradley broke those promises. By the time Tami filed the modification petition, approximately ten months after the dissolution decree was entered, the children were telling Tami that Bradley was calling her and Jason profane names.[1] The children said Bradley threatened to physically harm Jason and burn down his house. Bradley refused to return the children to the house Tami shared with Jason forcing Tami to do all the transportation for the shared care arrangement. Bradley has also told the children they must love just one of their parents and choose between them.

The district court found Bradley "has had difficulty coping with the divorce," and his "confusion has turned to bitterness" after Tami's marriage to Jason. The court found there was a total lack of communication between the parties. Clearly, the shared care arrangement was not working well for the children or the parties due to the high degree of animosity that existed between the parties. A shared care arrangement only works if the parties communicate effectively about the children. *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007).

> Where parents *respect* their former spouse and their children and recognize that *cooperation* and *communication* are important to

[1] The children told Tami as well as Funke, the social worker, that Bradley called Tami a "whore," a "fucker," a "dumb bitch," and a "cunt." The children reported that Bradley had called Jason a "fuck head" and "dumb ass," and he had threatened to shoot Jason in the head and hit him in the head with the butt of a gun. The younger children reported that when Bradley would play with them, they would make believe Jason was in a toy car and then they would run the car off a cliff. The children also reported Bradley threatened to bring a gun to Tami and Jason's wedding.

> their children's welfare and they put that welfare ahead of their own needs and petty differences, shared care can be beneficial to the children because it allows both parents to remain a viable and real part of the children's lives.

Melchiori, 644 N.W.2d at 368 (emphasis added).

Bradley contends that the discord between him and Tami has not affected the children. He maintains that the children are doing well in school, and are courteous, polite, age appropriate, and well-adjusted. While both Tami and Bradley echoed this sentiment in their testimony about their children, Funke testified Tami brought the children to see her because Tami was concerned the children had been negatively influenced by Bradley's behavior. Of particular concern to Tami was the level of aggressiveness the youngest two children were demonstrating. After meeting with the children two or three times, it was Funke who suggested to Tami to consider modifying the physical care because of what Funke considered to be "emotional abuse to the children perpetrated by their father because of the negative and derogatory statements and threats that he was making against their mother." She was very concerned about the comments the five-year-old twins were parroting from their father. She diagnosed the twins with adjustment disorder with mixed disturbance of emotions and conduct as well as phonological disorder.

Bradley met with Funke when he became aware of her treatment of the children. While he denied saying some of the comments the children reported, he acknowledged some of the comments he made in front of the children were in poor taste, and he expressed remorse for his conduct. Bradley vowed to improve his behavior. However, at the next meeting Funke had with the children,

approximately three weeks after her meeting with Bradley, the children reported Bradley was "still saying bad things about mom and Jason" and "always yells at us about what Jason does." However, one of the children reported that Bradley had not been "as angry as he was prior to him coming to visit with [Funke]." The district court acknowledged Bradley was attempting to work through his personal issues, but it did not appear he had made any progress to date.

> Discord between parents that has a disruptive effect on children's lives has been held to be a substantial change of circumstance that warrants a modification of the decree to designate a primary physical caregiver if it appears that the children, by having a primary physical caregiver, will have superior care.

Id.

After our de novo review, we agree with the district court that Tami has proved a material and substantial change that has been more or less permanent since the dissolution that relates to the welfare of the children. Bradley maintains that even if we find a material and substantial change to warrant modification, Tami does not have the ability to offer superior care. He requests he be awarded physical care of the children. Bradley asserts Tami's marriage to Jason, a man who has been found to physically abuse his own children, makes her unable to effectively administer to the children's well-being.

The court noted two prior incidents where Jason had slapped two of his children who were being disobedient. However, the court was less concerned due to the fact that Tami and Jason had an agreement that they would only discipline their own children and there had been no evidence to indicate Jason had ever disciplined Tami's children. In addition, Bradley's sister-in-law wrote to

Tami and told her that "according to the things the kids share with us and seeing how Jason interacts with the kids, it is obvious he is kind to the kids and would never hurt them." The district court found that despite the abusive statements being made by Bradley, Tami had not responded in kind but had instead downplayed the statements for the benefit of the children. Finally, due to Tami's part-time work schedule, she had considerably more time to spend with the children.

The evidence offered at trial makes it clear that Bradley at this point is unable to support the children's relationship with Tami. *See In re Marriage of Crotty*, 584 N.W.2d 714, 716 (Iowa Ct. App. 1998) ("Iowa courts do not tolerate hostility exhibited by one parent to the other."); *see also* Iowa Code § 598.41 (2011) (providing that when considering what custody arrangement is in the best interests of the child the court is to consider "[w]hether each parent can support the other parent's relationship with the child"). We agree with the district court's decision to award Tami physical care of the children due to her ability to provide superior care.

IV. ATTORNEY FEES.

A. Trial Attorney Fees. Next, Bradley argues the district court erred when it awarded $1000 in trial attorney fees to Tami. 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 (emphasis added); *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. *Rosenfeld*, 668 N.W.2d

at 849. Whether attorney fees should be awarded depends on the parties' ability to pay. *Id*. We find no abuse of discretion in this case. While the parties agreed to impute income to Tami for the purposes of calculating child support, the evidence admitted at trial demonstrated she works approximately fifteen hours per week netting $175 every two weeks. Bradley, on the other hand, works full time, earning eleven dollars per hour and netting $1677.15 per month. Bradley clearly has the superior ability to pay, and the court properly exercised its discretion in awarding only $1000 in attorney fees and not the entire $4900 fee claim.

B. Appellate Attorney Fees. On appeal, Tami requests an award of appellate attorney fees in the amount of $1500. 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*. As stated above, Bradley had the superior ability to pay, and Tami was required to defend the district court's decision on appeal. We award Tami $1000 in appellate attorney fees.

AFFIRMED.