IN THE COURT OF APPEALS OF IOWA

No. 3-421 / 13-0006
Filed June 12, 2013

IN RE THE MARRIAGE OF PENNY J. WOSEPKA AND MARK A. WOSEPKA

Upon the Petition of
PENNY J. WOSEPKA,
Petitioner-Appellant,

And Concerning
MARK A. WOSEPKA,
Respondent-Appellee.

Appeal from the Iowa District Court for Butler County, Rustin T. Davenport, Judge.

Appellant Penny Wosepka appeals the district court's refusal to modify the physical placement provisions of the dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Paul W. Demro of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellant.

Teresa A. Rastede of Klatt, Odekirk, Augustine, Sayer, Treinen & Rastede, P.C., Waterloo, for appellee.

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

MULLINS, J.

Penny Wosepka appeals the district court's ruling on her petition to modify the physical care provisions of the decree dissolving her marriage to Mark Wosepka. Penny asserts the court erred in finding there was no substantial and material change in circumstances since the dissolution decree. She also claims she has established herself as the superior parent. Finally, she claims the court erred in its child support calculations. She claims Mark has a higher income than the amount the district court used, she should be granted a greater reduction in her support obligation due to her expanded visitation, and she should have been awarded at least one of the tax dependency exemptions. For the reasons stated below, we affirm as modified and remand for a recalculation of child support.

I. BACKGROUND FACTS AND PROCEEDINGS.

Penny and Mark were divorced November 8, 2007. They have two children together, and the district court placed the physical care of those children with Mark. In making the physical care determination, the district court noted both parties had performed the normal duties associated with child-raising. Penny had a tumultuous relationship with one of the children. The court agreed with the recommendations of the counselor treating that child, who testified joint physical care was not in the children's best interests due to the parties' different communication styles, minimal or absent self-discipline, criticisms of the other parent's parenting styles, and a lot of blaming. The counselor also noted that the parties' conflicts developed "triangulation" with one of the children which exacerbated the conflict. The court was also concerned with the presence of

Penny's ex-husband, Daniel Cox, who had physically abused Penny in the past and threatened to kill one of the children. Cox was also at that time facing criminal charges of sexual abuse and lascivious acts with a child. The court entered a no-contact order between Cox and the children and found Mark was better able to minister to the long-range best interests of the children. The court set the visitation schedule and calculated the child support to be $571.38 per month.

Penny filed an Iowa Rule of Civil Procedure 1.904(2) motion, which was partially granted awarding her additional visitation. The court also then amended the child support to take into consideration this additional visitation and lowered the monthly amount to $457.10. Penny appealed the dissolution decree, which was affirmed in part and reversed in part by this court. *See In re Marriage of Wosepka*, No. 08-0292, 2008 WL 5235375, at *5 (Iowa Ct. App. Dec. 17, 2008).

Penny filed a petition to modify the decree in October 2011. The case proceeded to trial in July 2012. The district court found little had changed since the dissolution decree, except Penny had ended her contact with Cox. The parties were still unable to communicate, though the children were continuing to do well either because of or in spite of their parents. The court also concluded a joint care arrangement was not likely to be successful in light of the parties' inability to communicate and show mutual respect. However, the court did conclude that the original decree did not contemplate Mark's parenting time would be so limited that he would be unable to exercise two weeks of uninterrupted time in the summer, each week consisting of seven-consecutive

days. The court thus modified the summer schedule permitting Mark to select his two weeks of uninterrupted parenting time first followed by Penny selecting her six weeks of parenting time. The court also lowered Penny's child support to $411.92 per month. Penny appeals from this ruling.

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*. Penny, as the one seeking to modify the physical care arrangement, bears this heavy burden. "[O]nce custody of children has been fixed, it should be disturbed only for the most cogent of reasons." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

Penny in this case has failed to prove a substantial change or that she can provide superior care. She asserts Mark's work demands since the decree result in his inability to spend time with the children. A review of the original dissolution decree demonstrates the court acknowledged Mark worked sixty hours per week at his job and would be switching to the day shift if awarded physical care. In light of the early start to the day shift, the court was aware Mark would need assistance in getting the children ready for school. At the time of the dissolution trial, Mark anticipated using his mother and possibly the neighbor to assist him in the morning. After he was awarded physical care, Mark agreed to allow Penny this extra hour of care in the mornings to help get the children off to school, rather than have the children in daycare or with his mother. The children requested Penny provide this care, and Mark agreed knowing the children should spend more time with their mother. Now Penny seeks to use this additional visitation against Mark to prove a change in circumstances and that she is the superior parent. This extra visitation of a few hours a week does not justify a modification of the physical care.

At the modification action, Mark testified he was still working sixty hours per week and had been able to arrange his overtime schedule to correspond with Penny's visitation, so he could maximize the amount of time he had available to spend with the children. Penny's work schedule increased from thirty-two to forty hours per week, though her employer remained flexible with her work hours, as it had been at the time of the dissolution.

The record does reflect that Cox has remained absent from the lives of the children at issue; however, this was anticipated by the district court at the time of the dissolution decree as evidenced by its issuance of the no-contact order between the children and Cox. The parties had difficulty communicating at the time of the dissolution and continue to have difficulty. Simply put, we find there has been no substantial change since the time of the decree that is more or less permanent and that relates to the welfare of the children. *See Melchiori*, 644 N.W.2d at 368. In addition, we find Penny has not proved she can provide superior care. *See id.*

IV. CHILD SUPPORT.

Next, Penny asserts the district court erred in not lowering her child support even further. She maintains Mark earns more income than the amount used by the district court in the child support calculation. She asserts the district court should have given her a greater reduction due to her expanded visitation. Finally, she claims she could be awarded one or both of the tax dependency exemptions for the children.

With regard to the tax exemptions, a review of the record indicates Penny never asked the court to award her the exemptions, though her child support worksheet, which was submitted to the court, allocated an exemption to each party. Mark's worksheet allocated both exemptions to himself as ordered by the original decree, and he requested in his testimony to be granted both exemptions. The court did not address the tax dependency exemption in its ruling, and Penny did not file a rule 1.904(2) motion seeking a ruling on the issue.

We find she failed to preserve her request for the tax exemptions, and we will not address it in this appeal. *See In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005).

The district court accepted Mark's analysis of his income as set forth in his child support worksheet. Mark calculated his income on the worksheet based on $24.33 per hour for forty hours per week. He also added $3900 per month of rental income that he receives from his properties. This amounted to an annual income of $97,406.40. The court also accepted Penny's statement of her income based on her 2011 tax return of $36,510 annually. Contrary to Penny's contention on appeal, the district court gave her credit for her extraordinary visitation based on visitation of 148 to 166 days.[1] The court ultimately set the child support at $411.92.[2]

We find amount the court accepted for Mark's income is not supported by the record. Mark testified he worked sixty hours per week, but his child support worksheet submitted to the court reported income based only on forty hours per week. He further testified that his pay stub for the period ending May 27, 2012, stated he earned approximately $43,000 year to date. This included a $10,000 profit-sharing bonus. This court finds his income from John Deere for the first five months of 2012 was approximately $33,000, after removing the profit-sharing bonus. If this amount is annualized, Mark can expect to receive $79,200 in

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[1] The evidence at the modification action indicated Penny was awarded 157 overnights in the original decree and this did not change as a result of the modification decree.

[2] The district court incorrectly stated in its ruling that the current obligation at the time of the modification was $571.38. This was the amount originally set in the dissolution decree; however, the court had previously reduced it to $457.10 after Penny filed a rule 1.904(2) motion in 2008. This error does not affect our analysis.

2012.[3] He also testified he receives a net income of $3900 per month from his rental properties. This amounts to another $46,800 in nontaxed income for 2012. We find Mark's annual income for the purpose of child support calculation should be $126,000, not $97,406.40 as used by the district court.

We therefore remand this case to the district court to recalculate the monthly support due based on Mark's annual income of $126,000, Penny's annual income of $36,510, Mark receiving both tax exemptions, and Penny receiving an extraordinary visitation credit based on the number of overnights she receives.

In addition, Penny has asserted Mark failed to comply with the statutory requirements of participating in a Children in the Middle course or its equivalent and submitting proof of compliance. *See* Iowa Code § 598.15 (2011). Mark does not dispute that assertion, and on our review of the district court docket we find no evidence of compliance. On remand, the district court shall order that Mark satisfy the requirements of Iowa Code section 598.15. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED AND REMANDED.

[3] This is more consistent with his 2011 tax return, which indicated he earned $89,527 in wages in 2011.