IN THE COURT OF APPEALS OF IOWA

No. 7-435 / 06-1921
Filed October 12, 2007

IN RE THE MARRIAGE OF TROY SCOTT GRANGER AND KERRI MARIE GRANGER

Upon the Petition of

TROY SCOTT GRANGER,
Petitioner-Appellant/Cross-Appellee,

And Concerning

KERRI MARIE GRANGER,
Respondent-Appellee/Cross-Appellant.

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

Troy Granger appeals and Kerri Granger cross-appeals from the district court's ruling on the parties' petitions for modification of the decree dissolving their marriage and a subsequent modification order. **AFFIRMED AS MODIFIED AND REMANDED.**

Michael J. Winter, Council Bluffs, for appellant.

Suellen Overton, Council Bluffs, for appellee.

Heard by Zimmer, P.J., Miller J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

MILLER, J.

Troy Granger appeals and Kerri Randolph (f/k/a Kerri Granger) cross-appeals from the district court's ruling on the parties' petitions for modification of the decree dissolving their marriage and a subsequent modification order. Troy claims the court erred in failing to transfer physical care of the parties' minor child from Kerri to him. Kerri claims the court erred in awarding Troy additional visitation when he did not request such relief, not ordering him to pay additional child support based on the child support guidelines, and not requiring him to remain in the vehicle when dropping-off or picking-up the minor child for visitation. Kerri requests appellate attorney fees. We affirm as modified and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

Troy filed a petition of dissolution of marriage on February 27, 2001. A decree dissolving the parties' marriage was entered on October 17, 2001. One child, Shad Granger, born January 20, 2001, was born to their marriage. The dissolution decree granted the parties joint custody and joint physical care of Shad. Each parent was to have Shad for alternating three-month periods, with visitation every other weekend for the other parent. Kerri appealed and Troy cross-appealed the physical care provisions of the decree, arguing neither of them asked for joint physical care. This court affirmed the decree and its joint physical care provisions. *In re Marriage of Granger*, No. 01-2009 (Iowa Ct. App. Oct. 16, 2002).

Kerri remarried in 2004, to Bryan Randolph, and they have one child together, Brady, born December 29, 2004. Troy remarried, to Kelly Granger, on July 30, 2006. Kerri had experienced some vertigo since Shad's birth and that condition worsened during her difficult pregnancy with Brady. Her vocal cords were also impacted and she lost strength in voice with some loss of ability to articulate. As a result of these difficulties, and upon the recommendation of her employer at the time, Kerri applied for disability benefits. The claim was denied. Kerri has not worked outside the home since October of 2004 and stated she did not intend to resume work outside the home.

Troy filed a petition for modification in January 2005 alleging that since the entry of the decree a significant change in circumstances had occurred warranting modification of the physical care and visitation provisions. He argued Kerri was not providing proper medical care to Shad and they could not agree as to which school Shad should attend when he started school in the fall. He sought physical care of Shad. Kerri counterclaimed, agreeing the parties' inability to agree as to the child's schooling required a change in the physical care arrangement and asserting that physical care of Shad should be placed with her. The district court agreed that a change in circumstances had occurred and after considering all the evidence entered an order on September 5, 2005, placing physical care of Shad with Kerri subject to Troy's visitation rights, which would include every other weekend, one evening every other week, one-half of summers, and holidays and other special days as previously ordered in the dissolution decree.

On October 5, 2005, Troy filed a motion for new trial alleging that shortly after the September trial on his modification petition Shad had developed pneumonia, and that he had newly discovered evidence concerning Kerri's health and her alleged failure to make full disclosure relating to the extent of her current health concerns. On November 21, 2005, the district court denied the motion. Troy subsequently filed a motion to obtain a patient's waiver and Kerri provided the waiver. Based on the medical records he received, Troy filed a petition to vacate the September 2005 modification order contending Kerri had misrepresented her medical condition and it was much worse than she purported.

After viewing the records submitted by Troy, the district court denied his petition to vacate. In its ruling the court did find Kerri admitted in her answers to the petition that she had not made full disclosure during the modification hearing, because she did have arrangements to visit the Mayo Clinic based on a referral from her neurologist, Dr. Cotton, before the modification hearing yet she did not disclose this information. The court further found that some of Kerri's omissions of treating doctors and information regarding her condition were troubling, but that all of the doctors from the Mayo Clinic and their opinions regarding her condition did come after the modification hearing. Based on the court's review of Kerri's medical records, it concluded she left the Mayo Clinic with the following diagnoses: progressive neurological condition with ataxia; peripheral neuropathy; ophthalmoplegia, ataxia, dysarthria, etiology undetermined; opthalmoparesis; and pain in heels. The court noted that Kerri had just had surgery for fallen

arches which would be consistent with the "pain in heels" diagnosis. It also noted that Dr. Cotton's October 14, 2005, doctor's note made a parenthetical statement that "Kerri is capable of care for her children."

Accordingly, the court concluded

> Medical information concerning this continuing issue needs to be shared. This must be done, even if Kerri believes it is to her detriment. Decisions concerning this issue must be controlled by the best interest of the child and not the best interest of either parent. Further minimization, deception or omissions by Kerri will not be viewed favorably by the Court.

However, in denying the motion the court ultimately concluded

> The burden is on Troy to prove by clear and convincing evidence that the Petition for Modification should be vacated. He has established that there may well be concerns about Kerri's health in the future if her condition is in fact progressive. There will probably be more contentiousness and additional modifications in the future concerning this issue. He has not proven by clear and convincing evidence that the Order for Modification should be vacated.

On May 16, 2006, Troy filed a second petition for modification, from which the current appeal stems. He alleged Kerri had a progressive and deteriorating health condition that makes her unable to properly care for Shad and has caused his care to have fallen to others. He argued Shad's future health and safety required physical care be transferred from Kerri to him. Kerri filed an answer contending there had not been a substantial change in circumstances and counterclaimed asking for additional child support.

Pending the trial on the modification petition, Troy filed an interim motion for temporary custody alleging, among other things, that Kerri failed to obtain appropriate dental treatment for Shad, Shad had ongoing constipation and rash

that Kerri was not addressing, and Shad had stepped on a "nail" and Kerri failed to seek the necessary medical care. A hearing on arguments of counsel was held on the motion and the court overruled the motion. Troy also filed a "Motion for Guidance Concerning Visitation" during the pendency of the modification action. Troy alleged Kerri's husband Bryan was being hostile and initiating arguments with him in front of Shad. He requested that the court order the visitation exchanges occur between Kerri and him only, without interference from third parties. The court continued hearing on the motion to the modification hearing.

In addition, prior to hearing on the modification petition the court granted Troy's request for appointment of a guardian ad litem (GAL). The GAL interviewed all concerned parties in this matter, visited each party's home, reviewed Kerri's medical reports, and attended Dr. Cotton's deposition. The GAL submitted a report to the court concluding there was not a change in circumstances sufficient to warrant a change in physical care, but that Troy's visitation should be increased in order to provide Shad and Troy more time together and allow Kerri a "break . . . to focus on her own health issues."[1]

A hearing was held on Troy's petition for modification. On October 20, 2006, the district court entered an order adopting the findings and recommendations of the GAL, concluding Troy failed to prove a substantial change in circumstances, and denying the petition. In denying Troy's petition, the court found Kerri does have a deteriorating neurological condition, but that

[1] It appears that although the GAL report was admitted at trial as an exhibit, it also had been made part of the district court file prior to trial.

based on its review of the medical records submitted by both parties her condition does not impede her ability to care for Shad. The court also reviewed Shad's medical and dental records and found they did not support Troy's assertion Kerri was not meeting Shad's needs. In addition, based apparently on the recommendation of the GAL to do so, the court increased Troy's visitation with Shad in an effort to maximize Shad's time with both parents.

The district court thus left physical care of Shad with Kerri, modified the visitation schedule to increase Troy's visitation, did not modify Troy's child support obligation because his increased visitation now entitled him to an extraordinary visitation credit, and ordered that Kerri facilitate all visitation exchanges with Troy while Bryan remain inside their home during such exchanges.

Troy appeals, claiming the court erred in not transferring physical care of Shad from Kerri to him. Kerri cross-appeals, arguing the court erred in awarding Troy additional visitation when he did not request such relief, in not increasing Troy's child support obligation based on the child support guidelines, and in not requiring that Troy stay in the car when dropping off and picking up Shad for visitation instead of requiring her husband to stay in the home. Kerri also requests Troy pay her appellate attorney fees and the costs on appeal.

II. SCOPE AND STANDARDS OF REVIEW.

This action for modification of a dissolution of marriage decree is an equity case. *See* Iowa Code § 598.3 (Supp. 2005) ("An action for dissolution of marriage shall be by equitable proceedings. . . ."); *Id*. § 598.21 (providing for

modification of orders for disposition and support when there is a substantial change in circumstances). Our review is thus de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value on custodial issues, and courts must make their decisions on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

III. MERITS.

As the party seeking to modify physical care, Troy is required to establish, by a preponderance of the evidence, that a substantial change in circumstances has occurred since entry of the dissolution decree or any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief, and that the change was not within the contemplation of the district court when the prior decree was entered. *See In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). The change must be more or less permanent, and relate to the child's welfare. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Troy must also show he is the parent who can more effectively minister to the children's well-being. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). The burden upon the parent seeking

modification is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children." *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994).

Troy contends Kerri's health problems have prevented her, and will continue to prevent her, from providing appropriate care for Shad. In support of this assertion he presented evidence he claims showed that Shad had pneumonia that went untreated for too long, an ongoing constipation problem, ongoing rash issues, dental problems that were not taken care of in a timely manner, and a foot injury for which he should have been taken to the doctor but was not.

Kerri does have a degenerative neurological condition that is clearly a serious health concern. However, Dr. Cotton testified he had no concerns that her condition interfered with her ability to be a good mother. Dr. Cotton stated Kerri does have some trouble walking and a speech impediment, both of which he opined would get worse over time. He stated, however, that it was impossible to determine what the expected progression would be. He further stated that in his opinion these impairments would not interfere with Kerri's ability to be a good mother. He testified: "She has a neurological impairment, like a lot of people do, but that doesn't mean she can't be a good mother." He also noted in one of his medical notes concerning Kerri that there was "certainly no reason that she is not physically capable of caring for her son." Dr. Cotton has done nothing to restrict

Kerri's right to drive, she still has her driver's license, and it appears from the record she does in fact drive on a regular basis to pick Shad up from school.

Dr. Powers is Kerri's podiatrist and performed surgery on both of Kerri's feet. He testified he has no concerns that Kerri's condition hampers her ability to be a good parent. He testified her surgeries went well and she is recovering well. Dr. Powers put no restrictions on Kerri that would limit her ability to care for her children and stated that nothing he was treating her for would prevent her from caring for her children.

In its ruling on Troy's modification petition, the district court determined that "a review of Shad's medical and dental history do not support [Troy's] assertion that Shad's needs are not being met." Specifically with respect to Shad's dental issues the court found

> While Shad needed dental work, [Kerri] was already in the process of obtaining the care when [Troy] made an appointment through his own choice of dentists that was able to complete the work sooner than [Kerri's] dental clinic, where she had been referred.

Based on our de novo review of the record, we agree with the district court and adopt its findings and conclusions on this issue as our own. While Kerri could have responded more quickly to some Shad's medical issues, there is no evidence that Shad's general dental and medical needs are not being met or that Kerri's health problems are interfering with Shad's physical well-being. The GAL described Shad as smart and outgoing and the district court found he was happy and well-adjusted.

Accordingly, we conclude Troy has not met his heavy burden to show there has been a material and substantial change in circumstances, of a more or

less permanent nature, such that Shad's best interests make it expedient to make the modification of physical care requested. At most he has shown he and Kerri are equally competent to minister to Shad and that is not sufficient to warrant a change in physical care. *See Rosenfeld,* 524 N.W.2 at 213. The district court did not err in denying Troy's request to change physical care of Shad from Kerri to him. We do, however, repeat the district court's admonition in its order on Troy's petition to vacate, that all medical information concerning Kerri's ongoing medical problems does affect the best interest of Shad and must be shared, not minimized or hidden.

On cross-appeal, Kerri first claims the court erred in granting Troy additional visitation because he did not request such relief and the court made no finding there had been a sufficient change in circumstance to warrant modifying the visitation schedule. We agree.

Troy's petition for modification did not ask for additional visitation, only a change in physical care. Nor can we justify the court's grant of additional visitation based on a prayer for general equitable relief because Troy made no such request in his petition. *See, i.e., Jorge Const. Co. v. Weigel Excavating & Grading Co. Corp.,* 343 N.W.2d 439, 441-42 (Iowa 1984) (finding prayers for general equitable relief to be recommended as sound pleading practice and that such request will justify a court in granting relief beyond what is asked in specific prayers); *Ferrari v. Meeks,* 181 N.W.2d 201, 204 (Iowa 1970) (stating prayer for general equitable relief is to be construed liberally and will often justify the court in granting relief other than that contained in the specific prayer).

Nor do we believe we can justify the court's action on the basis the issue was tried by consent of the parties.

> When a party introduces evidence without objection on an issue not raised by the pleadings, the court considers the matter tried by consent and properly in the case. Consent will not be found, however, where the evidence was also admissible on a different issue that was raised by the pleadings. That is because a party cannot be expected to object to evidence on the basis that it goes to an issue not raised in the pleadings when the evidence is otherwise admissible on an issue properly raised. Additionally, when evidence is relevant to an issue properly in the case, its introduction would not signal to the opposing party that a new issue is being tried.

Gibson Elevator, Inc. v. Molyneux, 668 N.W.2d 565, 567-68 (Iowa 2003) (quoting *Dutcher v. Randall Foods,* 546 N.W.2d 889, 893 (Iowa 1996)). There was a brief amount of testimony from Troy about how it "concerns" and "worries" him that his visitation was "decreased" by the prior modification order, and the GAL report did recommend that Troy receive additional visitation. Kerri did not object to either the testimony or the admission of the GAL report. However, it is clear both were also relevant and admissible on the issue properly raised in the pleadings, whether physical care of Shad should be changed to Troy. Accordingly, we conclude the issue of modifying the visitation schedule to grant Troy additional visitation was not tried by consent of the parties. *See id.*

In addition, we note the district court made no finding that there was a sufficient change in circumstances to warrant a change in the visitation schedule. Even though a much less extensive change need be shown to modify visitation than custody or physical care, the petitioning party still must show there has been a change of circumstances since the decree in order to justify a modification of

visitation rights. *See Donovan v. Donovan*, 212 N.W.2d 451, 453 (Iowa 1973); *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). The only reason given by the court for modifying visitation was the GAL's recommendation to do so.

We conclude the district court erred in addressing visitation rights and granting Troy additional visitation, because the issue was not raised by the pleadings, it was not tried by consent, and the court made no finding of a change in circumstances that would support such a modification.

Kerri next claims the court erred in determining Troy's child support obligation. Because we have determined the district court should not have modified the decree to increase visitation, Troy is not entitled to the extraordinary visitation credit the court allowed in calculating his child support payments. Therefore, we remand the case to the district court to re-calculate Troy's appropriate child support obligation based on the child support guidelines and without credit for extraordinary visitation.

Finally, Kerri claims the district court erred in ordering that her husband Bryan remain out of sight and contact with Troy during visitation exchanges and that the better solution would be to order Troy to remain in the car when dropping Shad off after visitation or picking him up for visitation. We conclude the court's solution to avoid the obvious animosity between Troy and Bryan during visitation exchanges was reasonable and the court did not abuse its broad discretion in such matters in so ordering. Troy and Kerri are Shad's parents and thus they,

not others, should be the ones primarily responsible for handling most matters concerning him, including visitation exchanges.

Kerri requests an award of appellate attorney fees and the costs on appeal. An award of appellate attorney fees rests in the court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal(s). *Id.* Upon consideration of the foregoing factors, we deny Kerri's request for an award of appellate attorney fees.

We have considered all issues raised in the parties' appeals, whether or not expressly addressed herein. We find any issues not expressly addressed to be controlled by our resolution of those expressly addressed or to be without merit.

III. CONCLUSION.

We conclude Troy failed to meet his heavy burden to prove a material and substantial change in circumstances such that Shad's best interests make it expedient to make the modification of physical care requested. The district court did not err in denying Troy's request to change physical care of Shad from Kerri to him. We further conclude the court did err in granting Troy additional visitation. Accordingly, we modify the court's ruling by deleting the provision for increased visitation and remand the case to the district court to re-calculate Troy's proper child-support obligation based on the child support guidelines and without credit for extraordinary visitation. Finally, we conclude the court's order

requiring Bryan to have no contact with Troy during visitation exchanges was reasonable because such exchanges should ordinarily take place between parents. We deny Kerri's request for appellate attorney fees.

Costs on appeal are taxed one-half to Troy and one-half to Kerri.

AFFIRMED AS MODIFIED AND REMANDED.