IN THE COURT OF APPEALS OF IOWA

No. 8-608 / 07-1875
Filed August 27, 2008

IN RE THE MARRIAGE OF HOWARD LOUIS GUSKI
AND LUCILLE IRENE GUSKI

Upon the Petition of
HOWARD LOUIS GUSKI,
Petitioner-Appellant,

And Concerning
LUCILLE IRENE GUSKI n/k/a LUCILLE EBERT,
Respondent-Appellee.

Appeal from the Iowa District Court for Cherokee County, Patrick M. Carr, Judge.

A father appeals a district court order (1) denying an application to modify the physical care provisions of a dissolution decree and (2) finding that the mother was not in contempt for interfering with the father's parental rights under the decree. **AFFIRMED.**

Jay Denne of Munger, Reinschmidt & Denne, Sioux City, for appellant.

R. Scott Rhinehart of Rhinehart Law, P.C., Sioux City, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

A father appeals a district court order denying an application to modify the physical care provisions of a dissolution decree.

I. Background Facts and Proceedings

Howard and Lucille Guski divorced in 2004. Under a stipulated Wisconsin decree, Lucille received "primary physical placement" of their child, Micky, born in 2001. She was also granted the right to move with the child to Cherokee, Iowa. Howard was to exercise visitation "every second week from Thursday at 5 p.m. until Monday at 5 p.m." The decree further provided that this visitation arrangement would change "[a]fter the child starts Head Start/school." It continued, "if the parties can't reach an agreement as to the Petitioner's physical placement rotation, either party is free to approach the Court."

Howard remained in Wisconsin and Lucille initially moved to Cherokee, Iowa and then to Washta, Iowa. Almost immediately, the parents clashed on visitation and medical issues. Lucille contacted the police when visitation exchanges did not go as planned. She also complained to social service agencies in both states about Howard's treatment of Micky. Neither the Wisconsin nor Iowa agencies found merit to these complaints.

Howard filed a contempt application in Wisconsin. The parties ultimately settled that matter with a written agreement approved by the court. The agreement included a provision that the parents would "provide each other with notice 72 hours in advance of any medical appointment and/or procedure." Left

judicially unresolved was the question of Howard's visitation once Micky began school.[1]

Lucille filed an Iowa petition to modify the visitation provision of the Wisconsin decree. She alleged that the provision interfered with Micky's schooling. This schooling included a special education component to address issues with Micky's speech, including in-home therapy sessions on certain Fridays.

Howard countered with his own application for modification, alleging that Lucille consistently denied him his "rights as a joint legal custodian." He requested physical care of Micky and, in the alternative, joint physical care. He also filed a contempt application alleging that Lucille interfered with (1) visitation, (2) choice of religion, (3) choice of school, and (4) authorization for nonemergency health care.

Following a hearing, the district court entered detailed findings of fact and conclusions of law on the physical care issue. The court stated:

> In this case, the exhaustive record indicates that the Respondent has not been as cooperative in visitation as she should have been. The Court does not find, however, that she has engaged in a specific plan or campaign to destroy the Petitioner's emotional relationship with Micky. The Respondent is inclined to overuse medical services, and seek intervention of government authorities such as the police and DHS. However, the most significant issue hampering visitation between the Petitioner and Micky is the 500-mile distance between his home in Wisconsin and Washta, Iowa, a circumstance existing at the time of the initial custody decree.

[1] Despite the distance, Howard testified that he recognized the problem of having four consecutive days of visitation per month during the school year and he offered to switch to every-other-weekend visitation. He said Lucille declined to informally resolve the matter.

> The Court does not seek to minimize the behavior of the Respondent. If the court were making an initial custody determination based on the record before it, unencumbered by five years of history with Micky, the result in this case might very well be different.

The court denied Howard's request for physical care, concluding, "[T]here has been a failure to prove either a substantial change in circumstances or to prove that the petitioner is in a position to provide superior parenting."

The district court next considered Howard's alternate request for joint physical care. After applying the factors set forth in *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007), the court again concluded that a substantial change in circumstances had not occurred.

The district court ordered Howard to pay $2500 towards Lucille's trial attorney fee bill, noting the disparity in the parties' incomes. The court specifically declined to order a greater payment in light of Lucille's "behavior," which the court concluded was a "substantial contributing factor" in the filing of Howard's counterclaim.

The district court separately addressed Howard's contempt application. Again, the court thoroughly analyzed each of the claimed grounds for contempt. On the claimed visitation denials, the court noted that the spirit and possibly the letter of a prior visitation order were not violated. On the question of religion, the court recognized that Micky was baptized in a different church than the one she attended with Lucille at the time of trial. However, the court noted that Howard had "every opportunity to teach his faith to Micky during his time with her." On Lucille's choice of school, the court stated, "Enrolling the child in the school maintained by public authorities in the district in which the primary caregiver and

the child reside cannot fairly be characterized as a violation of [Howard's] joint custody rights."[2]

Finally, on the question of whether Howard was notified about health care decisions, the court explained that Lucille did indeed fail to provide Howard with notice of several health-related decisions and, accordingly, was in "technical contempt of the literal words of the decree." However, the court declined to punish Lucille for this contempt, stating, "[T]here was no evidence that (1) these failures harmed Micky, (2) any procedures were not necessary, or (3) the notification, if given, would have changed the result."

Howard moved to enlarge and amend the findings and conclusions. *See* Iowa R. Civ. P. 1.904(2). In another detailed ruling, the district court denied the motion. Howard appealed.

II. *Appeal*

Howard argues the district court (1) should have granted him physical care, (2) alternately should have ordered joint physical care, (3) erred in its ruling on the contempt issue, and (4) abused its discretion in ordering him to pay a portion of Lucille's trial attorney fees.[3]

After reviewing the record de novo, we concur with the district court's thorough analysis of the physical care and joint physical care issues, including its

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[2] Micky was originally in the Cherokee school district. While Howard claims Lucille should have kept Micky in that district rather than moving her to a Washta school, a speech and language pathologist with the area agency covering the Washta school stated that Howard did not tell her of his preference for the Cherokee school district.

[3] The district court also modified the visitation provisions of the decree to provide for visitation every other weekend rather than four consecutive days a month in the event Howard remained in Wisconsin. Howard has not appealed this aspect of the court's ruling.

conclusion that the result might have been different had this been an initial custody determination. We affirm the court's decision to deny Howard's modification application.

With respect to the contempt ruling, the court's fact findings are supported by substantial evidence and the court did not abuse its discretion in declining to punish Lucille for failing to follow the letter of the health care notification provisions of the amended decree. *See* Iowa Code § 598.23(1) (2005) (stating person who willfully disobeys order or decree "*may* be cited and punished by the court for contempt . . . ." (emphasis added)); *Ary v. Iowa Dist. Court*, 735 N.W.2d 621, 624-25 (Iowa 2007) (reviewing punishment for abuse of discretion).

As for the district court's attorney fee award, we discern no abuse of discretion. *See In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2007) (reviewing trial attorney fee award for abuse of discretion). The district court based the award on Howard's higher earnings. The court could have ordered Howard to pay a significantly greater amount of Lucille's attorney fees, but did not do so in light of Lucille's behavior.

Finally, we turn to Lucille's request for appellate attorney fees. We recognize that Howard's higher earnings would militate in favor of an award. However, Howard's appeal is not without merit. *See In re Marriage of Benson*, 585 N.W.2d 252, 258 (Iowa 1996) (authorizing consideration of relative merits of appeal). For that reason, we decline to order Howard to pay some or all of Lucille's attorney fees associated with this appeal.

AFFIRMED.