IN THE COURT OF APPEALS OF IOWA

No. 9-414 / 08-0469
Filed July 2, 2009

IN RE THE MARRIAGE OF PATRICK MAHONEY AND ROSE MAHONEY

Upon the Petitioner of
PATRICK MAHONEY,
Petitioner-Appellee,

And Concerning
ROSE MAHONEY, n/k/a ROSE KUEHL,
Respondent-Appellee.

Appeal from the Iowa District Court for Buchanan County, John Bauercamper, Judge.

The petitioner appeals from the district court's order modifying physical care of the parties' children. **AFFIRMED.**

Jeffrey Clements, West Union, for appellant.

Cheryl Weber, Waterloo, for appellee.

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

MANSFIELD, J.

Patrick Mahoney appeals from the district court's order modifying the parties' physical care arrangement. He asserts that he should have been granted more visitation time with the children. We affirm.

I. Facts

Patrick Mahoney and Rose Kuehl married and had two children, a daughter born in 1996 and a son born in 1999. They filed a stipulated decree for dissolution of marriage in 2003, which contained a provision for joint physical care of the children. The children would be in the care of Patrick every Wednesday evening through Sunday evening and with Rose from Sunday evening until Wednesday evening and every fifth weekend. This arrangement coincided with Rose's work schedule.

In 2005, Patrick petitioned for modification of the joint physical care arrangement, alleging that he should be awarded physical care. Rose cross-petitioned, requesting that she be granted physical care of the children. The district court conducted a trial and ultimately declined to modify the physical care provisions of the decree. On appeal, we reversed and remanded. *In re Marriage of Mahoney*, No. 06-1237 (Iowa Ct. App. October 12, 2007). In our opinion, the details of which we do not repeat here, we pointed out that Patrick had reported or instigated approximately twelve unconfirmed child abuse complaints against Rose between 2003 and 2005, and had wrongfully withheld visitation (forcing Rose to seek court intervention). We also noted that Patrick's improper efforts to influence the children in support of his campaign against Rose had resulted in an

adverse effect on the children. Accordingly, we determined that Rose should be granted physical care and remanded for further proceedings.

On remand, the district court did not receive any additional evidence, but instead adopted our findings and rulings and awarded Rose physical care of the children. The decree also granted Patrick visitation from Friday evening to Sunday evening on alternate weekends, one evening of the week during the school year (if the parties live in the same school district), an extended summer visit of two separate three-week periods, and alternate holidays. Patrick's motion for new trial and motion for amended and enlarged decree were denied. Patrick then filed this appeal. Patrick argues that he should have received extraordinary visitation on remand, rather than the liberal but fairly typical visitation that he did receive.[1]

II. Standard of Review

This action for modification of a dissolution of marriage decree is an equity case. *See* Iowa Code § 598.3 (2007). We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). Our overriding consideration is the best interests of the children. Iowa R. App. P. 6.14(6)(*o*).

[1] Patrick does not tell us exactly what additional visitation time he feels he should have received. In the district court, he argued, among other things, that the weekend visitations should commence on Thursday rather than Friday.

III. Analysis

Patrick argues that the district court, when it considered this matter on remand, should have given him more visitation with the children than he received. He points to the provision in the original dissolution of marriage decree that allowed him approximately six months a year with the children. The supplemental decree would reduce that time to approximately three months a year. To a large extent, this reduction in time with the children (from approximately one-half to one-quarter) stems from our earlier decision on appeal that Rose should be awarded physical care. Many of Patrick's arguments now are a reprise of his arguments in the prior appeal. We believe that our prior opinion addresses those arguments. There we concluded that the joint physical care arrangement needed to be changed, that the parental discord was having a disruptive effect on the children, and that Rose was the superior caretaker because of the detrimental effect Patrick's actions had on the children.

We believe the district court's decision to provide Patrick with liberal but not extraordinary visitation was an appropriate action on remand. The facts in this record, including the substantial difficulties between the parties[2] and the adverse effects of Patrick's unwarranted actions, demonstrate that the district court's visitation schedule is reasonable. *Callender v. Skiles*, 623 N.W.2d 852, 855-56 (Iowa 2001) (holding that in fashioning the visitation schedule, the court should consider the best interests of the child including potential disruptions that could result from additional time with the noncustodial parent).

[2] For example, they were transferring the children to each other at the police department.

Patrick argues that Rose "did not have any objection to Patrick being awarded extraordinary visitation if she were awarded primary physical placement." We think this argument reads too much into a single answer that Rose gave to a single question at the modification hearing. She was asked, "If the court were to deem it appropriate for Mr. Mahoney to have extraordinary visitation, would you object to that?" She answered, "No. I would not object to that." This answer was a statement concerning the position Rose would take *if* the court deemed extraordinary visitation appropriate, which it did not. It is not a binding stipulation. In any event, the district court was authorized to determine the appropriate level of visitation itself, based upon the factors in Iowa Code section 598.41 and Iowa case law. *See id.* at 855-56.

Finally, Rose requests appellate attorney fees in the amount of $1500. An award of appellate attorney fees is not a matter of right, but lies within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Id*. When this case was previously before us, we denied Rose's request based on the parties' financial circumstances. However, we believe the situation is different now, because Rose has been forced to undergo a second round of appellate proceedings defending the district court's decision against arguments that, to a large extent, are restatements of prior positions. In our exercise of discretion, we grant Rose's request for attorneys fees on appeal in the amount of $1500.

AFFIRMED.