IN THE COURT OF APPEALS OF IOWA

No. 9-612 / 09-0558
Filed August 19, 2009

IN RE THE MARRIAGE OF MICHELLE SAWYER AND BRENT SAWYER

Upon the Petition of
MICHELLE SAWYER,
n/k/a MICHELLE JANSSEN,
Petitioner-Appellant/Cross-Appellee,

And Concerning
BRENT SAWYER,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

A mother appeals and the father cross-appeals a district court order modifying the legal custody, visitation, child support, and apportionment of tax exemptions provisions of their dissolution decree. **AFFIRMED IN PART AND REVERSED IN PART.**

Barry S. Kaplan and Melissa A. Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C., Marshalltown, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

DOYLE, J.

Michelle Janssen, formerly Michelle Sawyer, appeals the district court's order granting Brent Sawyer's petition to modify the legal custody, visitation, child support, and apportionment of tax exemptions provisions of the parties' dissolution decree. Brent Sawyer cross-appeals claiming the court erred in not granting him Wednesday overnight visitation and trial attorney fees. Both parties request appellate attorney fees. Upon our review, we affirm as modified.

***I. Background Facts and Proceedings*.**

Brent and Michelle married July 3, 1999, and have two children born of the marriage. During the marriage, Brent was an assistant manager of a retail store and earned approximately $44,000 per year. Brent used methamphetamine for several years during the marriage and did not seek treatment.

On February 5, 2007, Michelle filed a petition for dissolution of marriage. The parties filed a stipulation and agreement on March 27, 2007, signed by the parties and each party's counsel. Among other things, the stipulation provided that the parties agreed:

> 3. That Michelle and Brent mutually agree that each party is a fit and proper parent to have custody of [their two minor children] . . . and that *Michelle shall have sole legal custody* of the children and the rights and responsibilities of the children's physical care.
>
> The parties agree that they shall cooperate in all ways possible to assure that this dissolution of marriage shall have the least amount of impact on said children and that the best interests of the children shall be at all times taken into consideration by both parties relative to the children's needs, education, discipline, and health care.
>
> 4. That *Brent shall be entitled to reasonable and liberal visitation* with the children at all times and places not inconsistent with the children's health, education, or welfare, as the parties may agree. *In the event the parties are unable to agree, Brent shall be*

> *entitled to visitation of two weekends per month* from Friday at 5:00 p.m. until Sunday at 5:00 p.m. (the 1st and 3rd weekends) and alternate holidays, as well as Father's Day each year.
>
> *The above schedule is intended to be used only as a last resort when the parties are unable to agree.* Both parties shall attempt to reach a mutually acceptable decision on all visitation, and the above schedule is not intended to suggest any limitation upon visitation. . . . The parties acknowledge that they will make every reasonable effort to facilitate visitations by cooperating with each other in all respect to make said visitation as enjoyable as possible for the children.

(Emphasis added.) The stipulation further provided that Brent would pay child support of $775 each month and Michelle would be entitled to claim both children as her dependants for federal and state income tax purposes each year. Brent's monthly child support obligation was based upon his $44,000 salary. The stipulation did not specify visitation holidays nor did it provide Brent any additional summer visitation with the children. On April 25, 2007, the district court approved the parties' stipulation, and a decree dissolving Brent and Michelle's marriage was entered.

At the time the parties reached their stipulation and agreement and at the time the decree was entered, Brent and Michelle were friendly with one another, communicating well, and open to reconciliation. During this time, Brent was seeing the children approximately four days a week. However, a month or two after the decree was entered, the parties decided not to reconcile and ended their relationship. After the parties' ended their relationship, Michelle reduced the amount of Brent's visitation.

After the stipulation had been signed, but just prior to the district court's entry of the decree, Brent's employment with the retail store was terminated after it was alleged he had sex some months before with a subordinate employee at

work. Brent had previously violated the store's sexual harassment policy for having sex with a different subordinate employee.[1] In May 2007, Brent began working for Ball Plastics and earned $16.00 per hour. Brent left the job in June 2008 due to the employer's inconsistent schedule, mandatory overtime requirements, and because he needed every other weekend off for visitation with his children. Brent was on track to make $40,000 or more from Ball in a year, including his overtime pay. Thereafter, Brent began working for Iowa State University, earning $12.50 per hour. Brent worked for the university for approximately three months until he was laid off. At the time of the modification hearing, Brent was working at a retail store earning $9.00 per hour, but anticipated he would be called back to Iowa State University in a few weeks and would again earn $12.50 per hour.

Less than a year after the decree was entered, Brent filed a petition to modify the decree, requesting that legal custody of the children be modified to joint legal custody, that the court set forth a liberal visitation schedule, that his child support obligation be reduced based upon his new lower income, and that the tax exemption apportionment provision of the decree be modified so each parent could claim one child as a dependent for tax purposes. He also requested attorney fees. A hearing on Brent's application to modify was held September 24, 2008. Brent testified the substantial changes in circumstances that warranted modifying the decree were his change in job, his visitation with the

[1] Brent admitted that during the course of the parties' marriage he had sex with this employee and that she became pregnant as a result thereof. Brent denied the alleged acts that precipitated his termination.

children had not gone the way he wanted, and the parties' lack of communication.

Brent testified that after he filed his petition to modify, Michelle further restricted his visitation to the fall-back visitation schedule set forth in the decree—the first and third weekends of each month. Brent testified Michelle promised him at the time he agreed to the stipulation that he would have liberal visitation with the children, which he believed would be four days a week. He testified the parties never planned to use the minimum schedule set forth in the decree if the parties could not agree on visitation. Brent also testified that Michelle interfered with some of his planned visitation with the children. Brent testified that he was unable to receive information regarding the children's education, extra curricular activities, and medical appointments. Brent testified he had been drug free for several years.

Michelle testified that she had previously sought sole custody of the children due to Brent's past methamphetamine, alcohol, and sexual abuse. She testified that Brent had requested their oldest child to provide a urine sample to falsify a drug test, and that she had found a methamphetamine pipe in their basement in the presence of their children. Michelle testified she had allowed Brent liberal visitation with the children even after their relationship ended until she receive a letter from his attorney requesting more visitation and other changes. Because they were unable to agree on the visitation, she restricted his visitation to the minimal visitation schedule set forth in the decree. However, she acknowledged that neither she nor Brent planned to use the minimal visitation schedule set forth in the decree. Michelle testified that she had notified Brent as

to the children's information school, extra curricular activities, and health information and she had no objection to providing such information to Brent. She requested that Brent's petition to modify be denied.

On October 31, 2008, the district court entered its order granting Brent's petition to modify the decree. The court modified the decree to provide the parties joint legal custody, finding

> It is this court's impression and conclusion that Michelle has used her position as sole legal custodian to restrict Brent's visitation. The lack of communication between Michelle and Brent, and the difficulties they have had with visitation, have combined with the vague, sparse description of Brent's visitation in the April 25, 2007 decree to constitute a material change in circumstances on the issue of joint legal custody [versus] sole legal custody.

As to visitation, the court found that "Brent has had difficulty exercising visitation, and the communication between the parties has deteriorated. While Michelle has legitimate concerns about Brent and his history of drug use, there is no current evidence that he has used illegal controlled substances." The court then modified the visitation provisions of the decree, allowing Brent visitation with the children every other weekend, Wednesday evenings, and four weeks in the summer, every other holiday, and other miscellaneous days. The court further found there was a material and substantial change in circumstances justifying modification of Brent's child support obligation, based upon Brent's lower income following his termination from the retail store. The court found that Brent's misconduct leading to his termination was not motivated by his desire to avoid paying child support, and therefore reduced his child support obligation to $522.35 per month, based upon his expected income of $12.50 per hour. The court also modified the decree to allow each parent to claim one child as a

dependant on his or her tax returns. The court ordered each party to pay his or her own attorney fees.

Thereafter, Michelle filed a motion to amend or enlarge, requesting that the modification decree be set aside in full. Brent resisted and requested the court specify the holiday visitation schedule and transportation responsibilities. Brent further requested attorney fees.

The court on March 12, 2009, entered an order denying Michelle's motion. Additionally, the district court noted that parties were unable to agree on any issue relating to their children and unfortunately required micromanagement by the court of their affairs. The court then set forth a specific holiday visitation schedule, the transportation responsibilities of the parties, and clarified several other issues for the parties.

Michelle appeals. She contends the district court erred in all of its modifications to the decree. Brent cross-appeals. He contends the court should have granted him Wednesday overnight visitation and trial attorney fees.

***II. Scope and Standards of Review*.**

Our review is de novo. Iowa R. App. P. 6.907 (2009). We examine the entire record and adjudicate anew rights on the issues properly presented. *See In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). We are not bound by the district court's findings of facts, but we give them deference because the court had a firsthand opportunity to view the demeanor of the parties and evaluate them as custodians. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998); *see also* Iowa R. App. P. 6.904(3)(*g*).

***III. Discussion*.**

***A. Modification of Custody*.**

A court is empowered to make changes in a dissolution of marriage decree only upon a demonstrated qualifying change in circumstances. *See In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999); *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991). Whenever a dissolution decree is being modified, a parent must show a substantial change in circumstances, except where otherwise provided by statute. *See In re Marriage of Pals*, 714 N.W.2d 644, 646-47 (Iowa 2005). A party seeking modification of the legal or physical custodial provisions of a dissolution decree must meet a high standard. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

Id.; *see also In re Marriage of Dethrow*, 357 N.W.2d 44, 45 (Iowa Ct. App. 1984) (distinguishing between the standards used in initial custody awards from the standard used in modifications of initial custody awards).

The district court found that the parties' lack of communication and difficulties with visitation, "combined with the vague, sparse description of Brent's

visitation" in the decree constituted a material change in circumstances on the issue of joint legal custody versus sole legal custody. Upon our de novo review, we disagree.

Brent acknowledges in his brief that the evidence "actually demonstrates that [the parties] communicate just fine regarding the children" and that "[Michelle] testified that she and Brent were able to sit down in her canteen at her place of employment and discuss a visitation schedule without any fighting or arguing." This directly contradicts the district court's finding that the parties lacked communication constituting a substantial change in circumstances to modify the legal custody provision.

Additionally, the district court found that Michelle "used her position as sole legal custodian to restrict Brent's visitation." We disagree. Here, the parties' stipulation called for "liberal visitation" and no set schedule was set forth unless the parties failed to agree on a schedule. Brent testified that he saw the children four days a week while the parties were considering reconciling and that he received less visitation after the parties ended their relationship. Michelle testified she allowed Brent a significant amount of time with the children and worked hard to accommodate his nontraditional work schedule. She testified she only limited his visitation to the fall-back visitation schedule set forth in the parties' stipulation after she received a February 27, 2008 letter from Brent's attorney indicating there was a disagreement as to the visitation. Given the language of the decree allowing for liberal visitation without setting forth a specific schedule and the decree's fall-back visitation schedule to be employed if

the parties could not agree, we conclude the evidence does not establish Michelle used her position as sole custodian to restrict Brent's visitation.

There is no question that "[o]ur statutes express a preference for joint custody over other custodial arrangements," *In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988). Nevertheless, Brent stipulated and agreed at the time of the parties' dissolution that Michelle would have sole legal custody of their children. He agreed to Michelle having sole legal custody even though both parties agreed that each party was a fit and proper parent to have custody of the children. Brent also agreed to Michelle having sole legal custody even though the terms of his visitation were "vague" and "sparse." Although Brent may now regret some aspects of the stipulation he and Michelle entered into, we conclude Brent failed to establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to modify the legal custody provision of the decree. We therefore reverse the district court's order modifying the legal custody provision of the decree.

***B. Visitation*.**

In order to modify the visitation provisions of a dissolution decree, a party must establish by a preponderance of the evidence there has been a material change in circumstances since the decree, and the requested modification is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000). However, the burden in a modification of visitation rights is different from the burden in a child custody change. *See In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985). Generally, a much less

extensive change of circumstances needs to be shown to modify a visitation schedule than a custody provision. *Id.*

As to visitation, the court found that "Brent has had difficulty exercising visitation . . . ." Although this is a much closer call, both parties acknowledged that Brent was to have liberal visitation with the children and that neither planned to utilize the fall-back visitation schedule in the decree. The evidence at the hearing indicated that Brent's visitation with the children was reduced from four days a week at the time the stipulation was agreed upon to something less after the parties ended their relationship. After receiving the letter from Brent's attorney, Michelle was unwilling to provide Brent any more contact with the children than the minimum the parties stipulated and agreed to. At the time of the decree no one contemplated this level of inflexibility. Because the burdens in establishing a change of circumstances to modify visitation are less extensive than those to justify changing legal custody, we agree with the district court that Brent established there was a material change in circumstances since the decree regarding his reduced visitation. We agree the district court's visitation schedule, allowing Brent to have visitation every other weekend, Wednesday evenings, alternating holidays, and four weeks in the summer, to be liberal, fair, and in the best interests of the children. We also find no error with the court's failure to award Brent Wednesday overnight visits with the children. We therefore affirm the district court's order modifying the visitation provisions of the decree.

***C. Child Support*.**

In determining whether there has been a substantial change in circumstances, the court may consider "[c]hanges in the employment, earning

capacity, income, or resources of a party." Iowa Code § 598.21C(1)(a) (2007); *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). However, "a parent may not rely on a claim of decreased income to obtain a modification of a support order if the parent's reduced earning capacity and inability to pay support is self-inflicted or voluntary." *In re Marriage of Swan*, 526 N.W.2d 320, 323-24 (Iowa 1995). Where a parent's reduction in income is the result of an improper intent to deprive children of support, we may refuse to modify the parent's child support obligation. *See In re Marriage of Rietz*, 585 N.W.2d 226, 229-30 (Iowa 1998); *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998).

Here, the district court found that there was a material and substantial change in circumstances justifying modification of Brent's child support obligation based upon Brent's lower income following his termination from the retail store. The court further found that Brent's misconduct leading to his termination was not motivated by his desire to avoid paying child support, and therefore reduced his child support obligation to $522.35 per month, based upon his expected income of $12.50 per hour. Upon our review, we agree.

While Brent's termination for violation of company sexual harassment policies is not commendable, it does not qualify as a self-inflicted or voluntary reduction of income that would justify using his former salary in setting child support payments. Brent's alleged acts of sexual misconduct in the workplace occurred before Michelle filed her petition for dissolution of marriage and months before any child support obligation was imposed. Also, we doubt that an intent to deprive his children of support was in Brent's mind as he engaged in the alleged conduct that lead to his termination. We conclude that Brent's termination as a

result of the alleged misconduct does not qualify a self-inflicted or voluntary reduction of income for purposes of calculating child support. *See In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993) (termination for insubordination did not qualify as self-inflicted or voluntary reduction of income justifying the use of former salary in setting child support).

After termination from his $44,000 a year job, Brent took a position at Ball Plastics with a potential of making $40,000 a year. There was no flexibility in the schedule, and overtime was mandatory, so it was difficult for him to see his children on the weekends he had designated visitation. He testified he left that job so that he could see his children. Michelle counters that Brent voluntarily quit because he did not care for the hours at Ball. Although Brent's leaving Ball Plastics was voluntary and resulted in a reduction in income, we do not find Brent's motivation in leaving Ball Plastics to be improper.

Brent was next employed at the university until he was laid off as a result of union "bumping" rules. His termination from this $12.50 an hour job was involuntary and not attributable to any acts on the part of Brent. He reapplied for another position at the university and took a job at Theisen's for $9.00 an hour, the job he was working at the time of the modification hearing.

Upon our de novo review, we affirm the district court's order modifying the child support provision of the decree.

***D. Tax Exemptions*.**

The district court modified the tax exemption apportionment provision of the decree to allow each party to claim one child as a dependant. However, the court did not set forth any reasons for changing the parties' stipulated agreement.

Applying the above stated principles for the modification of a decree, we conclude the district court erred in modifying the tax exemption apportionment. Brent agreed that Michelle would be able to claim both children as dependants in their agreed upon stipulation, and he has not set forth any reasons to establish a substantial change in circumstances to warrant modification of this provision. Furthermore, as Michelle earns substantially more money than Brent, the children reside with Michelle for the majority of time, and Brent's child support obligation has been reduced, we find that Michelle can more fully utilize the tax exemptions. We conclude Brent failed to establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to modify the tax exemption apportionment provision of the decree.

***E. Trial Attorney Fees*.**

Brent argues the district court erred in failing to award him attorney fees on the modification. Iowa district courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). Upon our review, we find no abuse of discretion in the denial of Brent's request for trial attorney fees.

***F. Appellate Attorney Fees*.**

Additionally, each party requests an award of appellate attorney fees. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id*.; *In re Marriage*

of Berning, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We decline to award attorney fees in this case. Court costs are taxed one-half to Michelle and one-half to Brent.

***IV. Conclusion*.**

Upon on our de novo review, and for the reasons set forth above, we conclude the district court erred in modifying the legal custody and the allocation of tax exemptions provisions of the decree. We further conclude the district court did not err in its modification of the visitation schedule and Brent's child support obligation. The district court did not err in failing to award Brent trial attorney fees. We decline to award appellate attorney fees.

AFFIRMED IN PART AND REVERSED IN PART.