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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-93 / 99-469
Filed April 28, 2000

IN RE THE MARRIAGE OF SUSIE M. SPAULDING and RANDY J. SPAULDING

Upon the Petition of
SUSIE M. SPAULDING, n/k/a SCHONE,
Petitioner-Appellee,

And Concerning
RANDY J. SPAULDING,
Respondent-Appellant.

FILE
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CLERK SUPREM

Appeal from the Iowa District Court for Marion County, Robert Hutchison, Judge.

Respondent appeals from the district court's ruling modifying the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Kolleen K. Samek, Des Moines, for appellant.

Carmen Eichmann, Des Moines, for appellee.

Heard by Huitink, P.J., and Streit and Miller, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

Susie and Randy Spaulding's marriage was dissolved on July 21, 1995. The decree dissolving their marriage included the following provisions concerning custody of their two children:

> 1. The parties shall have joint legal custody of the minor children namely:
>
> Kandi Spaulding, born May 29, 1981; and
> Shane Spaulding, born July 7, 1986.
>
> Primary physical care custody and control of Shane shall be with Susie subject to the visitation as set forth following:
> Primary physical care and custody and control of Kandi shall be with Randy subject to the visitation as set forth following:
>
> 2. VISITATION: That the parties shall have the children an equal amount of time. Both parents will stay in Knoxville School District.
>
> That regardless of other visitation Randy shall have the children on Father's Day and Susie shall have the children on Mother's Day. That the children shall be with Susie on Christmas Eve of even numbered years and with Susie on Christmas on odd numbered years.

On July 16, 1998, Susie filed an application to modify the July 1995 decree. In her application Susie requested physical care of Kandi, modification of Randy's visitation rights concerning Shane; child support for Shane, attorney's fees, costs, and general equitable relief. Susie withdrew her request for Kandi's physical care prior to January 19, 1999, the date on which her application was reached for trial.

The trial court found that "Since July 1995, the parties have treated Shane's situation as a shared physical care arrangement." Based on this finding,

the court deemed Susie's application to include a request for physical care of Shane. Susie was assigned the burden to prove a substantial change of circumstances justifying modification of Shane's physical care. Because the court ultimately found Susie had sustained her burden, she was awarded Shane's physical care and child support. Randy was awarded substantial but well-defined visitation rights.

On appeal Randy argues the district court erred in entering an order changing primary physical care of Shane, stating this issue was not properly before the court. Also, Randy argues the district court erred in finding Susie established a substantial change in circumstances necessitating a change in Shane's physical care.

Susie contends Randy failed to preserve error on his claim that the issue of modifying primary physical care of Shane was not properly before the court. She requests appellate attorney fees.

II. Standard of Review.

Our review in this equitable matter is de novo. Iowa R. App. P. 4; *see In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We are not bound by the district court's findings but give them deference because the district court had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

III. Scope of Trial Issues.

The district court's characterization of the issue below and Randy's contention on appeal are both premised on the notion the parties' postdecree

physical care experience resulted in either a constructive modification of the 1995 decree or de facto split physical care of Shane. As a result Randy contends, and the district court determined, Susie bore the burden to show a substantial change of circumstances warranting modification of the parties' de facto split physical care arrangement.

We are reluctant to endorse the district court's premise and resulting allocation of the burden of proof. Notions of de facto custodial arrangements or constructive modification of a dissolution decree implicate enforcement of extra judicial agreements made by the parties. The enforceability of extra judicial agreements made by the parties in dissolution proceedings is generally dependent on acceptance or approval by the court. *In re Marriage of Von Glan*, 525 N.W.2d 427, 430 (Iowa App. 1994) (citations omitted). The strong public policy precluding enforcement of private agreements in a child support context is also instructive. *See In re Marriage of Jacobo*, 526 N.W.2d 859, 867 (Iowa 1995) (courts are loath to sort through numberless disputed claims of undocumented private agreements concerning support obligations; a matter so important should be clearly fixed and authorized by court order). The action taken by the district court is in irreconcilable conflict with these authorities.

We believe the parties' de facto circumstances are more appropriately considered as evidence on the issue of modification rather than the subject matter to be modified. The confusion and uncertainty resulting from the district court's contrary conclusions are aptly demonstrated by the following exchange during the trial:

> MS. EICHMANN [Susie's Counsel]: Your Honor, I would point out for the Court that I don't believe the issue of change of physical custody was pled by the Respondent. That was not an issue we were addressing here today.
>
> COURT: Well, whether it was or it wasn't, I think it's before the Court. I think what you're asking me to do is no less than a change of custody and whether I say that and if that were by conclusion and said you had to come back for another trial, that seems to be very silly. You can make your objection if you want to do that. As far as I'm concerned, everything is fair game at this point.
>
> MS. SAMEK [Randy's counsel]: I believe the trial ordered custody was in issue.
>
> COURT: No, as a matter of act, it was not.
>
> MS. SAMEK: I thought it was.
>
> COURT: But I think this is a custody case in the guise of visitation.

We hold the subject matter of the modification and the attendant burden of proof are properly defined by the provisions of the relevant order, judgment, or decree addressing the issue.

Under our interpretation of the record, the trial issues were limited to Randy's visitation with Shane and obligation to pay child support. The district court erred to the extent modification of Shane's physical care was considered an issue in dispute. We, however, see no reason to disturb the district court's ultimate ruling. At its worst, the district court's modification of Shane's physical care only served to confirm the controlling physical care provisions of the 1995 decree.

IV. Visitation.

The burden on the party seeking to modify visitation has been expressed in the following terms:

> The burden to change physical care is heavier than the burden to change the place of school attendance or to change the

> visitation schedule. *See In re Marriage of Jerome*, 378 N.W.2d 304, 305 (Iowa App. 1985). To justify a change of visitation, the petitioning party must show there has been a change of circumstances since the dissolution decree. *Id.* The burden in a modification of visitation rights is different from the burden in a child custody change. *Id.* Generally, a less extensive change of circumstances need be shown in visitation cases. *Donovan v. Donovan*, 212 N.W.2d 451, 453 (Iowa 1973).

In re Marriage of Spears, 529 N.W.2d 299, 302 (Iowa App. 1994).

The district court found:

> [T]he Court feels compelled to find a substantial change of circumstances and to make a change in the custody and visitation arrangement. The indisputable fact is that these parents are at present incapable of communicating with one another toward the best interests of the child. Shane must be given an alternative to living out of a suitcase for the next six years. The present situation is not in his best interests. The Court is also persuaded that further counseling is desired by Shane, and will not occur given the present custodial arrangement where each parent essentially has unilateral power over all decisions concerning the child. Although as expressed above the Court has serious reservations about petitioner's past conduct and future intentions, it appears at this time that Shane's best interests will be better served by living with Susie.

Based on these findings, the court imposed the following visitation schedule:

> alternate weekends from Friday evening at 6:00 p.m. to Sunday evening at 7:00 p.m., one weeknight each week from 5:30 p.m. to 8:00 p.m., and alternate holidays (which shall include Easter Memorial Day, July 4, Labor Day, Thanksgiving, Christmas Eve, Christmas Day, New Year's Eve, and New Year's Day). Petitioner shall have the child on Mother's Day each year, and respondent shall have the child on Father's Day each year. The parties shall alternate the child's birthday. In addition to the foregoing, respondent shall have six weeks of visitation with the child each summer, provided, however, that no more than two weeks may be consecutive. Respondent shall designate in writing by May 1 of each year which weeks are to be his summer visitation weeks. Holiday visitation takes priority over all other provisions of this decree.

The district court's findings of fact find abundant support in the record, and we adopt them as our own. We also conclude the visitation schedule established by the district court is more than adequate and is in keeping with our preference for liberal visitation. *See Metallo v. Musengo*, 353 N.W.2d 872, 875 (Iowa App. 1984).

V. Appellate Attorney Fees.

An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). We are to 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 trial court's decision on appeal. *In re Marriage of Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). We award Susie $1000 in appellate attorney's fees.

The judgment of the district court is affirmed.

AFFIRMED.