IN THE COURT OF APPEALS OF IOWA

No. 8-478 / 97-1759

IN RE THE MARRIAGE OF GEORGE STEVE MRLA AND RHONDA MRLA

Upon the Petition of
GEORGE STEVE MRLA,

Petitioner-Appellant/Cross-Appellee,

And Concerning
RHONDA MRLA,

Respondent-Appellee/Cross-Appellant.

FILED
JAN 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge.

Petitioner appeals the district court's order modifying the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Craig H. Lane of Craig H. Lane, P.C., Sioux City, for appellant.

Shelley A. Horak, Sioux City, for appellee.

Heard by Streit, P.J., Mahan, J., and McCartney, S.J.* Zimmer, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

MC CARTNEY, S.J.

The petitioner, George Steve Mrla (George), appeals from a decision of the district court which modified in certain particulars a decree of dissolution. Respondent, Rhonda Mrla (Rhonda), cross-appeals the decision of the court in failing to modify the decree of dissolution in certain other particulars. We affirm as modified.

The marriage between the parties was dissolved by decree of dissolution in October 1993. The parties had stipulated and agreed upon all outstanding issues between them. The decree of dissolution endorsed and adopted the stipulation of the parties.

That stipulation, in part, provided that while the parties would enjoy joint legal custody of their three minor children, Samantha, Danielle, and Nicole, that the physical placement of these little girls would be with the petitioner, George.

Extensive visitation was given respondent, Rhonda, including every other weekend for two days, half of the Christmas vacation, alternating holidays, and six weeks in every summer vacation.

The relationship between the parties subsequent to the dissolution of their marriage has constantly deteriorated to such a point that they find themselves incapable of dealing with matters involving the children with any civility or accord. The report of the guardian ad litem for the minor children clearly reflects the degree and depth of dislike each party has toward the other.

In the forepart of 1995, Rhonda petitioned the court to modify the decree of dissolution by awarding the physical custody and care of the little girls to her, subject to rights of visitation by George. George, in his turn, made an application for writ of injunction in August of 1996.

In October 1996 and pursuant to a joint motion by the parties, the court appointed an attorney to act as guardian ad litem for the children. The guardian ad litem filed an extensive and detailed report and made her recommendations to the court in May of 1997.

The trial of the matter was finally held in September 1997.

The trial court found that the petition to modify the decree by placing the physical placement and care of the children with their mother, Rhonda, was not warranted under the record made.

The court, however, did modify the decree by granting Rhonda eight weeks visitation with the girls during the summer in lieu of the six weeks agreed to in their original stipulation of 1993. The court further found that the writ of injunction should not issue in favor of George and enjoining Rhonda from coming upon the home premises occupied by him. George appeals from the trial court's decisions in these two regards.

In addition thereto, George was displeased with the report proffered by the guardian ad litem and withdrew his consent to her appointment and asked that she be discharged and that a new guardian ad litem be appointed if the court deemed it appropriate. The trial court refused to discharge the guardian ad litem and further

overruled the motion of George that the report of the guardian ad litem be stricken. The report was received into the record of the cause and the guardian ad litem was retained as such throughout the litigation.

George further appeals from these findings respecting the guardian ad litem.

Rhonda cross-appeals asserting the court erred in denying her petition to modify and by leaving George as the caretaker of the children.

Our review is de novo. Iowa R. App. p. 4. We give weight to the findings of the trial court since it had the opportunity to observe the witnesses, but we are not bound by them.

It is apparent that the issue of increased visitation was never raised by Rhonda either in the pleadings in this matter or at trial. While it is true that equitable jurisdiction will extend to all relevant aspects of the cause, it is also necessary that a party should be reasonably apprised of an issue so that the party may analyze it and prepare to dispute it in court if deemed necessary. Our Rules require a statement of the claim and of the relief sought. Iowa R. Civ. P. 70. The only way visitation could be an issue that could be inferentially raised would be the issue of George's visitation of the girls in the event Rhonda's petition to modify to have the girls placed in her care was granted.

George had no opportunity to speak to this particular issue and though the court only increased summer visitation from six weeks to eight weeks, it did so apparently without any hearing on this matter. Under these circumstances we find

that Summer visitation should be returned to that originally agreed upon by the parties.

George complains about the failure of the trial court to grant him the requested injunction prohibiting Rhonda from coming upon his home premises. An injunction is an extraordinary remedy. *See In re Marriage of Knight,* 507 N.W.2d 728, 731 (citing *Hughes v. Bagley, Inc. v. Begley,* 463 N.W.2d 423, 425 (Iowa App. 1990). We also note that there are other legal remedies available for addressing some of the unhappy conduct of each party. In exercising her visitation an injunction would severely limit the ability of Rhonda to pick up the children at George's home and to return them. The burden is upon the one seeking injunctive relief. "The grant or denial of injunctive relief is within the sound discretion of the trial court under the facts of the particular case." *Braverman v. Eicher* 238 N.W.2d 331, 335 (Iowa 1976). We agree with the trial court that an injunction should not be granted under these circumstances.

Finally, George contends that the trial court was in error in retaining the guardian ad litem over his protests and in admitting the report of the guardian ad litem for the children into evidence, thus overruling his motion to strike the same.

While our review is de novo, the appropriate standard here is whether or not the trial court abused its discretion in rejecting the claims made by George with regard to the guardian ad litem and her report.

The report is complete and thorough. In part, it is critical of both parties' conduct toward the other. George charges that the guardian ad litem was prejudiced

against him, but other than that allegation, no proof is offered in support of this statement. The fact that the appellant does not like certain aspects of the report is not the determining factor as to whether or not it will be admitted into evidence. The guardian ad litem does not represent the parties, but must represent the interests of the children. The trial court did not abuse its discretion in this regard.

Rhonda asserts on her cross-appeal that the trial court erred in not granting her petition to modify the decree insofar as the physical placements of the minor girls are concerned. One seeking to change such physical placement carries a heavy burden to show that the best interests of the children are best served by such a change and that the conditions surrounding the placement of the children have so changed since the decree as to be materially and substantially different. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The children appear to be developing normally and appear to receive good care from George. The dispute between the parties is not new, but existed at the time of the dissolution of the marriage so this conduct does not pose any substantially different material change. We note that the guardian ad litem recommended that the primary residence and physical care of the girls be with their father. She appended a number of conditions to that continuing situation, some of which were adopted by the trial court in its decree. The girls are developing socially and in a normal fashion. The two older girls are doing well in their present school, and a change in their physical placement would require a change in school districts. On balance, we agree with the trial court that Rhonda has failed

to sustain her burden that the best interests of the girls will be served by change of physical placement.

George seeks attorney fees from Rhonda. Considering the issues asserted by each party against the other and in further considering the limited resources of the parties we do not consider it appropriate to grant such fees.

Based upon the foregoing, we affirm the judgment and order of the trial court except we modify it by reducing the trial court ordered eight weeks of summer visitation to the six weeks originally stipulated by the parties.

AFFIRMED AS MODIFIED.