IN THE COURT OF APPEALS OF IOWA

No. 1-096 / 00-0555
Filed April 27, 2001

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF LAUREEN M. TILKES AND MICHAEL H. TILKES

Upon the Petition of
LAUREEN M. TILKES,
Petitioner-Appellee/Cross-Appellant,

And Concerning
MICHAEL H. TILKES,
Respondent-Appellant/Cross-Appellee.

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

The respondent appeals, and petitioner cross-appeals, a district court ruling on respondent's application to modify the child custody, support, and visitation provisions of the parties' dissolution decree. **AFFIRMED IN PART AND REVERSED IN PART ON CROSS-APPEAL; APPEAL RENDERED MOOT.**

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for appellant.

Judith O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, Charles City, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

The respondent appeals a district court ruling on his application to modify the child custody, support, and visitation provisions of the parties' dissolution decree. Respondent contends the district court erred in ordering a deviation from the child support guidelines by ordering him to pay $700 per month rather than $70.[1] On cross-appeal, petitioner contends the district court erred in: (1) awarding respondent physical care of the parties' eldest son; and (2) failing to find respondent in contempt for willful non-compliance with visitation provisions. Petitioner also requests attorney fees. We affirm in part and reverse in part on the cross-appeal, thus rendering respondent's appeal moot.

Background Facts and Proceedings. This case presents us with the story of a long, drawn out, nasty and bitter divorce in which too many extended family members have gotten involved, and one child has been permitted to "get his way," to the detriment of his parents, the other children, and the court. The long and arduous dissolution process led to many of the problems now before us.

Petitioner Laureen Tilkes was born in November 1960. She is a high school graduate, lives in New Hampton, and works for a psychologist at the Floyd County Hospital in Charles City. Respondent Michael Tilkes was born in May 1958. He is a high school graduate and operates a grain and livestock farm in Chickasaw County. He lives on the farmstead. His parents, sister, and

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[1] In addition to the child support issue he raises, respondent initially appealed the court's reduction in the amount of his visitation. At oral argument, however, the parties stipulated to respondent's withdrawal of the visitation issue. Therefore, we need not address the issue.

brother live nearby. An aunt and uncle live in New Hampton. Other family members live in the area.

The parties married on June 5, 1982. Four children were born of the marriage: Andrew, born in 1986, Lindsey and Lisa, born in 1987, and Nathan, born in 1992. Laureen and Michael separated in August 1997. The petition for dissolution was filed in October 1997. A temporary custody order, filed in January 1998, granted Michael visitation from Thursday evening to Monday morning alternating weekends, and from Tuesday evening to Wednesday morning and Thursday evening to Friday morning during the week preceding a non-visitation weekend.

On June 3, 1998, the parties entered into an oral stipulation on the record. The stipulation provided for joint custody of the children, with physical care of all four children to Laureen. The parties stipulated to Michael's liberal visitation with the children, and child support payments of $1100 per month from Michael to Laureen. Due to disagreements between the parties and other circumstances, a decree of dissolution was not entered until August 3, 1999. The decree contained the same terms of physical care and child support as the June 1998 oral stipulation.

The record contains accounts of numerous incidents to illustrate the tumultuous period that began prior to the June 1998 stipulation and continued until well after entry of the August 1999 decree. We highlight the events most relevant to the issues before us.

In June 1998, Michael assaulted Dean Nelson, with whom he believed Laureen was having an affair, at his daughter's ball game. Three of the parties' children observed the assault. Afterwards, Michael walked through the crowd at the ballpark calling Laureen names and saying she was having an affair with Dean Nelson. Andrew heard Michael say "some tough things about his marriage" to the sheriff's deputy investigating the assault. Due in part to the assault incident, the court granted Laureen a temporary protective order against Michael in August 1998. A mutual no contact order between Michael and Laureen was entered in October 1998.

During the summer of 1998, Andrew's relationship with Laureen began to deteriorate. In October 1998, while entry of the final decree was pending, Andrew moved in with Michael without Laureen's consent. Laureen contends Andrew's decision to leave her home resulted in part from pressure by Michael. The report from a court-ordered child custody evaluation supports her contention:

> Mr. Tilkes' unresolved feelings of hurt and anger at the time of the separation prevented him from supporting Ms. Tilkes' efforts as the primary care provider. Instead of encouraging Andrew to comply with his mother, Mr. Tilkes criticized Ms. Tilkes' parenting. Instead of developing insight, through counseling, of his role in the dissolution of the marriage and helping Andrew understand this, Mr. Tilkes consistently blamed Ms. Tilkes for the divorce.

Laureen attempted several times to get Andrew back after he left her home. Michael told her Andrew did not want to come back. When she went to Michael's to retrieve Andrew, Michael told her, "I will send [Andrew] out to talk to you, but I won't make him get in the car." Laureen had very few visits with Andrew after he moved to Michael's.

On April 7, 1999, Michael filed a petition to modify the physical care and child support terms of the June 1998 stipulation.[2] The district court overruled Laureen's motion to dismiss the petition to modify for lack of subject matter jurisdiction. On August 3, 1999, the same date the decree was filed, the court filed a temporary order granting physical care of Andrew with Michael pending the hearing on Michael's petition to modify.[3]

In October 1999, Laureen arrived at Michael's to pick up Lindsey and Nathan after their mid-week visitation. Andrew came out to the car to ask Laureen if Nathan could stay all night. When Laureen told him no, he became angry, jumped on the hood of her car, and started beating on it. He said, "What does Nathan have to do, kill himself or run away, just to get away from you?" Andrew would not get off the car. Laureen proceeded slowly down the road. She stopped several times and asked Andrew to get off. He refused. After one-eighth mile and Laureen's continued refusal to let Nathan stay all night, Andrew got off the car and walked back to Michael's. Michael told Andrew not to do it again, but did nothing to stop him from doing essentially the same thing two weeks later. Michael held Laureen responsible for the situation because of her insistence on following the visitation schedule precisely. A DHS Child Protection Worker investigated the incidents, but concluded Laureen "acted in a manner which a reasonable and prudent person would under similar circumstances taken

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[2] We note Michael's petition to modify was filed before the entry of the dissolution decree on August 3, 1999.

[3] The district court filed this temporary order even though the dissolution decree entered on the same date granted physical care of Andrew to Laureen.

[sic] into consideration the custody issues with this family, the divorce, and the child's manner of coercing his mother to meet his demands."

The other children have not been unaffected by the situation. Lisa and Lindsey told their guidance counselor about Michael saying mean things about Laureen, calling her names, and wanting them to choose who to love and who to live with. Lisa and Lindsey told the guidance counselor they did not want to go to their father's for mid-week visitation. They did not understand why Andrew got to choose which parent to spend time with and they did not.

The guidance counselor referred Lindsey for professional counseling because she was withdrawing and was very worried about making her father mad. The counselor diagnosed Lindsey with an adjustment disorder with anxiety and depression. The counselor reported Lindsey's anxiety came from how she felt about Andrew living with Michael, "being afraid that dad would somehow convince Nathan . . .that's where he needed to be as well. She reported being scared to say things because she was afraid that dad would get angry and dad would get mad and upset."

Michael's relatives also got involved in the dissolution proceedings. When disputes arose over where the children would play ball, an uncle told Nathan he could not play on the computer unless he stopped playing ball in New Hampton. Lisa, Lindsey, and Nathan were upset when Michael's relatives drove by Laureen's house in New Hampton at all times of the day and night to "check up on" them. These relatives had to go out of their way to get to Laureen's house. Laureen alleges Michael's relatives have been verbally abusive toward her on

different occasions. She blames them for influencing Andrew's anger and bitterness toward her.

On February 22, 2000, Laureen filed a contempt motion for Michael's denial of her visitation with Andrew. The court heard Laureen's contempt motion and Michael's petition for modification on March 1 and 2, 2000. On March 7, 2000, the court filed a modification decree. It granted physical care of Andrew with Michael, lowered Michael's child support payments to $700 per month, denied Laureen's contempt motion, and set a new visitation schedule. Michael appeals and Laureen cross-appeals. Because our resolution of the child custody issue raised by Laureen renders Michael's appeal moot, we address the cross-appeal first.

Scope of Review. Our review is de novo. Iowa R. App. P. 4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997).

Child Custody. Custody, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). To change a custodial provision of a dissolution decree, the party seeking modification must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially

changed that the child's best interest make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change must be more or less permanent and relate to the welfare of the children, but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

In addition to the burden of showing a material and substantial change in circumstances, Michael must also show he has the ability superior to that of Laureen to minister to Andrew's needs. *Whalen*, 569 N.W.2d at 628. Therefore, the question is not which is the better home but whether Michael has demonstrated he can offer Andrew superior care. *Id.*

The record provides us with no easy answers in this case. The child custody evaluator's report explains the dilemma before us:

> *It is impossible for me to recommend that the status quo be maintained because it reflects such a dysfunctional set of relationships for this young man.* The current situation promotes a peer-like relationship between father and son with no opportunity for Andrew to experience any relationship with his mother. *I am very concerned that Mr. Tilkes is reinforcing hostility in Andrew toward his mother and disrespect for the law by his lack of support for the most recently Court-ordered visitation. . . .* Although I believe Ms. Tilkes had good intentions at the time, she contributed to the present problems by allowing Andrew to have control over the decisions about visits; the "inch" she gave led to the proverbial "mile" and to the status quo.
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> *I am very reluctant to recommend Ms. Tilkes' suggestion that Andrew be placed back in her primary physical care and that his contacts with Mr. Tilkes be supervised. . . .* Andrew has lost all respect for his mother's authority. *If he were returned to her primary physical care at this time, I believe that Andrew would lose even more respect for her and for the legal system, as well.* Furthermore, I believe that he would gain more experience acting out inappropriately, perhaps putting himself in danger, to demonstrate the perceived desperation of his predicament. Finally, I believe that Andrew would continue to practice the disrespectful

> treatment of his mother, perhaps escalating it, and that this would be witnessed first-hand by three younger children. . . . My biggest concern about the entire situation is the possibility that Andrew, who has tried on at least two occasions to coerce his mother by placing himself in an unsafe situation, might intensify his efforts and engage in even more dangerous behavior. I have seen powerful young adolescents in similar situations do this to such an extent that they were deemed out of either parent's control and placed in foster care. (Emphasis added).

The procedural history of the case serves only to complicate matters. Andrew was already living with his father when Michael filed his petition to modify. This arrangement was against Laureen's wishes and in violation of the court's January 1998 temporary order and the June 1998 stipulation. Michael filed his petition to modify after the June 1998 oral stipulation, but prior to entry of the decree in August 1999. Therefore, we must first address whether the "material and substantial change in circumstances" standard should be measured from the date of the oral stipulation or the date of the decree.

The law suggests we measure the "change in circumstances" from the date of the decree, August 1999. *See Frederici*, 338 N.W.2d at 158 (the party seeking modification must establish conditions have materially and substantially changed since *the order* was entered). We need not decide this issue, however, because we conclude Michael has failed to show a material and substantial change in circumstances as measured from either June 1998 or August 1999. More importantly, even if Michael had met his burden, he has failed to meet the additional burden of showing he has the ability superior to that of Laureen to minister to Andrew's needs.

The child custody evaluator described Michael's relationship with his children as follows:

> In general, Mr. Tilkes seems to have difficulty understanding that what feels good for him might not necessarily be good for the children. . . . In Andrew, Mr. Tilkes seems to have found a boy who gratifies his own wants and needs by adopting the same ones and by acting them out, vis a vis Ms. Tilkes, when Mr. Tilkes is unable to. This reflects a powerful symbiosis between father and son.

Michael has failed to support the relationship between Andrew and his mother. He fails to recognize the negative effects of his behavior on Andrew's relationship with Laureen. In addition, we are disturbed by the sleeping arrangement with Michael and the children at his house. The children sleep with Michael in two beds pushed together. The twin girls discontinued this practice a few months prior to the modification hearing, but Andrew and Nathan continue to sleep in the same bed as their father. Michael sees nothing wrong with this arrangement. Michael's approval of Andrew's alcohol use at the age of thirteen also disturbs us. He does not see anything wrong with Andrew drinking alcohol as long as it is "in moderation" and "under supervision." These examples, and numerous others contained in the record, support the conclusion Michael has failed to demonstrate he can offer Andrew superior care.

When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining child custody rights. *In re Marriage of Pundt*, 547 N.W.2d 243, 246 (Iowa Ct. App. 1996). However, a child's preference is entitled to less weight in a modification action than would be given in an original custody proceeding. *In re Marriage of Hunt*,

476 N.W.2d 99, 101 (Iowa Ct. App. 1991). Furthermore, the analysis involved in deciding custody is far more complicated than asking children with which parent they want to live. *Id.* at 101-02.

In this case, we give little weight to Andrew's stated preference. The record clearly demonstrates Michael's influence over Andrew, thereby diminishing the weight of any "preference" he might express. Andrew has consistently defied court orders, with his father's tacit, and perhaps explicit, approval, and gives every indication he intends to continue doing so if necessary. We commend Andrew for his ability to excel in the classroom despite problems with his parents, but we find he has failed to show the maturity and "enlightened judgment" necessary to make decisions regarding with which parent he should live.

Michael has failed to show *a material and substantial change of* circumstances requires modification in this case. Moreover, he has failed to demonstrate he can offer Andrew superior care. Therefore, we reverse the child custody terms of the modification decree and grant physical care of Andrew to Laureen under the child custody terms of the August 3, 1999 decree of dissolution.

We fully recognize the difficulties this decision may cause given the child custody evaluator's report and the factual situation present. However, we decline to abandon our own appellate responsibilities in this case. To do so would be tantamount to giving legitimacy to a highly dysfunctional situation brought about

by the parties' inability to put aside their own selfish interest and focus instead on the best interest of their children.

Child Support. Our resolution of the child custody issue renders moot the child support issue raised by Michael. Child support will remain at $1100 per month, as provided in the August 1999 decree.

Contempt. When an application for contempt is dismissed, a direct appeal is permitted. *In re Marriage of Ruden*, 509 N.W.2d 494, 496 (Iowa Ct. App. 1993). Our review of a contempt ruling is at law, not de novo. *McKinley v. Iowa Dist. Court for Polk County*, 542 N.W.2d 822, 824 (Iowa 1996). We determine whether substantial evidence supports the district court's judgment. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Proof beyond a reasonable doubt must support a contempt finding. *McKinley*, 542 N.W.2d at 824. "Substantial evidence" to support such a finding is "such evidence as could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt." *Ervin v. Iowa Dist. Court for Webster County*, 495 N.W.2d 742, 744-45 (Iowa 1993).

Contempt can be described as willful disobedience. *Ervin*, 495 N.W.2d at 744. "Willful disobedience" requires:

> evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Id. When a contempt allegedly involves a violation of a court's order, the violation must be found to be willful. *Rolek v. Iowa Dist. Court for Polk County*, 554 N.W.2d 544, 547 (Iowa 1996). Acting contrary to a known duty may

constitute willfulness for this purpose. *Id.* The alleged contemner carries the burden of producing evidence on any defense tendered. *McKinley*, 542 N.W.2d at 824. The burden of persuasion on the willfulness issue, however, remains on the contemnee. *Id.*

After a careful review of the record, we conclude Laureen failed to present substantial evidence to support a finding beyond a reasonable doubt that Michael willfully disobeyed the court-ordered visitation. While Michael certainly was not cooperative in getting Andrew to visit with his mother, we find nothing in the record to show he deliberately and willfully kept Andrew from visiting with Laureen. "While the evidence shows [Michael] could have done more to assure [Laureen] got the visitation ordered by the court, there is insufficient evidence [Michael] deliberately prevented [Andrew] from participating in visitation." *See Rüden*, 509 N.W.2d at 496. We affirm the district court on this issue.

Attorney Fees. Laureen requests attorney fees arising out of the contempt action and appellate attorney fees. The district court ordered the parties to pay their own attorney fees and expenses for the modification and contempt litigation.

Ordinarily, an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). An award of attorney fees depends upon the ability of the respective parties to pay, depending upon the financial circumstances and earnings of each. *Id.* We

conclude the district court properly considered this issue and we find no abuse of discretion.

Similarly, an award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). A successful party does not have a vested right to appellate attorney fees. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Wood*, 567 N.W.2d at 684; *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We deny Laureen's request for appellate attorney fees.

Conclusion. We reverse the child custody provisions of the district court's modification decree, and grant physical care of Andrew to Laureen under the child custody terms of the August 3, 1999 decree of dissolution. Our resolution of the child custody issue renders the child support issue raised by respondent moot. We affirm the district court's denial of Laureen's contempt application. We deny Laureen's request for attorney fees.

AFFIRMED IN PART AND REVERSED IN PART ON CROSS-APPEAL; APPEAL RENDERED MOOT.