FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-578 / 90-125

IN RE THE MARRIAGE OF PAMELA J. LEONARD AND MARK W. LEONARD

Upon the Petition of

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PAMELA J. LEONARD, n/k/a **PAMELA J. CORD,**

Appellee,

And Concerning

MARK W. LEONARD,

Appellant.

Appeal from the Iowa District Court for Ida County, Terry L. Huitink, Judge.

Mark Leonard challenges the district court's denial of his petition to modify the primary physical care provision of the parties' dissolution decree. **AFFIRMED.**

Warren L. Bush, Wall Lake, for appellant.

John Otto of Otto, Lorence & Barry, Atlantic, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J.

Prior to the time Mark Leonard and Pamela Cord dissolved their marriage they and their three minor daughters were living on a farm near Holstein, Iowa. Mark was a farmer; Pamela taught school. When the parties entered into the stipulation, incorporated as part of their decree on November 3, 1988, Pamela and the three girls were living in Correctionville, Iowa, thirteen miles from Mark's farm.

The decree provided that the parties would have joint custody of their children with primary physical care awarded to Pamela. During seven weeks of the summer the children would reside with Mark. He also received alternate holiday, weekend, and Wednesday visitations (as did Pamela when the girls were spending the summer with their father). Mark was to provide child support.

At a deposition prior to the decree being entered, Pamela indicated that both she and her intended husband, Bob Cord, expected to remain in the Correctionville area for the foreseeable future. Pamela remarried fifteen days after the decree was filed. Mark married Cheryl Leonard within the year.

During the 1988-89 school year Mark was able to maintain an ongoing relationship with his daughters by exercising his visitation rights. Near the end of that school year however, Pamela's husband resigned his position with the Correctionville school to become the elementary

school principal in Atlantic, Iowa, with a resulting $9,500 salary increase. Pamela left her full-time teaching position to accept part-time teaching work in Atlantic.

Atlantic is approximately 100 miles from Mark's farm. As a result of the move to Atlantic, it became more difficult for Mark to accomplish the Wednesday visitations and for his daughters to maintain close contact with the Holstein community. When negotiations regarding alternative visitation broke down Mark filed a petition for modification of the dissolution decree, praying for a transfer of the primary physical care of the children to him. Alternatively, he asked that his visitation rights be modified to account for the greater distance currently existing between the parties.

A two-day hearing was held. The court declined to change the primary physical care provision. However, Mark was awarded one additional day of visitation per month to compensate him for the loss of his Wednesday visitation. The court ordered that Mark pay $1000 towards Pamela's attorney fees and that he pay the fees of the attorney appointed to represent the children. Mark was ultimately assessed with one-half the costs of the home study evaluation and with all the court costs. He appeals.

Mark believes the court erred in several respects. He contends a change in the primary physical care provision of the decree is warranted based on the change of circumstances demonstrated by the evidence. He also

contends the children's appointed attorney did not adequately represent their interests. He complains the home study was of little value because the investigator did not visit the parties' respective homes while the children were present. Lastly, Mark contends the trial court should have assessed costs and attorney fees to Pamela.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. **Was Modification Appropriate?** Mark contends Pamela's remarriage, her move to a community 100 miles away, the children's stated preference of living with him, and his remarriage constitute a substantial change of circumstances warranting a change in the primary physical care of the children. We find no merit in respondent's contentions.

The principles governing a change in the primary physical care are well-known.

> 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.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

In the present case, this court finds no changed circumstances not contemplated when the decree was entered. At the time the decree was entered, Mark knew Pamela was likely to marry Bob Cord. At the time the decree was entered, Mark knew Pamela was moving from the Holstein community and the children would no longer experience the same contacts with that community. Mark entered into the dissolution stipulation placing the children in their mother's primary physical care with knowledge of these factors. We find the fact that Pamela later moved further away to be of little significance, especially where the move to Atlantic offered Bob Cord a substantial increase in income in a larger school district. See, e.g., Frederici, 338 N.W.2d at 159; In re Marriage of Jerome, 378 N.W.2d 302, 305 (Iowa App. 1985).

Further, Mark has not presented any evidence which establishes he can more effectively minister to the children's well-being. Mark's own witnesses testified to Pamela's capabilities as a parent -- none of that testimony

was derogatory. Mark appears to contend the children, necessarily, would be better off living on the farm with him and Cheryl. This court is unwilling to reach such a conclusion. Mark presented abundant (if not redundant) evidence concerning the girls' interest in raising and showing cattle but nothing in the record suggests to this court that the children cannot continue to nurture this interest within the context of the current physical care arrangement. In fact, quite the contrary is evident.

The evidence presented at trial establishes quite clearly that both Pamela and Mark love their daughters. Both parties have married caring and loving individuals who are actively involved and interested in the children's well-being. Both couples could adequately care for the children. Mark has simply failed to meet the heavy burden required in order to transfer the children's primary physical care. He has presented no compelling reason physical care should be changed.

Both Mark and Pamela concede they have difficulty communicating with one another about visitation. Both parties demonstrate distrust and suspicion of the other. Neither party appears to be wholly accepting of the other parent's rights concerning the children. We feel it necessary, therefore, to repeat the rights and responsibilities of divorced parents having joint custody of their children.

> . . . Joint custody gives both parents not only rights to the child but at least as important it

> gives responsibilities. The responsibilities include the obligation to allow the child significant contact with the other parent. Rights and responsibilities of legal custodians of a child include but are not limited to equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction. Iowa Code § 598.41(4). In re Marriage of Zabecki, 389 N.W.2d 396, 399 (Iowa 1986); In re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983); In re Marriage of Fish, 350 N.W.2d 226, 230 (Iowa App. 1984).
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> The responsibilities also include the obligation to put personal biases aside and to work with the children's other parent to arrive at a schedule that gives due consideration to the educational and social needs of the children. . . . The parent having physical care will be the one receiving information on school events, getting conference slips and report cards. These should be shared with the other parent. Except for emergency situations, the parent then having physical care has a responsibility of communicating to the other parent the need to make the decision and making the necessary information available. Both parents have an obligation to personally discuss these problems with each other. While no one can expect medical and school personnel to serve as referees, we can and do expect the parents to meet with them jointly and we expect each parent to focus on the children's problem and help the personnel arrive at a solution that is in the children's best interests. Both parents should be mature adults who can put aside their differences and operate in their children's best interests.

In re Marriage of Fortelka, 425 N.W.2d 671, 673 (Iowa App. 1988).

We specifically address two issues we find quite disturbing. First, Pamela's present husband admits to tape recording Mark's telephone calls to the Atlantic home in order to "document" any misstatements or disparaging remarks made by Mark. This court expressly disapproves of Bob's practice of recording Mark's telephone conversation.

Any possible interest Pamela and Bob may believe this practice serves is clearly outweighed by the invasion of privacy and potential interference with the parent-child relationship. This court refuses to condone the practice. We order the cessation of all eavesdropping.

Second, there is evidence Mark has made disparaging comments concerning Pamela in the presence of the girls. Degrading comments about the other parent made in the children's presence can serve no useful purpose and places the children in an unhealthy and confusing position. Mark and Pamela are reminded of their responsibilities: (1) to be mature adults and (2) to consider the best interests of their children. We hope these strong admonitions will result in the improvement of the less than desirable parental conduct currently being exhibited. If not, this court shall take appropriate action significantly stronger than this opinion. We are simply not satisfied that enough concern for these three children has been demonstrated.

The burden in a modification of visitation rights is different from the burden in a child custody change. Generally, a much less extensive change of circumstances need be shown in visitation rights cases. Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973). While this court does not agree the move to Atlantic warrants a change in the primary physical care provisions, we do find the move necessitates a change in the visitation provisions of the decree.

Pamela argues the trial court overcompensated Mark for the loss of alternate Wednesday evening visitation. Because this visitation only lasted three hours every other week, Pamela contends an additional 12 days of visitation per year is excessive and inequitable. We do not agree. We find no reason to alter the trial court's award in this respect. The modification of the visitation is affirmed.

II. Attorney Appointed To Represent The Children. Mark contends the children's appointed attorney did not adequately represent the children's interests because Mr. Treinen did not contact the girls, ages six, eight, and nine, concerning their preference of a primary residence. He asks that this court establish defined duties for an attorney appointed pursuant to section 598.12 identical to the statutorily-defined duties of an attorney appointed pursuant to section 633.561(4) (concerning the opening of a guardianship). This court declines the invitation. The respondent's request is more appropriately addressed to the legislature.

Iowa Code section 598.12(1) (1989) provides:

> The court may appoint an attorney to represent the interests of the minor child or children of the parties. The attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify before the court on matters pertinent to the interests of the children.

Our supreme court has most recently addressed the responsibilities of an appointed attorney in two cases. In In re Marriage of Joens, 284, N.W.2d 326, 329 (Iowa 1979), the supreme court stated,

> Significantly the attorney is to investigate and to secure the testimony of witnesses helpful to the cause of the children. There is no provision that he "report" or that he make recommendations. . . . The attorney appointed, then like the attorney for any client, is to see that the interests of those he represents get a full and fair airing at the trial by the presentation of competent and relevant evidence. . .

(Emphasis added.) In In re Marriage of Schneckloth, 320 N.W.2d 535, 536 (Iowa 1982), the supreme court indicated that the appointed attorney should participate actively as an advocate for the child through the entire proceeding.

We have thoroughly reviewed the record and find that the children's appointed counsel did conduct an investigation into Mark's allegations and did actively participate in the modification proceedings. Our review of the record convinces us that Attorney Treinen fulfilled his duty as an advocate for the children. Attorney Treinen was of the opinion that Mark's allegations did not constitute a substantial change of circumstances and, therefore, did not warrant putting the children "in a position of choosing between their homes," possibly raising expectations that were unrealistic. He was aware of evidence the children have expressed a desire to live on the farm but, in light of the children's ages, did not find the statements to be of great probative value. Attorney Treinen opined that it was not in the children's best interest to become involved in the modification proceedings, especially because the parties had conceded that the children had stated a

preference to live with their father. The trial court apparently agreed. The trial court refused to require Attorney Treinen to speak with the children and also refused to require the children to come to court to discuss a preference already noted in the record. Under the circumstances of this case, we do not believe appointed counsel was required to interview the children to determine with which parent they preferred to live.

III. **Home Study.** Mark now complains of the value of the home study conducted for use in this modification proceeding. He contends the report submitted was of little benefit to the court because the evaluator visited the parties' respective homes in the absence of the children. We need not address the relative value of this report because we have already concluded Mark failed to establish the requisite change of circumstances. We do note, however, that no objection to the admissibility or reliability of the report was made to the trial court and, consequently, Mark did not preserve this issue for review. In re Marriage of Dally, 222 N.W.2d 478, 480 (Iowa 1974).

Mark appears to invite this court to establish guidelines to be followed by those preparing home study evaluations. Again, we decline Mark's invitation. This court does expect all professionals working in areas affecting the lives of children to perform their tasks with the honesty, energy, and integrity the children's welfare deserves. However, we are unqualified to dictate to these various professions within their respective bailiwicks.

IV. Attorney Fees And Costs. The order denying Mark's application for modification also assessed $1000 of Pamela's attorney's fees and the costs of the litigation to Mark. Mark challenges this assessment. He contends Pamela should have been assessed the costs of the proceeding and Mark's attorney's fees and seeks appellate attorney's fees. Pamela asks that the costs of this appeal and her appellate attorney fees be assessed to Mark.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We conclude there is no reason to disturb the trial court's assessment of costs and attorney's fees. We affirm.

Costs of this appeal are taxed to appellant. Mark is ordered to pay $750 toward Pamela's appellate attorney's fees.

AFFIRMED.