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IN THE COURT OF APPEALS OF IOWA

No. 3-323 / 92-1784

IN RE THE MARRIAGE OF ROXANN ALENE MOELLER AND GREGORY MARVIN MOELLER

Upon the Petition of
ROXANN ALENE MOELLER,

Appellant/Cross-Appellee,

And Concerning
GREGORY MARVIN MOELLER,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Henry County, D. B. Hendrickson, Judge.

Roxann Moeller appeals the district court's denial of her motion to quash a temporary injunction prohibiting her from allowing the parties' minor child to be in the physical presence of Roxann's boyfriend. **AFFIRMED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Merry C. Ford and T. K. Ford of Ford Law Offices, Burlington, for appellee.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.*

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

PER CURIAM 000414

Roxann Moeller appeals the district court's denial of her motion to quash a temporary injunction. The temporary injunction restrained Roxann from permitting the parties' minor child to be in the physical presence of her boyfriend, Jimmy Ray Fett. Roxann contends the injunction was dissolved by entry of the final decree in an action for modification of the parties' dissolution decree. She also argues insufficient evidence exists to justify a permanent injunction. Gregory Moeller cross-appeals the district court's denial of his application to modify the physical custody provision of the parties' dissolution decree. He contends that if the injunction is not found to be permanent, he should be given primary physical custody of the parties' child. In addition, Gregory asserts Roxann should pay child support and his attorney fees.

Roxann and Greg Moeller were married in 1985. Their daughter, Kaytlin Moeller, was born January 12, 1989. The marriage was dissolved in 1991, and the parties were awarded joint legal custody of Kaytlin. Greg was given primary care from 7 p.m. on Sunday until 6 p.m. on Thursday, and Roxann was awarded primary care for the remainder of the week.

Roxann is thirty years of age and is employed at Blue Bird, a school bus manufacturing company. Greg is thirty-four years of age and is an independent insurance agent. Both parties have a net monthly income exceeding $1000.

In March 1992 Greg filed a petition for modification of the parties' dissolution decree asking for sole primary care of Kaytlin subject to visitation rights for Roxann. Gregory requested that Roxann be prohibited from exposing Kaytlin to Jimmy. Roxann filed her answer and a counter application for modification seeking primary physical care. During the proceedings Greg sought, and was granted, a temporary writ of injunction enjoining Roxann from permitting Kaytlin to be in the physical presence of Jimmy. Roxann's motion to quash temporary injunction was heard at the same time as the cause in chief.

On October 1, 1992, the district court denied the motion to quash temporary injunction and denied each party's petition to modify the decree. The court ordered the injunction to be continued until further order of court. Roxann appeals, and Greg cross-appeals. We affirm.

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).

The central issue in the present case is whether the temporary injunction issued by the district court survives the final order denying the parties' petitions to modify

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the original dissolution decree. Had the trial court not included certain language regarding the injunction in its final order, it is clear that the temporary injunction would have been dissolved. Foods, Inc. v. Leffler, 240 N.W.2d 914, 919 (Iowa 1976).

In Leffler, the court stated:

> When a decree is entered, a temporary injunction is merged or dissolved into it and thereafter the propriety of the order directing the issuance of a temporary injunction or affording temporary relief is generally regarded as academic, or moot.

Id. (citing 42 Am. Jur. 2d Injunctions § 356 (1969)). However, in the present case, the district court specifically included the following language in its final order:

> IT IS FURTHER ORDERED that the motion to quash the temporary writ of injunction be and is hereby ordered denied and that the injunction be continued until further order of the Court.

Roxann contends this language did not create a permanent injunction. She argues that if the district court had intended to create a permanent injunction, the court would have modified the terms and conditions of the temporary injunction, which it did not do. Specifically, Roxann contends the trial court should have amended the temporary injunction by both adding the word "permanent" and by striking the words "during the pendency of this action." Roxann asserts the failure to do so evidences the district court's lack of intent to create a permanent injunction.

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We disagree. The district court's order clearly indicates an intent to extend the injunction "until further order of the Court." The inclusion of this language is clearly inconsistent with Roxann's argument. The presence of this language manifests the district court's intention to continue the existing injunction, in effect making the injunction permanent. Our reading of the district court's final order convinces us this was the court's intention. After reviewing the evidence regarding Jimmy's violent and abusive personality, the district court stated:

> [A]s the Court stated in the beginning of this ruling, this case centers around the character of Jimmy Ray Fett, who remains in the picture after founded allegations of abuse toward Kaytlin, after evidence of abuse towards his boys, and after evidence of abuse toward his ex-wife Janet.
>
> The Court believes and concludes that the preponderance of the evidence and circumstantial evidence demonstrates that Jimmy Fett committed acts of abuse towards Katylin on September 13, 1991. . . .
>
> * * *
>
> For these reasons, the Court concludes that the motion to quash the temporary injunction should be denied.

The district court's discussion in this regard is entirely inconsistent with Roxann's contention that the court merely "declined to dissolve the temporary injunction [and] did not create a permanent injunction."

Having concluded that the district court intended the injunction to become permanent, subject to further order of the district court, we must determine whether the district

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court exceeded its authority in doing so. We hold the district court acted within its authority. "Courts of equity exercise discretionary power in the granting or withholding of their extraordinary remedies, and this is particularly true in a case where injunctive relief is sought." 42 Am. Jur. 2d Injunctions § 24 (1969). "The relief depends upon broad principles of equity and may, in the discretion of the court, be granted or denied in accordance with the justice and equity of the case." Id. at § 2. "While the court in the exercise of its discretion in respect of the grant or denial of injunctive relief is not controlled by technical legal rules, the power is not a mere arbitrary and unlimited one, nor does it constitute the mere whimsical will of the court, but is the exercise of a sound judicial discretion, reviewable on appeal, the court being informed and guided by the established principles, rules, and practice of equity jurisprudence." Id. at § 25.

Here, Roxann contends that a de novo review of the evidence adduced at trial does not establish by a preponderance of evidence that irreparable damage will occur if the injunction is not extended. In addition, Roxann argues it is not equitable to impose a restriction upon her which would prohibit her from having Katylin in Jimmy's presence. She contends such a restriction forces her to chose between her daughter and her boyfriend. Roxann asserts the injunction precludes the possibility of

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marrying Jimmy unless Roxann elects to relinquish physical custody of Katylin.

However, our review of the record confirms Gregory's assertion that an environment in which Jimmy is present is one in which violence and abuse abound. Katylin must be protected from such an environment. The record contains the following evidence to support the district court's decision to extend the injunction, pending further order of court, thereby creating a permanent injunction: (1) Jimmy was found guilty of assault causing bodily injury in September of 1992, following an incident in which he beat his ex-wife, Janet; (2) In 1983 Jimmy beat Janet to the extent that hospital emergency treatment was required; (3) Jimmy sexually molested his thirteen-year-old sister-in-law during his marriage to Janet; (4) Jimmy has imposed severe punishment upon his own children by inflicting physical force such as punching, kicking, picking them up by the ears, throat, and hair, and hitting them with objects such as boards and belts; (5) Jimmy has referred to Katylin as a "whiney little bitch"; (6) Jimmy has told Katylin that her dad (Gregory) is an "asshole"; and (7) the district court found that Jimmy committed acts of abuse towards Katylin on September 13, 1991, resulting in bruises to Katylin's face and bottom.

This evidence dictates our conclusion that Katylin must not be permitted to be in the physical presence of Jimmy. The district court correctly determined that a permanent

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injunction, pending further order of the district court, was essential for achieving this end. Not only is extending the injunction consistent with Katylin's best interests, but extending the injunction is essential to prevention of the emotional and physical harm to Katylin which is imminently likely to result from contact with Jimmy.

Next, we consider Gregory's contention on cross-appeal that the district court incorrectly concluded a change in the physical custody provision of the parties' dissolution decree was not warranted.

> 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.

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)).

Having reviewed the record, we agree with the district court that no material and substantial change has occurred warranting the requested modification. Gregory admits that he pursued this issue as an alternative to protecting Katylin from Jimmy in the event the injunction is not held to be permanent. As the parties both recognize, the current physical custody arrangement is working well, and

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the arrangement affords Katylin the opportunity to enjoy maximum contact with both parents. No modification is necessary regarding physical custody or child support.

Finally, Gregory requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We deny Gregory's request for appellate attorney fees.

The parties shall each pay one-half of the costs of this appeal.

AFFIRMED.