STATE OF MINNESOTA
IN COURT OF APPEALS
A10-673

In re the Marriage of:
Thomas Carroll Rubey, petitioner,
Appellant,

vs.

Valerie Ann Vannett,
Respondent.

Filed February 15, 2011
Affirmed in part, reversed in part, and remanded
Toussaint, Judge

Washington County District Court
File No. F8-02-4611

Mark A. Olson, Burnsville, Minnesota (for appellant)

Valerie Ann Vannett, Apple Valley, Minnesota (pro se respondent)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Judge

This custody and child-support appeal is taken from remand proceedings in district court following a series of appeals that ended in this court's reversal of the district court's

determination of legal custody and division of health-care costs. *See Rubey v. Vannett*, 714 N.W.2d 417 (Minn. 2006) (*Rubey I*); *Rubey v. Vannett*, No. A05-310, 2007 WL 1412749 (Minn. App. May 15, 2007) (*Rubey II*), *review denied* (Minn. Aug. 7, 2007).

Appellant Thomas Carroll Rubey raises four issues on appeal. These are whether he was entitled to a full retrial to determine custody, whether the district court improperly deferred to findings from the 2004 dissolution judgment that we reversed, whether the child's medical expenses were misapportioned, and whether he was entitled to a partial refund of child-support payments. We affirm in part, reverse the district court's apportionment of medical expenses, and remand for calculation of respondent Valerie Ann Vannett's proportionate share of medical expenses for the time period between the 2004 judgment and the 2007 effective date of medical costs ordered on remand.

D E C I S I O N

Custody determinations are reviewed for an abuse of discretion. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006). We review questions of law de novo and findings of fact for clear error. *Id.*; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Reversible error must be shown by the party claiming it. *Luthen v. Luthen*, 596 N.W.2d 278, 283 (Minn. App. 1999); Minn. R. Civ. P. 61.

I.

Appellant argues that the district court abused its discretion by failing to provide him a full "trial on the entire issue of custody" on remand because that was the "implication of [this court's] decision" in *Rubey II*. A district court has broad discretion to determine how to proceed on remand, and it may proceed "in any way not inconsistent

with the remand instructions provided." *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759, 763 (Minn. 2005). But when the appellate court provides specific remand instructions, the district court must execute the mandate of the remand order strictly according to its terms. *Bauerly v. Bauerly*, 765 N.W.2d 108, 110 (Minn. App. 2009). Although legal custody and physical custody are addressed collectively by appellant, we consider each in turn.

A. Legal Custody

In *Rubey II*, this court held that the district court's sua sponte decision to vacate appellant and respondent's stipulation to joint legal custody "resulted in the lack of an opportunity to litigate or to present evidence on the issue," thereby violating appellant's right to due process. 2007 WL 1412749, at *4. The clear import of *Rubey II* is that the district court was required to allow appellant to litigate and present evidence on the issue.

On remand, the district court held a hearing at which appellant presented expert testimony that equal parenting time is an important objective, particularly as a child gets older. The court also received the expert's report, which stressed the benefits to the child of joint custody. Apart from the evidence in connection with the expert's opinion, the district court record was not supplemented. Several remaining issues, including custody, were extensively briefed or otherwise argued in district court.

We question whether accepting evidence from appellant's expert was, by itself, sufficient to comport with the requirements of *Rubey II*'s reversal and remand. But the rationale underlying our decision was that the parties had agreed to joint legal custody, and the district court erred by rejecting the stipulation because the parties were not given

an opportunity to litigate the issue. There is no indication in appellant's brief or in the record that appellant ever sought sole legal custody. Because the district court granted joint legal custody on remand, any error in this regard was harmless.

B. Physical Custody

Rubey II was silent on physical custody, merely noting that it was challenged by appellant. *Id.* at *1. Physical custody was treated as an open question on remand, and we believe this was an appropriate understanding of the procedural posture of the case.

Appellant's argument that this court's decision impliedly required a new trial carries less force with respect to physical custody. The reason for reversing the legal-custody determination was that appellant did not receive an opportunity to litigate the issue after the district court disregarded his and respondent's stipulation. Because the parties did not stipulate to—and in fact did—litigate physical custody, a trial to determine physical custody was not a necessary implication or term of the remand. Thus, the deferential abuse-of-discretion standard for reviewing remand proceedings applies.

Appellant cites several cases acknowledging that post-separation events in cases involving lengthy litigation may be relevant to determining the best interests of the child. *See, e.g., Sefkow*, 427 N.W.2d at 211-12 (affirming district court's consideration of post-separation evidence in lengthy custody litigation because that evidence was relevant to understanding the child's interaction with the significant persons in her life); *Wopata v. Wopata*, 498 N.W.2d 478, 483 (Minn. App. 1993) (remanding due to lack of record evidence "of the events that have affected and shaped the lives of the minor children during the inappropriately lengthy passage of time since issuance of the original decree");

LaValle v. LaValle, 430 N.W.2d 224, 228 (Minn. App. 1988) (noting importance of post-separation events in determining child's best interests); *Heard v. Heard*, 353 N.W.2d 157, 162 (Minn. App. 1984) ("On remand the trial court has responsibility to learn how the case is affected by events since trial and the parties must be free to offer additional evidence.").

This argument comes down to the claim that in the years since the 2004 judgment, circumstances have changed and the record needs to be reopened to determine the child's best interests. Appellant's factual claims regarding the best-interests factors center on the theory that respondent is unwilling to be cooperative. For example, appellant asserts that both he and respondent love their daughter very much but that respondent created communication problems with him during the dissolution proceeding in a calculated attempt to defeat joint physical custody. He cites various facts as evidence of her bad faith and asserts that she made false claims in litigation. None of these facts or allegations directly relates to developmental changes with the child or to any new circumstances in the case.

Caselaw has recognized that joint physical custody "is not a preferred arrangement" because "the maintenance of stability and continuity in a child's living situation serves the child's best interests." *Wopata*, 498 N.W.2d at 482-83. Further, parents' inability to cooperate weighs strongly against joint physical custody, and the fact that each parent is well-qualified to raise the child does not mean that they are qualified to raise the child jointly. *Id.* at 483; *see also Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985) (stressing the importance of stability for a young child).

Respondent has retained sole physical custody since 2004, although appellant has parenting time and remains involved in the child's life. The evidence cited by appellant about the parties' inability to communicate civilly with each other or to cooperate in raising their child weighs in favor of an award of sole physical custody. Given the child's need for continuity, as well as the fact that appellant has not alleged any meaningful changes in the child's or the parties' circumstances since 2004, it is clear that on retrial the district court would continue to find that sole physical custody with respondent is in the child's best interests, and this determination would not be an abuse of discretion. Thus, appellant has not established reversible error.

II.

Appellant argues that the district court improperly applied the custody-modification standard by relying on the 2004 custody determination. Appellant asserts, without citation to the record or any relevant law, that the "trial court was not directed to determine if [the original district court judge] was correct in his 2004 custody determination—it was to make its own determination."[1]

Despite this claim by appellant, the district court's orders after remand show that the court considered all of appellant's arguments and evidence. Further, the court did not merely recycle or deferentially review the 2004 findings; rather, it made its own findings based on its own review of the record. Several findings were different—for example, in the September 2009 amended judgment, the court found that neither party was the child's

[1] After *Rubey II*'s remand to district court, a different judge presided over the proceedings in this matter.

primary caregiver, even though the original judge had previously concluded that respondent was the primary caregiver. The court considered the new evidence from appellant's expert; it expressly found "all experts persuasive," including appellant's expert. Appellant has not shown error by the district court on this issue.

III.

Appellant argues that the district court erred by failing to modify medical support effective as of the 2004 judgment. We agree. This court reversed the district court's order that appellant cover the cost of the child's insurance because both parties were statutorily required to pay a share of the child's health-care costs in proportion to their net incomes. *Rubey II*, 2007 WL 1412749, at *8. This decision reversed the 2004 judgment on that point; each party was required to pay part of the child's medical expenses based upon his or her proportionate share of their total net income, which the district court was required to determine and allocate on remand.

On remand, the district court ordered, in relevant part:

> The effective date of the medical support order shall be January 1, 2007. While [appellant] requested this date be June 21, 2004, or the date of the original Judgment and Decree, the [parental income for determining child support] formula was not in existence as of said date. The [parental income for determining child support] formula was not made applicable to amended orders until January 1, 2007.

The district court also ordered: "The effective date of [appellant's] new child support amount shall be May 1, 2008." By setting an effective date of January 1, 2007, the district court effectively ignored this part of our opinion, which was an abuse of discretion; we therefore reverse this part of its order.

The current parental income for determining child support calculation is "gross income minus deductions for nonjoint children." Minn. Stat. § 518A.26, subd. 15 (2010). As of the time of the initial litigation in district court and under the law cited in our 2007 opinion, the parties were "to each assume a portion of [medical] expenses based on their proportionate share of their total net income." Minn. Stat. § 518.171, subd. 1(d) (2004). The new parental income for determining child support scheme was enacted in 2005 and 2006; the provisions of the act used to calculate support obligations apply to actions or motions filed after January 1, 2007. 2006 Minn. Laws ch. 280, § 44 at 1145.

We remand for the district court to determine how much money respondent owes appellant for medical costs that he paid and that should have been apportioned between the parties for the time period between the 2004 judgment and January 1, 2007, in accordance with our opinion in *Rubey II*. This calculation shall be based on Minn. Stat. § 518.171, subd. 1(d) (2004), rather than the parental income for determining child support formula used to calculate the medical-support obligation as of January 1, 2007.

IV.

Appellant argues that our reversal of the 2004 custody determination necessitated reinstatement of the temporary order that was in effect until the 2004 decision, thereby also reinstating the original child-support obligation of $300 per month.

On remand, the district court issued an order modifying child support and appointing a parenting-time expeditor. In this order, the court stated that respondent "retain[ed] sole legal and physical custody of [the] child" pursuant to the 2004 dissolution judgment. Because we reversed that part of the judgment and remanded for

further proceedings, and the previously awarded temporary custody was joint, appellant may well be correct that custody should have reverted to joint custody under the previous temporary order. But we cannot retroactively give appellant actual joint physical custody during that period.

The question of custody during that period is now moot; the real question presented by this appeal involves appellant's child-support payments from 2004 until custody was determined by the district court on remand. Appellant contends that his "support obligation must be re-computed as part of this appeal to credit him for payments exceeding $300 a month since 2004." We disagree. Essentially, appellant's position is that he should have had joint custody, which would have resulted in lower child-support payments, and that he therefore should be reimbursed for child-support payments made while respondent in fact had sole custody. Appellant has not cited any law indicating that he is entitled to this windfall (and that respondent should suffer a loss) because of the alleged error in failing to revert to temporary joint custody, and it would defy common sense to reimburse appellant for his contribution to the support of the parties' daughter while respondent was raising her just because appellant theoretically should have been a joint custodian.

Affirmed in part, reversed in part, and remanded.