IN THE COURT OF APPEALS OF IOWA

No. 1-391 / 10-1204
Filed July 27, 2011

IN RE THE MARRIAGE OF
SALVADOR MARTI
AND KIM MARTI

Upon the Petition of
SALVADOR MARTI,
Petitioner-Appellant,

And Concerning
KIM MARTI,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Kathleen A. Kilnoski, Judge.

Salvador Marti appeals the district court's denial of his application to modify the physical care provisions of a dissolution decree. **AFFIRMED.**

Karen A. Dales of Law Offices of Karen A. Dales, Council Bluffs, for appellant.

Joseph G. Basque of Iowa Legal Aid, Council Bluffs, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, J.

Salvador Marti appeals the district court's denial of his application to modify the physical care provisions of a dissolution decree.

I. Background Facts and Proceedings

Salvador and Kim Marti married in 2001 and divorced in December 2006. Under the dissolution decree, Kim received physical care of the couple's two children. Salvador, who was in the military, received visitation in the summers and during alternate Christmas and spring breaks.

Salvador's first Christmas visit was to take place in 2006. Salvador was stationed in Oklahoma and chose not to exercise visitation at that time.

In April 2007, Salvador was transferred to his home state of Hawaii, where he settled down with his second wife. He did not exercise his 2007 summer visit. Later that year, he was deployed to Iraq. While granted forty days of leave for the birth of his third child, he did not visit his children in Iowa.

Salvador's deployment ended in February 2009.[1] A month later, he participated in his first post-decree visit with the children. He also made arrangements to transport the children to Hawaii for his summer 2009 visit.

During that visit, Salvador learned from his children and his second wife, who happened to be a friend of Kim's, that Kim was engaged in an abusive relationship with a man named Bruce. Soon after, while the children were still in Hawaii, Salvador learned that police arrested Bruce for assaulting Kim. This was his second arrest for assaulting Kim, but not his last. Just months later, he was

[1] Salvador was scheduled for re-deployment to Afghanistan in July 2010, two months after the modification hearing.

again arrested for hitting Kim and assaulting her brother. In 2009, Bruce pleaded guilty to domestic abuse assault and was the subject of several protective orders. Salvador was notified and filed an application to modify the physical care provision of the dissolution decree. He alleged Kim "continuously exposes the children to an individual with a history of violence against whom she has a no contact order."

Following a hearing, the district court denied Salvador's application to modify physical care. Salvador appealed.

II. Analysis

A party seeking to modify a physical care provision of a decree is generally required to show: (1) a material and substantial change in circumstances not contemplated by the decree that is essentially permanent, and (2) an ability to provide superior care. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

The district court found the domestic violence in Kim's home amounted to a substantial change in circumstances not contemplated at the time of the decree, but found a failure of proof on the second factor, Salvador's ability to provide superior care. The court reasoned as follows:

> Although this is a very close question, the court concludes that a modification of primary physical care to Salvador would not be in the children's best interest at this time. The children's primary bond is with their mother. Salvador bears responsibility for not having cultivated a closer relationship with his children, despite the obvious distance and demands of his career with the Army. Although Salvador is capable of being the children's fulltime custodian, he has not demonstrated that his care for the children is superior to that of their mother.

On our de novo review, we agree with this reasoning.

Salvador was essentially absent from the children's lives for several years, as he left for Oklahoma in 2005, saw the children only a few times before the divorce in 2006, and then did not see them again until 2009. During this period, he had several opportunities to visit them. He did not avail himself of these opportunities.

By 2009, he was essentially a stranger to the children. Although they warmed up to him, neither identified him as part of the nuclear family and the older child told a social worker that she did not want to live with him.

We recognize the child's preference is accorded less weight in a modification action than it would be in an original custody determination. *See In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). But, the child's desire to remain with her mother is striking, given the volatile and chaotic conditions in Kim's home.

Those conditions were in large part based on Bruce's presence in the home. Two professionals who worked with Kim and Bruce opined that the situation had improved. One even went so far as to express "no concerns" with the home situation.

We are not as sanguine as these professionals that Bruce is a changed man. Our queasiness is based on Bruce's equivocal testimony about the abuse

during the modification hearing.[2] We also find little comfort in the fact that Bruce did not hit the children, as Kim argues; he exposed them to his severe abuse of their mother, and they saw enough of it to recount chilling details to Salvador's wife. But, despite what we see as clear efforts by Bruce and Kim to minimize the abuse and its adverse effects on the children, we cannot discount the opinions of the two professionals or the opinion of the district court judge, who had an opportunity to see the parties and assess their demeanor. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (noting trial courts are aided by ability to assess demeanor, whereas "appellate courts must rely on the printed record in evaluating the evidence"); *Paxton v. Paxton*, 231 N.W.2d 581, 584 (Iowa 1975) (affording district courts considerable discretion in modifications even though our review of such proceedings is de novo). Based on their opinions that the children would be better off remaining with their mother, we reluctantly affirm the denial of Salvador's modification application.[3]

AFFIRMED.

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[2] At the hearing, Bruce stated:

> I mean, the physical assault—I mean, I believe that's what I was charged with, but, yeah, that's—
>
> Q. Okay. You're rolling your eyes like it didn't happen. A. Yeah. I mean, I remember pushing her, but, I mean, I don't recall what . . . happened. The fact of calling it a physical altercation, I don't really—myself, I don't see it as a physical altercation.
>
> Q. But you pled guilty to domestic abuse. A. Yes.

[3] On July 11, 2011, Salvador filed a Motion for Limited Remand, alleging the children had been adjudicated children-in-need-of-assistance and he wished to file another application to modify physical care based on this circumstance. We deny the motion for limited remand and do not consider the additional allegations in resolving this appeal. However, a copy of this opinion is being furnished to Assistant Shelby County Attorney Todd Argotsinger.