IN THE COURT OF APPEALS OF IOWA

No. 1-863 / 11-0386
Filed December 7, 2011

IN RE THE MARRIAGE OF DENNIA L. KELSEY AND MICHAEL J. KELSEY

Upon the Petition of
DENNIA L. KELSEY, n/k/a DENNIA L. QUINN,
Petitioner-Appellant,

And Concerning
MICHAEL J. KELSEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Mitchell E. Turner, Judge.

A mother appeals from a district court order modifying the physical care provision of the parties' dissolution decree. **AFFIRMED.**

Thomas J. Viner of Jacobsen, Johnson & Viner, P.L.C., Cedar Rapids, for appellant.

Angela M. Railsback of Railsback Law Office, Cedar Rapids, for appellee.

Jenny Schulz of Kids First Law Center, Cedar Rapids, for minor child.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Dennia Kelsey, now known as Dennia Quinn, appeals from a district court order modifying the physical care provision of the decree dissolving her marriage to Michael Kelsey. Upon our de novo review, we affirm.

I. Background Facts and Proceedings.

Michael and Dennia divorced in August 2006. They have one child together. The stipulated dissolution decree placed the child in the parties' joint legal custody and Dennia's physical care. The visitation schedule, however, established what was essentially a joint physical care arrangement, under which the parties alternated care of the child weekly. That schedule remained in place until January 2007 when Dennia moved to Minnesota with her fiancé. She allowed the child to remain in Iowa in Michael's care.

Both parties remarried in 2007. The child did not get along well with Michael's new wife, Debra, and began asking Dennia if he could live with her. Dennia told him that he needed to do his best to get along with his stepmother.

In October 2009, Michael and Dennia learned the child was having suicidal thoughts. Michael took him to see a counselor. He and Debra began seeing a counselor as well, who recommended that Debra let Michael handle more of the child's discipline. Michael believed the child's relationship with Debra improved after that, though he acknowledged it was still "not great."

Dennia, however, did not notice an improvement in the child's mood. He continued to tell Dennia that he did not like living at his father's house because of his poor relationship with his stepmother. He also told Dennia he was still having "bad thoughts." Dennia accordingly asked Michael if the child could come live

with her in Minnesota. Michael refused and, in February 2010, filed an application to modify the parties' dissolution decree, seeking physical care of the child.

In March 2010, the child called Dennia and told her he had gotten a knife out of the kitchen. He said he was going to use the knife to hurt himself but stopped when his stepsister walked in. He told Dennia, "I just am unhappy here. I'm tired of fighting with Deb. I'm tired of fighting with my dad."

Michael took the child to the hospital for a mental health evaluation. He was diagnosed with major depressive disorder and placed on medication. Notes from the child's hospitalization indicate the child reported the major stressor in his life was the ongoing custody battle between his parents. The child was released from the hospital several days after his initial admission but continued to see a counselor on an outpatient basis. Michael saw an improvement in the child's mood, but Dennia stated he was still calling her "every weekend, crying, saying . . . that he can't stand being at home."

Michael's application came before the district court for trial in November 2010. The child, who was twelve years old at the time, testified. He expressed a clear preference to live in his mother's home, stating:

> I think I would be better off with my mom because I have a better relationship with the stepparent there than here, and I get along with everyone better there. And I also think if I move there, I will make a lot more friends. . . .

Following the trial, the district court entered a ruling granting Michael's application to modify the physical care provisions of the dissolution decree. The court found Dennia's move to Minnesota and decision to leave the child in Iowa

with Michael was a substantial change in circumstances. The court further found that change in circumstances warranted a modification of the decree to allow the child to remain in Michael's physical care, where he had been since January 2007. In so finding, the court stated:

> In considering the entirety of the evidence produced at trial, it appears that [the child] has thrived under his father's care, even since the hospitalization in March of 2010. His grades are good, he is involved in extracurricular activities at school, is well-liked by his teachers, has many friends, and has been receiving appropriate professional counseling . . . and appropriate medications to assist with his prior depression.

In a post-trial ruling, the court elaborated on its decision to grant Michael's application as follows:

> [Dennia's] entire position revolves around her desire to attribute all of [the child's] emotional/mental health issues to what she contends is a bad relationship between [the child] and his step-mother. As specifically found by the Court in its ruling, the objective mental health records themselves conclusively establish that the great majority of [the child's] mental health issues are referable to [the child's] desire that the squabbling of [his parents] stop, as well as a number of other factors that have nothing to do with [the child's] relationship with his step-mother. It is not that the Court did not consider [the child's] emotional well-being but, rather, that the Court specifically disagreed with [Dennia] as to the cause of any distress.

Dennia appeals.

II. Scope and Standards of Review.

We review a district court's modification of a dissolution decree de novo. Iowa R. App. 6.907; *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). However, we recognize the district court was able to listen to and observe the parties and witnesses. *Id.* Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. *Id.*; *see also* Iowa R. App. P. 6.904(3)(*g*).

III. Discussion.

To change a custodial provision of a dissolution decree, the applying party 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). Dennia claims neither showing was made. We conclude otherwise.

Dennia argues, somewhat disingenuously, that her move to Minnesota and decision to allow the child to remain in Iowa with Michael was not a substantial change in circumstances because it was a "temporary mutual decision." The record shows, however, this "temporary" arrangement lasted almost three years before Dennia sought a return of the child to her care. During this time period, Dennia's visitation with the child was sporadic due in varying degrees to her work schedule, weather, and transportation issues. At times, several weeks, if not more, would pass between her visits with the child.

Although Dennia attempts to blame her irregular visitation with the child on Michael's intransigence, the district court found that while

> Michael could have been much more flexible in sharing in the transportation burdens and affirmatively facilitating the visitation . . . Dennia could have done a much better job in putting [the child] at the top of her priority list and at least trying to make arrangements further in advance. . . . She could also, with an absolute certainty, have done a better job of making visitation arrangements through Michael, as opposed to through [the child], and stopped blaming the missed visitations on Michael.

We agree and note, more importantly, the effect Dennia's irregular visitation had on the child.

Michael testified the child "misses not seeing" Dennia and observed "he does better when he sees her on a consistent basis." One of the child's counselors similarly noted the child "missed having contact with his mother." A different therapist told Dennia she needed to see the child as much as she could. We fully concur with the district court

> that [the child] has a close relationship with his mother and does better in most aspects of his life when he has frequent or at least consistent and regular visitation with his mother. During the times when Dennia was unable or unwilling to exercise her visitation with [the child], the evidence was clear that [the child's] relationships with his stepmother, stepsiblings, and his general mental health suffered.

As the court observed, the child's hospitalization in March 2010 was precipitated by "a relatively extended period where Dennia did not exercise visitation with" him.

In light of the foregoing, we find Michael established a substantial change in circumstances. The more difficult question is whether he demonstrated an ability to provide superior care and minister more effectively to the child's well-being. On this question, the child's best interest remains our polestar. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998) ("The best interests of the children is the first and governing consideration in determining the primary care giver of the child."). When determining the best interests of a child, we consider, among other things, the emotional and environmental stability offered by each parent. *See In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998).

Dennia argues the district court failed to give sufficient weight to the child's expressed preference to live with her. We disagree. 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, 245 (Iowa Ct. App. 1996). However, a child's preference is entitled to less weight in a modification action that 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 considering the child's request to live with his mother, the district court found that although the child "is an intelligent and articulate young man whose opinions/testimony should be considered . . . he is somewhat immature and lacks insight into the custodial situation." We defer to the court's observations of the child, *see In re Marriage of Berning*, 745 N.W.2d 90, 92 (Iowa Ct. App. 2007), and in doing so note both Michael and Dennia acknowledged the child had a tendency to exaggerate or misinterpret situations.

Much of the child's testimony at trial regarding his desire to live with Dennia centered on his poor relationship with his stepmother, Debra. Dennia accordingly argues "the hostility aimed at [the child] (or at a minimum *sensed* by [the child]) from Debra is a significant factor in assessing whether or not Michael offers care superior to Dennia." We recognize a poor relationship with a stepparent may support placing the child elsewhere, *see In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215-16 (Iowa Ct. App. 1994), but the evidence introduced at trial indicates the child's relationship with Debra had improved somewhat. Moreover, contrary to Dennia's assertions otherwise, the child's

depression and difficulties in Michael's home seemed to stem primarily from this custody dispute. The district court found that while the child's

> relationship with Debra is mentioned in the hospital records, far, far more prevalent is his complaint that he feels that he has been placed in the middle of his parents' custody dispute, and his wish that his parents got along and would stop arguing.

We agree based on our own review of the child's mental health records.

The child's primary therapist noted the child was originally seen by him in November 2009

> because of depression due to his thoughts of responsibility for his parents' divorce two years prior.
>
> . . . .
>
> In therapy, [the child] demonstrated increased ability to deal with the core conflict, but he continued to wish that his parents would work with each other for his best interest. He expressed love for both his parents but felt much anguish that they were separated from each other. Consequently, he felt not free to express himself for fear of hurting each parent.
>
> Subsequently, [the child] was admitted to St. Luke's Hospital following suicide thoughts and ideation. . . .
>
> It appeared that his depressive behavior was an attempt to communicate his anguish, pain, and desperation to resolve a situation beyond his control.

Counseling notes from the child's hospitalization confirm the major stressor in the child's life was the discord between his parents.

Finally, we reject Dennia's assertion that the district court improperly placed the burden in this modification action on her. Although the court's ruling did state "Dennia has failed to shoulder the very heavy burden necessary to disturb that primary care relationship which has existed with Dennia's full knowledge and consent for almost three years," we believe that statement was simply an acknowledgment of the reality of the parties' situation. *See In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa Ct. App. 1994) (giving weight to

father's role as de facto physical caregiver in modification action); *accord In re Marriage of Scott*, 457 N.W.2d 29, 32 (Iowa Ct. App. 1990) (finding modification of child custody provisions of a dissolution decree "preserves rather than disrupts the stability and continuity established" in the child's life where noncustodial father had assumed care of the child for close to three years). As the court's subsequent ruling on the parties' post-trial motions recognized,

> While [Dennia] at no time had a legal burden of proof to establish a change in circumstances in this case, she did have a very definite realistic factual dilemma of asking the Court to ignore the agreed upon living arrangements of the child for the prior three years and basically upset/change almost every aspect of the child's life (i.e. state of residence, home, family, teachers, friends, medical and mental health providers).

In conclusion, we find Dennia's move to Minnesota, her decision to leave the child in Michael's care for several years, and her lack of regular visitation with the child constitute a substantial change in circumstances. For the same reasons, we agree with the district court that Michael demonstrated an ability to provide superior care for the parties' child. *See 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). Although the child struggled with depression while in Michael's care, Michael appropriately addressed the situation, which was improving at the time of the trial.

We accordingly affirm the district court's decision to modify the parties' dissolution decree and place the child in Michael's physical care. We deny Michael's request for appellate attorney fees. *See In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006) (stating appellate attorney fees are not a matter of right but rather rest in this court's discretion and factors to be considered include

the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal).

AFFIRMED.