IN THE COURT OF APPEALS OF IOWA

No. 3-564 / 13-0013
Filed August 7, 2013

IN RE THE MARRIAGE OF ROBERT LOUIS BERNS AND SALLY LYNN BERNS

Upon the Petition of
ROBERT LOUIS BERNS,
Petitioner-Appellee,

And Concerning
SALLY LYNN BERNS,
Respondent-Appellant.

Appeal from the Iowa District Court for Allamakee County, John J. Bauercamper, Judge.

A mother appeals the district court's refusal to modify the physical care and child support provisions of the dissolution decree. **AFFIRMED.**

Erik W. Fern of Putnam Law Office, Decorah, for appellant.

Robert L. Sudmeier of Fuerste, Carew, Juergens & Sudmeier, Dubuque, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Sally Berns appeals the district court's denial of her petition to modify the terms of the decree dissolving her marriage to Robert Berns. Sally asserts on appeal the district court erred by not finding a substantial change in the circumstances to change the physical care provisions. She also claims the district court should have ordered the parties to participate in co-parenting counseling, should have awarded her child support, and should have fixed a holiday parenting schedule. Lastly, both parties seek appellate attorney fees. For the reasons stated herein, we affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Sally and Robert divorced in January of 2004 after more than twenty years of marriage. The parties filed legal separation documents in March of 2001, and then attempted to reconcile. The only child at issue in this case was born during the period of time between the legal separation and the divorce. The parties' other three children have since reached majority. The decree of divorce provided for shared physical care with exchanges occurring weekly on Sundays. The decree also provided for no child support to be paid due to the fact both parties earned substantially equal incomes. The decree had no provision regarding parenting time during holidays, and the child would spend the holiday with the parent who had parenting time that week.

The parties have had a very acrimonious and contentious relationship since the divorce with multiple interventions from law enforcement. Robert has

refused to communicate with Sally in order to avoid the conflict. The hostile relationship has often placed the children in the middle.

Sally filed a petition to modify the decree in September 2010, seeking an order for Robert to participate in family counseling, she be given the first option to care for the child in the event Robert cannot care for her during his parenting time, and such other orders as are indicated after the completion of counseling. Robert filed an answer and counterclaim seeking physical care of the child and also asking the court to enforce the health insurance and postsecondary education provisions of the 2004 decree.[1] As a result of Robert's counterclaim, Sally amended her petition to modify seeking physical care of the child and for the court to order a specific holiday visitation schedule.

The modification action proceeded to trial in November 2012. The child at issue was ten years old at that time. After hearing from the witnesses including two therapists for the child and two of the three adult children, the court concluded the evidence was "not sufficient to carry the burden of proof in favor of a change in custody/placement." The court maintained the joint physical care arrangement as it found it to be in the child's best interests despite the parties' communication difficulties. The court accepted Robert's child support calculation worksheet as best representing the parties' income and concluded child support should not be awarded because the incomes remained roughly equal. It

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[1] Sally was ordered to provide health insurance coverage for the children in the 2004 decree. When she had failed to provide that coverage, Robert obtained coverage through his employer. Sally was ordered to provide postsecondary education assistance to the children, and Robert claimed he had paid for the children's education with no assistance from Sally.

enforced the requirement Sally maintain health insurance for the child and provided no specific holiday schedule "because communication on these subjects promotes conflict between the parties."

Sally now appeals. Robert does not file a cross-appeal and only defends the district court's action.

II. SCOPE AND STANDARD OF REVIEW.

We review de novo an action to modify a dissolution decree as it is heard in equity. Iowa R. App. P. 6.907; *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). Because of its ability to see and hear witnesses first hand, we give weight to the factual findings of the district court, especially its assessment of credibility, though we are not bound by those findings. Iowa R. App. P. 6.904(3)(g). Case precedent has little value as we must base our decision on the particular circumstances of the case before us. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004).

III. PHYSICAL CARE.

The first issue we address is Sally's claim the court erred in finding no substantial change in circumstances to justify the modification of the physical care of the child. Courts can modify the custody and care provisions of a dissolution decree only when there has been "a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child." *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The parent seeking to change the physical care provision has a heavy

burden and must show the ability to offer superior care. *Id*. Where there is an existing order for joint physical care, both parents have been found to be suitable primary care parents. *Id*. at 369. If it is determined the joint physical care agreement needs to be modified, the physical care provider should be the parent "who can administer most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives." *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998).

Sally contends the evidence at trial clearly shows the parties have an inability to communicate and that inability has detrimentally affected the child. The district court found:

> There is a long history of conflict and litigation between Sally and Bob. Charges of sexual abuse, child abuse, domestic abuse, multiple calls to police, [a] juvenile court referral, [and] contempt applications, have been made, without any significant findings against any party.
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> Many of the recent disputes between the parties appear to result from Sally's repeated requests to Bob for changes in the care schedule for [the child] to accommodate her holiday and family activities. She rejects the decree provisions that require the parents to schedule their holiday, family, and other similar activities during their respective placement weeks. Bob has consistently rejected her requests and refused to discuss these matters with her, citing his reliance on these provisions in the decree as his method of avoiding conflict with Sally. . . . He prefers to have no contact with her at all. There is also a long history of conflict between Sally and Bob's extended family members which helps explain his attitude.

It is clear the parties do not communicate. The question becomes whether this lack of communication is a change in circumstances and whether the change relates to the welfare of the child. When asked at trial whether she was able to

communicate with Robert at the time of the dissolution decree was entered, Sally responded, "I believe so." Following the 2004 dissolution, Sally believed her relationship with another man was the catalyst of the lack of communication that currently exists. Robert testified that during the legal separation period before the divorce decree was entered, there was no communication between the parties and yet they made the joint physical care arrangement work with all of the children. He testified Sally filed a domestic abuse charge again him during the legal separation period, which was dismissed, but the parties stipulated at that time to the entry of a no-contact order. The evidence supports the district court's conclusion that there has never been much communication between the parties. Thus, the current lack of communication appears to have always existed between these parties and is not a change in circumstances.

The ability to communicate and show mutual respect for the other party is an important factor to consider when determining whether to award joint physical care. *In re Marriage of Hansen*, 733 N.W.2d 683, 698 (Iowa 2007).

> Discord between parents that has a disruptive effect on children's lives has been held to be a substantial change of circumstance that warrants a modification of the decree to designate a primary physical caregiver if it appears that the children, by having a primary physical caregiver, will have superior care.

Melchiori, 644 N.W.2d at 368. The parties' inability to communicate alone is not enough, there must be a showing that the lack of communication affects the welfare of the child or that the child will have superior care if physical care is granted to just one parent.

Here, the child treated with two different therapists starting at age four. The most recent therapist testified she recommended the child cease therapy as she had received maximum benefits. The initial treatment recommendation from the therapist in December of 2010, was for the child to attend four to six sessions. By the time of trial, the child eventually attended more than thirty sessions over two years. Sally continued to bring the child to therapy despite the therapist recommending multiple times for the sessions to cease. In May of 2011, the therapist noted the sessions had not been that helpful for the child but had been more of a support and guidance to Sally. Sally shared that her hope was for Robert to become involved with counseling so that she and Robert could have more communication. The therapist again recommended suspending counseling in August 2011, but Sally stated she believed therapy delivered the message to the child that the child needed to be respectful of Sally's authority, and Sally stated she felt supported by the therapist. The counseling continued on a roughly monthly basis until the time of trial.

The district court noted the therapist testified the child "has learned to better understand the situation between her parents and has developed appropriate coping skills." The therapist stated at trial that she was ready to discharge the child from counseling with the understanding that the child could reinitiate contact in the future if she felt it necessary. The child communicated to the therapist that she wanted joint physical care to continue, and the therapist recommended the same, noting it would be best if the parents could communicate, but if communication cannot improve it is still her recommendation

that joint physical care continues. The therapist stated it would be extremely difficult on the child to award physical care to just one party at this time in the child's life. The therapist recommended the parties start communication by e-mail first as it is less likely to lead to conflicts.

At the time of trial, the child was ten years old and had lived the last eight and a half years, nearly all her life, under the current parenting arrangement. While Sally asserts the lack of communication has negatively impacted the child, at this time, the child is happy, healthy, and performing well in school. She has been discharged from counseling, and it appears the prolonged nature of the counseling was the result of Sally's insistence rather than the child's needs. We agree with the district court after our de novo review that there has not been a change in circumstances warranting a modification of the physical care provisions at this time.

IV. COUNSELING.

Next, Sally claims the court erred in not ordering Robert to participate in co-parenting counseling. Despite her request for counseling, which the district court acknowledged, the district court did not specifically address the request in its decision, simply saying both parties' requests to modify are denied.[2] Sally claims the court can use its broad equitable powers to force Robert to communicate with her. Essentially, she is requesting a modification of the provisions of the existing parenting order.

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[2] Robert does not contest error preservation on this issue, and therefore, we will address it.

As stated above, the lack of communication between the parties is nothing new, and while it likely would greatly benefit the child to have two parents that can communicate civilly regarding her needs, it does not appear that court-ordered counseling will accomplish this goal. Robert chooses to avoid communication to avoid conflict; as the adage says, "If you don't have anything nice to say, don't say anything at all." Sally's attempts at communication often escalate due to her long-held resentment.

In this case court-ordered co-parenting counseling would not be beneficial to the parties or the child. Both parties have to be willing to communicate. *See In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996) (modifying the district court's order to delete the requirement for counseling between the parties where the counseling would not be fruitful due to the substantial conflict between the parties that had existed for an extensive duration). Assuming, without deciding, that Sally's burden of proof is the lesser burden as required to modify visitation provisions,[3] we find she has failed to prove that a change of circumstances warrants modifying the existing parenting provisions to require counseling. We therefore conclude co-parenting counseling, while beneficial if both parties would agree, should not be court-ordered at this time.

V. CHILD SUPPORT.

Sally claims the district court's finding regarding the income of the parties was in error and the case should be remanded to calculate the support due. Specifically, she asserts the court should have used a three-year average

[3] *See* VI: Holiday Schedule.

instead of a five-year average to calculate Robert's income and should have set her income at $80,904. She believes Robert's income shows a pattern of increasing, but her income shows a pattern of decreasing.

The trial court found Robert's child support guideline worksheet most accurately reflected the respective incomes of the parties. The court noted Sally testified she expects her wage to be less in light of the fact that she is not expecting bonuses. Robert stated he has discontinued his grain bin business due to his outdated equipment, and he wanted to quit his third job working nights at the Wisconsin prison once Sally was able to provide health insurance for the children. Thus, Robert planned for his only income to be farming after Sally starting providing health insurance.

The child support worksheet provided by Robert provided for a five-year average income of $92,192 after his wages from his prison job were removed. Sally's five-year average wage was calculated at $89,899. Due to the similarities in the income and the joint physical care arrangement, the support guidelines provided for child support in the amount of approximately ten dollars per month. The court concluded no child support should be awarded, unless Robert does not quit his job by July of 2013 as he planned to do when Sally is to have health insurance covering the children.

We agree with the district court's acceptance of Robert's child support calculations. The court must calculate the parents' current monthly income from the most reliable evidence presented, which includes considering all the circumstances relating to the parents' income. *In re Marriage of Powell*, 474

N.W.2d 531, 534 (Iowa 1991). When a party's income fluctuates, it is acceptable to take an average over a reasonable period. *Id*. In this case, a five-year average applied to both parties was reasonable.

It was clear from the evidence that Robert would no longer be generating income from his grain bin business and intended to cease his employment at the prison once Sally complied with her obligation to provide health insurance for the children, which Robert maintained was the only reason he continued to be employed at the prison. Sally criticized Robert for leaving the child in Robert's father's care so that he could work nights at the prison, and now she seeks to impose a higher support obligation on him, which would require him to maintain that employment, by asserting he cannot reduce his child support obligation by voluntarily reducing his income.

While it is true a party cannot voluntarily reduce his income and then seek to reduce his child support obligation, *see id*, this rule is not applicable in this case. Robert did not reduce his income and then seek to modify his obligation. He intended to stop his employment at a third job he had maintained for the sole purpose of providing health insurance for the children. This obligation was originally imposed on Sally by the decree. In addition, he was not seeking to reduce his support obligation but simply maintain the same support obligation that was in place at the time of the decree. If his employment at the prison does not cease or his income substantially increases, Sally has the option of seeking a modification at that time. We affirm the court's order providing for no child

support to be paid in this case due to the roughly equal incomes of the parties and the joint physical care arrangement.

VI. HOLIDAY SCHEDULE.

Sally maintains it was error for the court not to provide for a specific holiday parenting schedule. The district court, in denying the request for a specific holiday schedule, noted "no changes in holiday time should be made because communication on these subjects promotes conflict between the parents." Sally states it is because of this conflict that a definitive holiday schedule should be implemented and the court should not leave holiday parenting time to chance based on whose week the holiday happens to fall.

Modification of parenting time in a joint physical care arrangement is subject to the lower standard of proof applicable in visitation modification actions. *Brown*, 778 N.W.2d at 52–53. "[T]he general rule is that a much less extensive change of circumstances need be shown in visitation right cases." *Nicolou v. Clements*, 516 N.W.2d 905, 906 (Iowa Ct. App. 1994). Our focus, as always, is on the best interests of the child. *Id*. While the burden to prove a change in circumstances is less, there must still be a change in circumstances. As stated above, the parties have always struggled in their communication. Setting a specific holiday schedule at this time is no different than maintaining the holiday scheduled that currently exists—the child spends the holiday with the parent that has physical care that week. Both provide the same amount of certainty and maintaining the holiday schedule as it is now minimizes the number of physical care exchanges that must occur. Finding that Sally has not met her burden to

prove a change in circumstances, we affirm the district court's decision not to change the holiday schedule.

VII. APPELLATE ATTORNEY FEES.

Finally, both parties request an award of appellate attorney fees. Sally seeks an award of $5000, and Robert seeks an award of $10,000. Neither party provided an affidavit of attorney fees with supporting documentation to justify their request.

> Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. Factors to be considered in determining whether to award attorney fees include: "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal."

In re Marriage of Sullins, 715 N.W.2d 242, 255 (Iowa 2006) (citation omitted). Both parties have roughly equal income and therefore the same ability to pay their own attorney fees. Sally was not successful in her appeal, and we therefore deny her request for attorney fees. Robert was forced to defend the district court action, and therefore, we award him $1000 in appellate attorney fees.

AFFIRMED.

Doyle, P.J., concurs; Danilson, J., dissents in part.

DANILSON, J. (dissenting in part)

I respectfully dissent in part because I believe a substantial change of circumstances exists to modify physical care of the parties' minor child. Conflict between parents can amount to a substantial change of circumstances. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). The joint physical care arrangement initially agreed upon by the parties cannot be said to have evolved as envisioned by the decretal court and probably also the parties. Although the parties' hostility and lack of communication has existed for years, the degree of intractability reflected in the record surely exceeds what may have been contemplated at the time the parties stipulated to joint physical care.

We have approved a modification of joint physical care where cooperation and communication is lacking:

> Discord between parents that has a disruptive effect on children's lives has been held to be a substantial change of circumstance that warrants a modification of the decree to designate a primary physical caregiver if it appears that the children, by having a primary physical caregiver, will have superior care.

Id. (internal citation omitted). The facts in this case reflect abundant examples of discord and effects on the child. The child has been told by Robert that what happens at his house stays at his house, requiring the child to keep secrets from Sally. Robert has also called the police on more than one occasion. On one occasion the police were called because Robert contended that Sally had kidnapped the child although she had simply taken the child home from the local swimming pool to avoid a rainstorm. This incident, combined with her father

yelling at her, scared the child. As another example, during sporting events on Robert's week, the child is not permitted to acknowledge her mother.

Robert also refuses to acknowledge almost all efforts by Sally to communicate with him even as it may relate to the child's well-being. Robert's refusal to communicate was most notable when Sally attempted to communicate to Robert that the child had suffered a case of head lice and the need for proper care to avoid re-infestation. As a result of Robert's refusal to communicate with Sally, the child became re-infested after a week at Robert's home. The child was very distraught from having the infestation.

Moreover, unlike Sally's willingness to be flexible, Robert has declined to permit any changes in the care schedule to allow the child to attend important events of Sally's family. The child has now been diagnosed with adjustment disorder, believed to be caused by an adverse reaction to the child's experiences.

I would reverse in part and conclude that Sally should be awarded sole physical care of the child. Sally is willing to communicate and be flexible in providing the child's care. Sally can offer superior care. The best interests of the child support the conclusion that Sally be awarded sole physical care. I concur in part because I agree with the majority's decision as it relates to the parties' income for child support calculations. I also dissent in part regarding the award of attorney fees to Robert. I would remand for a determination of Robert's visitation terms and his child support obligation.