

**IN THE COURT OF APPEALS OF IOWA**

No. 3-849 / 13-0592  
Filed October 23, 2013

**Upon the Petition of**  
**SOPHIA MAE FREERKING,**  
Petitioner-Appellant,

**And Concerning**  
**ZACHARY ROGER PREUL,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Crawford County, Gary E. Wenell,  
Judge.

Sophia Freerking appeals from the district court order refusing in part to terminate Zachary Preul's visitation with their minor child. **AFFIRMED AS MODIFIED.**

Gina C. Badding of Neu, Minnich, Comito & Neu, P.C., Carroll, for appellant.

Joseph J. Hrvol of Joseph J. Hrvol, P.C., Council Bluffs, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

**MULLINS, J.**

Sophia Freerking petitioned for modification of the decree establishing custody and visitation of her minor child with Zachary Preul. The court granted Sophia's request for sole legal custody of the child, but denied her request to terminate visitation with Zachary, who is incarcerated. On appeal, Sophia challenges the portion of the order relating to visitation.

Because Sophia has not shown in-person visitation would likely harm the child, we affirm the portion of the court's order granting Zachary with bimonthly two-hour visits. However, we vacate the portion of the order granting Zachary two five-minute telephone calls per month.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Sophia and Zachary were involved in an on-again, off-again relationship from 2009 until January 2012. They have one child together, born in April 2010. A September 2010 decree provided for joint legal custody of the child and granted Sophia physical care. Zachary was granted visitation each Wednesday evening and alternating weekends, and was ordered to pay \$441 per month in child support.

The parties' relationship has been marked by domestic abuse. In December 2010, Zachary pushed Sophia to the ground, breaking her arm; he was charged with domestic abuse assault and pleaded guilty to disorderly conduct. After the relationship ended, Zachary broke down Sophia's front door and a few days later broke her window, prompting Sophia to file a petition for relief from domestic abuse. Then on February 21, 2012—the day after the

district court entered a final protective order—Zachary broke into Sophia's home and hit her in the face and arms with a gun while their child slept in the next room.

As a result of the February 21, 2012 attack, Zachary was arrested for first-degree burglary and domestic abuse assault with intent or while displaying a deadly weapon. He pleaded guilty to domestic abuse assault as charged and a lesser charge of second-degree burglary, and is now serving a ten-year prison sentence.

On March 5, 2012, Sophia petitioned the court to modify the custody decree. She sought sole legal custody of the child and asked the court to terminate Zachary's visitation rights. Zachary resisted Sophia's request for sole legal custody and asked for monthly visits with the child.

Following a February 14, 2013 hearing, the district court entered its order modifying the decree. The court granted Sophia sole legal custody of the child but denied her request to suspend visitation. The court granted Zachary one two-hour visit with the child in person every other month, and telephone visits with the child twice per month, not to exceed five minutes per visit.

## **II. SCOPE AND STANDARD OF REVIEW.**

Our review of this equity action is *de novo*. Iowa R. App. P. 6.907. We give weight to the district court's fact findings—especially those involving witness credibility—but are not bound by them. Iowa R. App. P. 6.904(3)(g). The district court has reasonable discretion in determining whether modification of a custody decree is warranted, and we will not disturb a modification order unless there is a

failure to do equity. *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987).

### III. VISITATION.

Sophia appeals from the portion of the district court order granting Zachary both in-person and telephone visits with the child. She argues it is not in the child's best interests to visit Zachary while he is incarcerated. She also argues the telephone visitation is not appropriate because a no-contact order is in place.

A custody decree may be modified "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 burden for modifying visitation is less; the parent seeking modification need only show "that there has been a *material change in circumstances* since the decree and that the requested change in visitation is in the best interests of the children." *In re Marriage of Salmon*, 519 N.W.2d 94, 95-96 (Iowa Ct. App. 1994) (emphasis added). There is no dispute that Zachary's prison sentence is a material change in circumstances that occurred after the custody decree was entered. The only question before us is whether the visitation schedule provided by the district court is in the child's best interests.

Sophia advocates that in determining whether visitation should be granted to an incarcerated parent, we should apply the same criteria used for determining

the reasonableness of services the State must provide parents in child-in-need-of-assistance cases.<sup>1</sup> However, the Iowa legislature has outlined the criteria for determining visitation. Iowa Code section 598.41 provides for “liberal visitation” that “will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents” and that “will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.” While the legislature has made special provisions regarding visitation where a parent has committed a sex offense against a child or been convicted of first-degree murder of the child’s other parent, Iowa Code §§ 598.41A, .41B, it has not made any special provision relating to parents convicted of domestic abuse or who are otherwise incarcerated.

We have consistently interpreted the provisions of section 598.41(1)(a) to find a parent’s visitation should not be restricted unless a child or parent is likely to suffer direct physical harm or significant emotional harm. *E.g., In re Marriage of Rykhoek*, 525 N.W.2d 1, 4 (Iowa Ct. App. 1994). We find Sophia has failed to

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<sup>1</sup> Sophia cites *In re S.J.*, 620 N.W.2d 522, 524-25 (Iowa Ct. App. 2000), in which our court considered whether the State made reasonable efforts to reunify a child with an incarcerated parent prior to termination of parental rights as is required by Iowa Code section 232.102 (2011). We held that in determining what services are reasonable under the circumstances, the Iowa Department of Human Services

may wish to consider some or all of the following factors, among others, if applicable: the age of the children, the bonding the children have or do not have with their parent, including any existing clinical or other recommendations concerning visitation, the nature of parenting deficiencies, the physical location of the child and the parent, the limitations of the place of confinement, the services available in the prison setting, the nature of the offense, and the length of the parent’s sentence. *S.J.*, 620 N.W.2d at 525.

show such harm is likely to occur during the bimonthly two-hour visits. Given the controlled and supervised nature of the prison facility, we find it unlikely the child will suffer physical harm. There is also no indication in the record that Zachary has ever physically harmed the child. Sophia testified to the contrary, stating that Zachary is a good father when he is not using drugs. Presumably, Zachary does not have access to drugs in prison.

Sophia's primary concern seems to be the emotional harm that visitation may cause the child. Part of this concern stems from the belief that Zachary and his parents blame her for the violence Zachary perpetrated on her and that they may try to turn the child against her. These concerns are prevalent in custody cases where there is animosity between the parties and would understandably be amplified in situations involving domestic violence. We note two circumstances that reduce this concern here. First, the court's order states that Zachary's aunt—not his parents—shall be primarily responsible for providing the child's transportation to and from the prison. While a second woman may accompany the aunt, this selection is subject to Sophia's approval. Second, the court's order specifically states that each party is not to criticize the other in front of the child or cast them in an unfavorable light. While we acknowledge that provisions such as this may be difficult to enforce, we note that the visitation provisions are subject to modification if Zachary or his family acts in a manner to undermine Sophia's relationship with the child. See *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984) (finding custodial parent's attempt to destroy the child's image of and confidence in the non-custodial parent was detrimental to

the child's emotional well-being and grounds for modification of custody); *Norenberg v. Norenberg*, 168 N.W.2d 794, 797 (Iowa 1969) (finding the stepmother's display of hostility for the mother was a substantial change in circumstance warranting modification of custody).

Zachary committed a crime and he is being punished accordingly. However, the child is entitled to ongoing contact with both parents and should not be punished for Zachary's misdeeds by being denied a relationship with him. While Sophia's desire to keep the child from Zachary is understandable, we are unable to find it likely that ongoing contact will be harmful to the child. Generally, liberal visitation is in the child's best interest. *Rykhoek*, 525 N.W.2d at 4. Because two-hour, bimonthly visits provide maximum contact with both parents and such contact is in the child's best interest, we affirm.

However, we vacate the portion of the court's order granting Zachary semimonthly telephone visits with the child. The child's young age would require Sophia to be involved in these visits. Given Zachary's history of violence toward Sophia, any requirement that she have contact with Zachary, even briefly on the telephone to assist or coordinate contact between him and the child, is contrary to the intent and purpose of the no-contact order. For so long as the child is too young to participate in telephone visits independently, we determine that telephone visitation is not appropriate.

#### **IV. ATTORNEY FEES.**

Sophia requests an award of her appellate attorney fees, citing her wages and Zachary's reduced child support obligation while in prison. An award of

attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). In determining whether to award appellate attorney fees, we consider the parties' financial positions and whether the party making the request was obligated to defend the trial court's decision on appeal. *Id.* After considering the appropriate factors, we decline to award appellate attorney fees.

Each party is responsible for their own costs.

**AFFIRMED AS MODIFIED.**