IN THE COURT OF APPEALS OF IOWA

No. 3-158 / 12-1828
Filed April 24, 2013

IN RE THE MARRIAGE OF KELLIE R. RISBECK AND MATTHEW W. RILEY

Upon the Petition of
KELLIE R. RISBECK,
Petitioner-Appellant,

And Concerning
MATTHEW W. RILEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Gary G. Kimes, Judge.

A wife appeals the modification order of her dissolution of marriage decree. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, and Lora L. McCollom of Harrison & Dietz-Kilen, P.L.C., West Des Moines, for appellant.

Erin M. Carr of Carr & Wright, P.L.C., Des Moines, for appellee.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

Kellie Risbeck appeals the district court's order finding her in contempt of court and modifying the decree dissolving her marriage to Matthew Riley.[1] She argues the transfer of custody of their son to Matthew was not in the child's best interest, and the child's guardian ad litem (GAL) was ineffective. She also asserts her attorney provided her ineffective assistance of counsel regarding the jointly tried contempt matter. Because we agree with the district court that Matthew met his heavy burden of proof regarding modification and Kellie's claims of ineffective assistance are without merit, we affirm.[2]

I. Background Facts and Proceedings

A son was born to Kellie and Matthew in 1999. In 2002, their common-law marriage was dissolved by a stipulated decree of dissolution, in which physical care of the child was granted to Kellie, with liberal rights of visitation to Matthew. Since the dissolution, Matthew has filed multiple applications for contempt detailing Kellie's repeated failure to allow him visitation with their son.[3]

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[1] While appeals of contempt findings should be through a petition for writ of certiorari rather than direct appeal, we will treat this as if it were filed correctly. Iowa R. App. P. 6.108.

[2] Matthew argues Kellie did not preserve error on any of her claims, asserting her post-trial motions were untimely. The district court specifically found the motions were timely and Matthew did not appeal this determination. We therefore find Kellie's issues adequately preserved for our review.

[3] On December 16, 2003, Matthew filed an application for contempt of court alleging Kellie denied visitation on twenty-eight instances for a total sixty-three days missed. The court found Kellie guilty and allowed her to purge the contempt by allowing make-up visitation for Matthew. On August 31, 2005, Matthew filed again, but later dismissed his application. On January 7, 2009, Matthew filed again, which was dismissed after a two-day trial. The parties disagree on the weight the previous contempt findings should be given in this action. While the issue was argued at oral arguments, it was not briefed by either party, nor was any supporting authority provided through briefing or oral argument. We will therefore not address this issue.

Kellie filed this petition to modify the visitation schedule of the dissolution decree, citing Matthew's move and remarriage, the strained relationship between Matthew's spouse and the child, as well as the child aging, having extra homework, and new activities as the substantial changes warranting modification. Along with his answer, Matthew filed a counterclaim seeking physical care of the child. Shortly thereafter, he filed an application for rule to show cause, alleging eight counts—with multiple dates per count—of contempt for Kellie's willful disobedience to the court's order regarding visitation. On April 12, 2012, the parties attempted to mediate the issues, but could only agree to have a GAL appointed for the child and for the child to go to counseling. The court appointed a GAL, who met with Kellie one time at her home, speaking with both Kellie and the child during the visit. The GAL also spoke with Matthew and his wife, reviewed the court file, and some therapist reports before filing a report to the court. No counseling occurred prior to trial.

On July 19, a joint trial was held on Kellie's petition for modification, Matthew's counterclaim for physical care, and Matthew's application to show cause. At the time of the hearing, Kellie had not allowed Matthew to see his son for approximately one year. The court heard testimony from Kellie and Matthew and admitted several exhibits into evidence, including the GAL's report, before granting Matthew physical care of the child and giving Kellie the same liberal visitation schedule Matthew should have enjoyed from the original decree. The court also found Kellie to be in contempt of court for willful violation of the visitation provisions and sentenced her to five days in jail for each of the eight

counts, to be run consecutive for a total of forty days. After various post-trial motions, this appeal follows. [4]

II. Standard of Review

Kellie's claim regarding the modification of the physical care arrangement is reviewed de novo. Iowa R. App. P. 6.907. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(g). To the extent Kellie's claims are for ineffective assistance of counsel on the contempt matter, our review is de novo. *State v*. *Dudley*, 766 N.W.2d 606, 611 (Iowa 2009).

III. Modification

Child custody provisions of a dissolution 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 is more or less permanent and relates to the welfare of the child." *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). If the parent seeking to take custody from the other has shown a substantial change in material circumstances, then the court next considers whether the party has shown "an ability to minister more effectively to the children's well being." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). As always, "our first and foremost

[4] On September 13, 2012, after noting Kellie had served thirteen days of her sentence, the court, with the agreement of Matthew, suspended the remaining twenty-seven days, pending compliance with the provisions of the modified order.

consideration in determining custody is the best interest of the child involved." *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). It is also appropriate for us to consider the relationship of the parents. *Id.* "In determining custody we can give great weight to a parent's attempt to alienate a child from her other parent if evidence establishes the actions will adversely affect a minor child." *Id.* Tension between the parents is a factor in determining if a custody modification is appropriate. *Id.*

Although Kellie maintained she withheld visitation to protect the child, the record supports the district court's observation that Kellie "has completely and totally alienated her child from [Matthew]." The district court continued:

> I find that it is in this child's best interest to have a relationship with his father. It is clear to this Court that he can provide a place to have his son live with him . . . This child needs both parents. Without a doubt, he needs counseling. I am going to order that counseling be made available to this child . . . That counseling will continue until maximum benefits are reached and that will include, but not limited to, the involvement of the parents when that counselor thinks it is appropriate . . . I want this order to reflect that to the extent that there is bad-mouthing by either parent to this child, it is going to stop. For example, in the guardian ad litem's report it indicates that this child brought up violence between his mother and father when he was 15 months. Now somebody talked to this kid about that. That stuff has got to stop. The guardian ad litem's report is helpful in a couple respects. The reports from the local law enforcement and the fire department personnel seem to be very supportive of [Matthew] and his wife. It indicates no problems like those that have been alleged by [Kellie].

We agree with the district court that Matthew has carried his heavy burden of proof, demonstrating a substantial change in circumstances: Kellie's continued unwillingness to comply with the court ordered visitation schedule. *See e.g. In re Marriage of Quirk-Edwards*, 509 N.W.2d 476 (Iowa 1993) (finding the efforts of a

mother, who had physical care of a child, to deprive the father of court-ordered visitation, constituted a permanent and material change of circumstances).

We must next determine if Matthew has shown he can provide superior care and whether modification is in the child's best interests. Matthew testified he would provide a better home for the child because he would "help facilitate the co-parenting between Kellie and [himself] with [the child]," and do whatever needs to be done to help the child repair all of the damage this situation has caused, particularly counseling. This is telling as Kellie testified she was resistant to allow the child to have counseling with Matthew. We agree with the district court that in spite of the acrimony between the parties, Matthew is more willing to facilitate a relationship between the child and Kellie than Kellie has been able to do for him.

While Kellie focuses her argument on not disrupting the stability the child has had in her care, we find she has overstated that stability. Since her divorce from Matthew, Kellie has remarried and divorced again. At the time of the hearing, she was currently residing in a temporary residence with her new fiancé. Matthew, on the other hand, has lived in the same house for over five years, and has been married to only one other woman, his current wife. The child has a bedroom in Matthew's home and while Kellie attempts to portray Matthew in a negative light, including claims that Matthew's home is not a safe place, these accusations are not supported by the record.[5] The GAL report found both

[5] Kellie puts great weight on a Department of Human Services investigation in 2005 that initially determined there were founded reports of child abuse with Matthew as the perpetrator against the child. These assessments were appealed, and changed to "not confirmed" through a settlement agreement.

parents have adequate housing and can provide access to adequate schooling. While Kellie testified she would have "no problem with visitation resuming" once the child feels safe in Matthew's home, we look to her past performance and find this statement not credible. *See Winnike*, 497 N.W.2d at 174 (directing we look to a parent's past performance as indication of the quality of future performance). Rather than trying to work through any problems she perceives with Matthew, she has simply withheld visitation and a wedge was then driven between the child and his father. Contrary to the dissolution decree, Kellie failed to inform Matthew of important joint custodial information, including medical appointments and school events. We agree with the district court; Matthew has proved by a preponderance of the evidence he would be able to better minister to the needs of the child—most notably to foster a relationship with both parents.

Kellie also argues the district court did not act in the child's best interest in modifying the care arrangement because the court failed to consider the child's wishes in accordance with Iowa Code section 598.41(3)(f) (2011). When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his wishes, though not controlling, may be considered by the court, with other relevant factors, in determining child custody rights. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). However, a child's preference is entitled to less weight in a modification action than would be given in an original custody proceeding. *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa Ct. App. 1987). Furthermore, the analysis involved in deciding custody is "far more complicated than asking children with which parent they want to live." *Id.* at 101.

The GAL report relays the child does not want to visit Matthew, but would be willing to have visits as long as his stepmother was not present. The district court commented on Kellie's efforts to alienate the child, and concluded, "this child needs both parents." We find the efforts by Kellie to prevent Matthew and the child from having a relationship outweigh the thirteen year-old's desire to remain with Kellie.

Kellie also argues separating the child from her other child, a half-sibling, is not in the child's best interest, because siblings in dissolution actions should be separated only for compelling reasons. *See In re Marriage of Gonzales*, 373 N.W.2d 152, 155 (Iowa Ct. App. 1985); *In re Marriage of Mayer*, 347 N.W.2d 681, 684 (Iowa Ct. App. 1984). This principle has also been recognized as having application to half-siblings. *Quirk-Edwards*, 509 N.W.2d at 480. However, while there is slight mention in the record that Kellie has another child, there is no mention of the relationship between the two children and whether separation would be detrimental to this child. Based on our de novo review of the record before us, we cannot find any separation of the two children would be more compelling than the need for a healing of the relationship between this child and Matthew.

We find Matthew has proved a substantial change not in the contemplation of the dissolution court, he can provide superior care because he is willing to foster a relationship between the child and Kellie and modification is in the child's best interests.

IV. Ineffective Assistance of Counsel: Contempt Action

Next, Kellie argues she was provided ineffective assistance of counsel and is therefore entitled to a new trial.[6] The right to counsel has been extended to civil contempt proceedings because imprisonment was a contemplated sanction. *See McNabb v. Osmundson*, 315 N.W.2d 9, 14 (Iowa 1982). Our ultimate concern in claims of ineffective assistance is with the '"fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)). The party claiming ineffective assistance of counsel must show (1) counsel's performance was deficient, and (2) actual prejudice resulted. *Strickland*, 466 U.S. at 687. A failure to establish either factor will defeat the claim. *See In re D.W.*, 385 N.W.2d 570, 583 (Iowa 1986) (noting that having found counsel's performance not deficient, inquiry could end).

Kellie admitted multiple times on the record she understood not allowing the child to go to visitations was in violation of a court order. When asked by opposing counsel if Kellie was "well aware of the potential risk [she] face[s] when [the child] doesn't go on visitation," Kellie responded "Absolutely." After Kellie's testimony, Kellie's attorney stated on the record

> Over our break I had a chance to talk to Kellie. In light of what we discussed in chambers and in light of the things that your honor and I have discussed, Kellie has decided that at this point in time she is prepared to go to jail and doesn't see the point in continuing on. She would rather face the inevitable rather than going on. If it is

[6] Kellie requests we grant a new trial on all issues, not just the contempt, because the issues are of a "complex and intertwined nature." A party is not entitled to effective assistance of counsel in a custodial matter. *In re Marriage of Johnson*, 499 N.W.2d 326, 327 (Iowa Ct. App. 1993). However, because we find Kellie was not provided ineffective assistance of counsel, the distinction is inconsequential.

> okay with the Respondent, we would like to go ahead and just go ahead and move to sentencing for her and the rest.

Later, the following record was made:

> THE COURT: I will be glad to hear from you or your client by way of mitigation or allocution as to why I should not put her in jail.
>
> [ATTORNEY]: Your Honor, the only thing I would have to offer as far as mitigation was what Kellie stated during her testimony. She believes that she has been doing what is in the best interest of her child for safety concerns and as she stated in her testimony, she was willing to take the risk knowing what the risk could potentially be. But her primary concern is what she believes is in his best interest.

Kellie claims her attorney allowed her to incriminate herself on the stand, without offering any defense or rationale for her actions. At oral argument Kellie claimed her attorney should have advised Kellie to assert her Fifth Amendment right against self-incrimination. Again, this Fifth Amendment argument was not raised in her briefs, nor was any authority provided. Moreover, Kellie fails to argue how any of the questions posed to her during the trial would have been objectionable. Kellie freely admitted in her testimony she willfully violated the court order, feeling justified in her actions. Furthermore, even if she had not made these admissions, the record details all her repeated failures to provide Matthew with court ordered visitation and compliance with the defined provisions of legal custody under Iowa Code section 598.41(1)(e). Not only has Kellie failed to show a breach of a duty, but also because there was ample evidence of her contemptuous conduct in the record independent of her testimony, there was no prejudice.

To any extent she argues her attorney failed to insure she understood the consequences of her stipulation to the contempt, this argument must also fail.

She testified she understood the consequences of her actions. She chose to go to jail rather than comply with the visitation orders of the court. As the district court found,

> She has clearly and willfully ignored court orders. She has been held in contempt before. She was not ordered to go to jail and apparently didn't think the Court was serious about this stuff. I don't know. But I think it is serious. You just simply can't do this.

Her claim of ineffective assistance must fail.

V. Guardian Ad Litem for the Child

Lastly, Kellie claims the GAL provided the child ineffective assistance of counsel. Our Court has previously declined to address whether a parent has standing to raise the issue of ineffective assistance of a child's GAL. *In re J.V.*, 464 N.W.2d 887, 891-92 (Iowa Ct. App. 1990), *overruled on other grounds by In re P.L.*, 778 N.W.2d 33, 39 (Iowa 2010). Even if Kellie has standing to raise her argument, the argument fails. Kellie faults the GAL for not investigating the concerns he noted in his report, however, she cannot identify how any further investigation would have been to the child's benefit. In that same vein, Kellie argues the GAL was ineffective for not attending the trial, but she fails to show how this caused any prejudice to the child. This argument is wholly without merit. Based on the merits of her appeal, we decline her request for appellate attorney fees.

VI. Conclusion

Ten years of at best mediocre visitation compliance, and most recently noncompliance, is a significant change in circumstances from the original decree warranting modification. Matthew has proved he can provide a superior care for

the child as he is willing to work on encouraging a relationship between the child and his mother. Placing the child with the parent who is more likely to encourage contact with the noncustodial parent is in the child's best interests. We also find Kellie's claims of ineffective assistance of counsel to be without merit. We affirm the district court.

AFFIRMED.