IN THE COURT OF APPEALS OF IOWA

No. 7-776 / 06-2094
Filed December 28, 2007

IN RE THE MARRIAGE OF SALLY ELAINE SEATH AND KENNETH JAMES FISHER

Upon the Petition of
SALLY ELAINE SEATH,
Petitioner-Appellant,

And Concerning
KENNETH JAMES FISHER,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Robert E. Sosalla, Judge.

A mother appeals from a district court ruling granting the father's petition to modify the physical care, visitation, and child support provisions of the parties' dissolution decree. **AFFIRMED.**

Sheree L. Smith, Cedar Rapids, for appellant.

Christine L. Crilley, Cedar Rapids, for appellee.

Richard L. Borsei of King, Smith & Borsei, Cedar Rapids, for minor child.

Heard by Huitink, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Sally Seath appeals from a district court ruling granting Kenneth Fisher's petition to modify the physical care, visitation, and child support provisions of the parties' dissolution decree. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

The parties' marriage was dissolved in July 1994. They had one child together, Avolyn, born in October 1990. The dissolution decree placed Avolyn in the parties' joint legal custody and in Sally's physical care. Kenneth was granted visitation with Avolyn and ordered to pay child support.

Kenneth filed a petition for modification of the parties' dissolution decree in August 2004, seeking an order granting him physical care of Avolyn due to "the home situation between Avolyn and Sally," establishing visitation rights, terminating his child support obligation, and ordering Sally to pay child support for Avolyn. The petition came before the district court for trial in September 2006.

The record reveals that Avolyn has a troubled relationship with her mother. From an early age, Avolyn recalled that Sally was "always kind of telling me bad things about my dad and telling me . . . not to trust him." She felt like Sally did not "listen to how I would feel or she would say that I only feel that way because my dad told me to feel that way." As Avolyn matured, she and Sally began fighting almost every day. Sally told Avolyn a few times when they were arguing that "she wished I was never born." During their arguments, Sally would follow Avolyn around the house and into her room so Avolyn could not end the argument. The police were called to the home several times, and one argument

that resulted in a minor injury to Avolyn was reported to the Iowa Department of Human Services (DHS).[1] After these fights with Sally, Avolyn "felt trapped," "stressed out," and helpless.

Beginning around December 2002, Kenneth noticed a change in Avolyn's temperament and behavior. She was "quick to weep, had wide emotional swings," and exhibited "unpredictable" and "uncharacteristically poor behavior." Avolyn's complaints about her conflicts with her mother increased in intensity and frequency. She became reluctant to return to her mother's house after visitation with Kenneth.

In 2003, Avolyn started dressing in black clothing and wearing heavy dark eyeliner and eye make-up. Around that same time, Kenneth began taking her to see psychologist Richard Socwell. The focus of Socwell's sessions with Avolyn concerned her frustrations with her home environment and her mother. The level of conflict between Avolyn and Sally was far beyond what Socwell saw in most families.

In early February 2004, a very depressed Avolyn told Socwell she was cutting herself, which he believed was a response to a great deal of stress. It appeared to Socwell that "conflicts in that home were escalating" and "her depression was a response to that escalation." Avolyn was hospitalized at St. Luke's Hospital a short time later due to her self-injurious behavior. She believed "that house's atmosphere and me and my mom's relationship" contributed to her behavior because she "was kind of stuck there" and "could not do anything to help" herself. Avolyn "liked being at the hospital because [she] didn't have to

[1] DHS investigated the incident and determined the allegation of physical abuse was unfounded.

deal with [her] mom." She did not want to continue living with her mother upon her discharge from the hospital.

Her treating physician at the hospital, Dr. Wilharm, notified DHS that he believed Avolyn was being subjected to emotional abuse. He stated her "cutting has become an unfortunate and inadequate method of coping with what I believe to be an emotionally abusive environment," which he felt both parents contributed to.[2] DHS facilitated a family team meeting with Kenneth, Sally, and Avolyn to coordinate a discharge plan to accommodate Avolyn's desire to reside with her father. Kenneth and Sally ultimately agreed to share physical care of Avolyn.

Avolyn was discharged from the hospital towards the end of February 2004. She resided with Kenneth for about four weeks and then began the joint physical care arrangement. Dr. Elisabeth Robbins, the manager of the family counseling center at St. Luke's, provided counseling services to the family after Avolyn's hospitalization. Dr. Robbins simulated fights between Avolyn and Sally to help them learn how to communicate with one another. Avolyn did not feel the sessions were helpful because "[i]t was just a whole bunch of fighting, and then we went home and fought there." Although Sally implemented Dr. Robbins's communication strategies for a short time, she soon reverted to her previous behavior.

Avolyn became discouraged with the joint physical care arrangement because the discord between her and her mother did not improve. Avolyn believed the arrangement actually exacerbated her conflicts with Sally "because she was starting to . . . see me less and less," so she became "even more

[2] DHS investigated and determined the allegation of mental injury was founded as to both Kenneth and Sally.

aggressive or more temperamental." She felt as though Sally "was kind of always trying to get me to believe her and get on like her side," and she was "trying harder and harder to get me to change my mind about how I felt and trying harder to get me to dislike my dad."

In February 2005, Avolyn told Kenneth to "keep me or take me to the hospital" because her relationship with Sally was worsening, and she "could not take it anymore." Kenneth was concerned Avolyn would run away or end up in the hospital again, so he did not force her to return to her mother's home. Avolyn and Sally arranged short visits with one another on an approximately weekly basis throughout 2005 and 2006. Kenneth continued to pay child support for Avolyn until the district court entered an order on November 21, 2005, suspending his obligation pending trial.

Avolyn's temperament, behavior, and performance in school improved once she began residing primarily with Kenneth. She felt that the atmosphere at her father's house was "healthier. . . . I'm not in a fight every day, and it's not stressful." Avolyn testified outside of the presence of her parents at trial and expressed a strong desire to continue living with her father. She also expressed a desire to maintain a relationship with her mother. Sally was not opposed to Avolyn living with her father, but she testified she wanted to continue to be designated as her physical caregiver to prevent Kenneth from removing Avolyn from the state of Iowa.[3]

The district court granted Kenneth's petition to modify the physical care, visitation, and child support provisions of the parties' dissolution decree in

[3] There is no evidence in the record that Kenneth had any plans to move out of the state of Iowa with Avolyn.

October 2006. The court found the level and effect of the conflict between Sally and Avolyn was a substantial change in circumstances, which necessitated a change in Avolyn's physical care. The court accordingly concluded it was in Avolyn's best interests to be placed in Kenneth's physical care and have visitation with Sally "at least once a month" "at all reasonable times and reasonable places agreed upon between Sally and Avolyn."

The district court further found Sally had a net monthly income of approximately $1900 per month, while Kenneth had a net monthly income of approximately $4245 per month. Kenneth's child support obligation was terminated effective November 21, 2005, and Sally was ordered to pay child support for Avolyn in the amount of $365 per month retroactive to November 18, 2004.

Sally appeals and raises the following issues:

I. The trial court erred in its failure to continue primary physical care of Avolyn with Sally.
II. The trial court erred when it failed to provide a visitation schedule for Sally and Avolyn.
III. The trial court erred when it awarded retroactive child support to Kenneth as it is inequitable.

II. SCOPE AND STANDARDS OF REVIEW.

Our review is de novo in this equity case. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. 6.14(6)(*g*); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

III. MERITS.

A. Physical Care.

To change a custodial provision of a dissolution decree, the applying party is required to establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the child's best interests make it expedient to grant the requested change. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). The change must be more or less permanent and relate to the child's welfare. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the child, *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002), and to minister more effectively to the child's well being. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). This heavy burden stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. *Id*.

In her brief and at oral argument Sally claims that Kenneth orchestrated Avolyn's behaviors and other events, and enlisted the partisan aid of professionals, to create a record and support and facilitate a change of Avolyn's physical care. We find these claims lacking in evidentiary support and credibility.

Sally argues "the behaviors displayed by Avolyn are not material and substantial in that the behaviors although extreme are present in both homes." We do not agree. It is clear from the record that Avolyn's self-injurious behavior in 2004 was in response to the conflict that existed between her and Sally.

Avolyn testified she began seeing Socwell in 2003 due to her "problems in [her] mom's house and how to deal with them." Socwell likewise testified the focus of his sessions with Avolyn over the three and half years that he counseled her concerned her relationship with Sally. When Avolyn told Socwell in February 2004 that she was cutting herself on her arms, she again identified conflicts with her mother as the source of her emotional turmoil. She told the staff attending to her during her subsequent hospitalization that she could not cope with the stress present in her mother's home any longer. Although Avolyn did not "know the specific thing that triggered" her self-injurious behavior, she believed the atmosphere in her mother's house and her relationship with her mother were contributing factors. Based on the foregoing, we conclude the contentious relationship between Avolyn and Sally, which culminated in Avolyn's hospitalization, is a substantial change in circumstances.

We must next determine whether Kenneth demonstrated the ability to provide superior care and minister more effectively to Avolyn's well-being. On this question, Avolyn's best interests remain 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 children."). When determining the best interests of children, we consider the emotional and environmental stability offered by each parent. *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998); *see also In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) (stating the ultimate objective is to place children in the environment most likely to bring them to healthy physical, mental, and social maturity).

Socwell believed it was in Avolyn's best interests to reside with her father. He testified that since she began residing with her father, Avolyn's emotional state has become very positive and stable. She was functioning "excellently at school, home, [and] socially" after living with her father for a year and a half. According to Socwell, "[h]er depression was not in evidence when she was living with her father." He testified that Avolyn viewed her mother's home as emotionally unstable and dangerous "because her mother was so reactive and extreme in her accusations and her behavior." She felt "comfortable and safe emotionally in her father's home," and "uncomfortable and unsafe in her mother's home." He expressed a concern that if Avolyn returned to her mother's house to live, she would become depressed again and "we would be looking at the possibility of her going into that cutting phase again and hospitalization."

Although not controlling, we also give some weight to Avolyn's preference as to which parent she wants to live with. Iowa Code § 598.41(3)(f) (2003); *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993) (recognizing we give less weight to the child's preference in a modification action than in an original custody decision). In assessing Avolyn's preference, we look at, among other things, her age and educational level, the strength of her preference, her relationship with family members, and the reasons she gives for her decision. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 258-59 (Iowa Ct. App. 1985).

Avolyn was sixteen years old at the time of the trial. She was described by her family and her therapist as a mature and intelligent young woman. Her thoughtful and insightful testimony at trial confirmed this characterization. Avolyn was adamant and unwavering about her desire to live with her father. She

testified that when she lived with her mother, they "probably fought . . . almost every day. . . . It wasn't . . . a good atmosphere." Avolyn further testified she could not "communicate well with [her] mom. And if you can't communicate well with your parent . . . how are you going to grow up and . . . go through life if you don't have your parent to be there for you." She described the atmosphere at her father's home, on the other hand, as "better," "healthier," and "not stressful." She has a strong, close relationship with Kenneth and feels she is able to confide in him. She testified "it's nice living somewhere where I have somebody to go to."

We also consider Sally's testimony at trial that she did not oppose Avolyn's desire to live with her father. Sally testified she wanted Avolyn "to have a stable life. . . . I'm not going to make her come home because I know it does create turmoil in her life. . . . And I'm willing to go, in essence, with how things have been." Although Sally acknowledges the discord between her and Avolyn, she does not accept any responsibility for their troubled relationship. Instead, she believes her problems with Avolyn are due to Kenneth's influence and attempts to alienate her from Avolyn. The record, however, shows that Sally herself has harmed her relationship with Avolyn due in part to her constant disparaging remarks about Kenneth. *See In re Marriage of Manson*, 503 N.W.2d 427, 429 (Iowa Ct. App. 1993) (stating the ability of each parent to support the other parent's relationship with the child is an important factor in determining custody and is instrumental in the successful mental, emotional, and social development of the child).

In light of the foregoing, we find Kenneth demonstrated the ability to more effectively minister to Avolyn's well-being. We therefore agree with the district

court's decision to modify the parties' dissolution decree and place Avolyn in Kenneth's physical care.

B. Visitation.

We next turn to Sally's argument that the district court should have set forth a structured schedule for visits between her and Avolyn. The district court ordered that Sally shall have visitation with Avolyn at least once a month as agreed upon between the two of them. The court further provided that Avolyn could end the visit if she felt her safety was threatened. Upon our de novo review, we find the district court's order regarding visitation was appropriate given the facts of this case.

Generally, liberal visitation is in a child's best interests "insofar as is reasonable" because it maximizes physical and emotional contact with both parents. Iowa Code § 598.41(1)(a). However, "[a]lthough liberal visitation is the benchmark, our governing consideration in defining visitation rights is the best interests of the children, not those of the parent seeking visitation." *In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa Ct. App. 1994); *see also* Iowa Code § 598.41(1)(a) (stating the court "shall order . . . liberal visitation rights where appropriate, . . . unless . . . significant emotional harm to the child . . . is likely to result from such contact with one parent").

It is apparent from the record that Avolyn sincerely wanted to maintain a relationship with her mother. She testified that she "wish[ed] we could have a normal relationship. I wish we could spend more time together." Kenneth and Socwell both confirmed that Avolyn wanted to continue to have contact with Sally. Avolyn denied Sally's claims that she would never see her again if a

structured visitation schedule was not ordered, stating, "I think she puts her own thoughts in her head kind of like thinking I'm never going to see her again. I think she created that herself. I never said that."

Avolyn believed it was in her best interests to "take it gradually" and give her "control of when I go to see my mom knowing she could be unpredictable." She was fearful she and her mother would return to their previous behavior if they had to see one another too often at first, or if Avolyn was required to have visitation with her mother "when she's in a bad mood. That's just going to make us fight more, and I just wish that we could get along." Socwell likewise recommended that Avolyn maintain some level of control over visitation with her mother. He testified that while Avolyn wants to have a relationship with her mother, "she also wants to feel that she's emotionally safe . . . and I think what could provide that would be if . . . she were able to have control over being able to leave . . . if things got bad."

We believe the record demonstrates Avolyn's genuine desire to spend time with her mother and develop a healthy relationship with her. The district court's open-ended visitation order allows for that possibility while also providing for Avolyn's concern for her emotional well-being. We therefore find the circumstances presented by this case support the district court's decision to allow Avolyn and her mother discretion in scheduling visitation with one another. We accordingly affirm the district court's order regarding visitation.

C. Child Support.

Finally, Sally argues the district court "erred when it awarded retroactive child support to Kenneth as it is inequitable." We do not believe the district court's order regarding child support was inequitable.

The parties agreed to share physical care of Avolyn in February 2004 after she was discharged from the hospital. Kenneth filed his petition to modify the parties' dissolution decree in August 2004, and Sally was served with notice of the modification action on August 18, 2004. Kenneth's petition requested an order terminating his child support obligation and requiring Sally to pay child support for Avolyn. In February 2005, Avolyn began residing with Kenneth on a full-time basis. Kenneth continued to pay child support to Sally until November 21, 2005, when the district court entered an order suspending his child support obligation pending trial.[4]

Iowa Code section 598.21(8) provides that child support awards "may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party." The district court ordered Sally to pay child support in the amount of $365 retroactive to November 18, 2004, which is three months after she was served with notice of Kenneth's petition to modify their dissolution decree. The court further ordered that Sally shall pay an additional $100 per month "to apply to the retroactive application of her support obligation."[5] *See* Iowa Code § 598.21(8) ("Any

[4] Although Kenneth filed his petition to modify in August 2004, the matter was not tried until September 2006. Sally had five different attorneys of record during the course of these proceedings. The trial was continued at least twice due to Sally's change in counsel.

[5] In addition, the district court terminated Kenneth's child support obligation effective November 21, 2005. We recognize the well-established rule that "although a support order may be retroactively increased, it may not be retroactively decreased." *In re*

retroactive modification which increases the amount of child support . . . shall include a periodic payment plan."). Based upon the circumstances presented in this case, we find the district court's order requiring Sally to pay child support retroactive to three months after she was served with notice of the modification action was not inequitable. *See Barker*, 600 N.W.2d at 323 (reaffirming the principle that child support orders may be retroactively increased as provided for in section 598.21). We therefore affirm the judgment of the district court.

D. Appellate Attorney Fees.

Each party requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Applying these factors to the circumstances in this case, we decline to award either party appellate attorney fees.

IV. CONCLUSION.

Upon our de novo review, we agree with the district court's order modifying the parties' dissolution decree and placing Avolyn in her father's physical care. We also agree with the district court's order regarding Avolyn's

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Marriage of Barker, 600 N.W.2d 321, 323 (Iowa 1999). However, Sally does not raise this as an issue on appeal. *See Aluminum Co. of America v. Musal*, 622 N.W.2d 476, 479 (Iowa 2001) ("Issues not raised in the appellate briefs cannot be considered by the reviewing court."). Furthermore, we note the district court entered an order on November 21, 2005, suspending Kenneth's child support obligation pursuant to the parties' agreement. *See Barker*, 600 N.W.2d at 324 ("[W]e may not retroactively reduce child support obligations that have *accrued* prior to the time modification is ordered.") (emphasis added). We accordingly decline to disturb this provision of the district court's order.

visitation with her mother. We reject Sally's argument that the district court's order requiring her to pay retroactive child support was inequitable. The judgment of the district court is therefore affirmed. Each party shall be responsible for their own appellate attorney fees. Costs on appeal are taxed to Sally.

AFFIRMED.