

IN THE COURT OF APPEALS OF IOWA

No. 0-754 / 10-0905
Filed December 22, 2010

**IN RE THE MARRIAGE OF
MARY ELIZABETH LANGE
AND CALVIN J. LANGE**

**Upon the Petition of
MARY ELIZABETH LANGE,**
Petitioner-Appellee,

**And Concerning
CALVIN J. LANGE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Humboldt County, Thomas J. Bice,
Judge.

A father appeals from the district court's order denying his application to
modify the child custody provisions of a dissolution decree. **REVERSED AND
REMANDED.**

Dan T. McGrevey, Fort Dodge, for appellant.

Dani L. Eisentrager, Eagle Grove, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Calvin Lange appeals from the district court's order denying his request to modify the child custody provisions of his and Mary Lange's (n/k/a Mary Fowler) dissolution decree. He asserts that the district court should have granted him physical care of the parties' three children.¹

I. Background Facts and Proceedings

Calvin and Mary's marriage was dissolved in January 2005. They have three children: T.L. (born in 1999), J.L. (born in 2000), and S.L. (born in 2001). Calvin and Mary entered into a stipulation which granted each parent joint legal custody of the children, with Mary having physical care and Calvin visitation.

In March 2009, Calvin sought to modify physical care of the children, asserting there had been a significant change of circumstances since the entry of the decree, warranting modification. A trial was held in May 2010. In addition to the parties, numerous witnesses testified, including Mary's mother, Carolyn; her brother, James; James' girlfriend, Rebecca; Mary's former friend, Hope Hernandez; Calvin's fiancée, Rhonda; Calvin's sister-in-law, Rebecca; Calvin's boss, Matthew Landis; some of the children's teachers; parents of children at Mary's daycare; Bob Schulz, a counselor for Youth and Family Center; and Sue Hyland, the elementary counselor for South Hamilton Schools.

In its May 21, 2010 ruling, the district court found that both parents cared deeply for their children, and were both trying to provide for their needs. The fighting issue related to Mary's current husband, Chris Fowler, and his

¹ We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. See Iowa R. App. P. 6.905(7)(c).

questionable interactions with the children. In addition to the allegations of physically abusive conduct directed at J.L., the court was “extremely concerned about the allegations of sexual misconduct by Mr. Fowler directed at his stepdaughters.” The court did not find Fowler credible, stating it was “extremely suspicious of Mr. Fowler and his denial of any impropriety.” However, the court was unable to identify any “concrete finding of abuse” sufficient to sustain Calvin’s burden of proof in this custody modification action. Ultimately, the court decided that ordering a modification would “disrupt the stability now present and needed by these kids and the Court will not do so as it would not be in their collective best interest.”

II. Physical Care

Calvin contends that the evidence of physical and sexual abuse of the children by Fowler, as well as the instability and trauma they have suffered in Mary’s home was sufficient for the district court to have modified the child custody provision of the dissolution decree.

We review modification proceedings de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). 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. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). The controlling consideration in child custody cases is always what is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

A party who seeks a modification of child custody must establish by a preponderance of the evidence that there has been a material and substantial change in circumstances since the entry of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

Id.

While Mary is currently providing a stable home environment, such has not always been the case. As Calvin notes, in the five years since the dissolution decree was entered, Mary has moved three times with the children, been involved with five different men, and changed jobs six times.

Shortly after the divorce, Mary moved to Jewell and began residing with Chris Fowler. In January 2009, amidst allegations that Fowler had sexually abused one of the children, Fowler voluntarily moved out of the home while a child abuse investigation commenced. Mary then moved in with another man, Troy Madsen, and the two of them proceeded to purchase a house together in Jewell. However, that relationship was short lived, and Mary moved back in with Fowler and married him in April 2009.

Calvin's main point of contention for modification is Fowler's presence around the children and Mary's failure to protect the children. He asserts there is substantial evidence supporting the occurrence of sexual abuse by Fowler

against both T.L. and S.L. Carolyn Knowles, Mary's mother, testified to multiple incidents. In October 2008, Carolyn spent the night after babysitting the children. She slept on the couch in the living room, and T.L. was sleeping just next to the couch. When Carolyn awoke she saw Fowler on top of T.L., "grunting." After making eye-contact, Fowler, with an erection, "gradually got up and went into the kitchen." When Carolyn confronted Mary with the incident, and sought to tell Calvin, Mary threatened to cut off all contact with Carolyn.

According to Carolyn, Mary chose to ignore other observations that Carolyn reported to her. On another occasion, Carolyn saw Fowler standing behind T.L. and grabbing her breasts. Yet another time, she walked into T.L.'s bedroom to find T.L. under her covers, and Fowler with "his hands underneath T.L.'s blanket. After Fowler left the room, T.L. "jumped up and grabbed [Carolyn] and stood there." Carolyn also testified that Mary admitted Fowler "raped her eight to ten times," and stated "at least while he was raping me he was leaving my girls alone."

Mary asserts the allegations against Fowler are false and she became estranged from her mother following the October 2008 allegations. She questions her mother's credibility, and asserts the alleged incident was not reported until after Mary's relationship with Carolyn had deteriorated. To her credit, Mary cooperated with the DHS upon learning of the February 2009 investigation and participated in arranging therapy for the children.

The district court relied heavily on a Department of Human Services (DHS) 2009, "Child Protective Service Assessment Summary," (the assessment) which determined:

The report of alleged sexual abuse, specifically Lascivious Acts With a Child, pursuant to Iowa Code 709.8, is not confirmed as not all the factors could be supported with a preponderance of the evidence, *most notably the primary caretaker relationship of the alleged perpetrator with the alleged child victim.*²

(Emphasis added).

However Calvin points out that the assessment was seriously flawed in that it appeared to dismiss the allegations “most notably” because Fowler was not in a “primary caretaker relationship” at the time of the alleged abuse.³ We agree with Calvin that the tenor of the assessment was tuned to the relationship of the alleged perpetrator and victim, rather than focusing on the allegations of sexual abuse. The court’s reliance on the DHS’s “not confirmed” finding in the assessment was, in turn, suspect.

We employ our de novo review to assess the evidence anew. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). We look to the facts as testified to by the witnesses at trial, and the exhibits admitted into evidence to determine if Calvin has carried his burden of proof, which would warrant a change in physical care. Further, we must determine from the record whether

² Iowa section 709.8 (2009) defines “Lascivious acts with a child” as:

It is unlawful for any person sixteen years of age or older to perform any of the following acts with a child with or without the child’s consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:

1. Fondle or touch the pubes or genitals of a child.
2. Permit or cause a child to fondle or touch the person’s genitals or pubes.
3. Solicit a child to engage in a sex act or solicit a person to arrange a sex act with a child.
4. Inflict pain or discomfort upon a child or permit a child to inflict pain or discomfort on the person.

³ DHS made findings referencing Iowa Code section 709.8, relying heavily on the fact that Fowler was not a “caretaker.” A “caretaker” for purposes of DHS child abuse findings is found under Iowa Administrative Code section 441-175.24(1)(b), but not an element under Iowa code section 709.8.

Calvin can more effectively provide for the children's well being, and what is best for the welfare of the children. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

First of all, we note the assessment contains this fundamental misstatement: "The court has ordered the *shared legal and physical custody* of the children and any change would require a modification of the order." The statement is incorrect as Calvin did not have shared physical custody of the children but only visitation rights. Further the assessment repeatedly noted that Fowler was not a family member and that he maintained a separate residence. These two incorrect and misleading findings lead in part to the conclusion that risk of abuse was "low." However, the "protective capacities" available to the children were based on two falsehoods: (1) that Calvin shared physical care of the children, the inference being that he was equally able to protect the children, and (2) that Fowler, was not a family member, a caregiver, or living in the home. While Fowler, at the time the investigation was ongoing, was temporarily out of the home, he did live in the home in October 2008, when the incident under investigation allegedly occurred. The assessment did note that Mary "has resumed her relationship with the alleged perpetrator." Indeed, Fowler soon moved back into the home, and he and Mary were married in April 2009.

The assessment itself includes details T.L. provided of Fowler's inappropriate touching although guarded by the comment that "grandmother [Carolyn] helped her remember." Nonetheless, T.L. gave more details than other witnesses provided, including that "[Fowler] touched me," and when asked to demonstrate where the touching occurred, T.L. pointed to the crotch area of a

demonstration doll. She related that Fowler had used his hand to touch her, applying some pressure. She stated there was clothing between his hand and her skin. Her recitation indicated this happened on more than one occasion. She stated, "I've tried to talk to mom, but she's always talking to someone when I tried," understanding that her mother did not want Fowler to go to jail.

In addition to testimony by Carolyn, Calvin's fiancée, Rhonda, testified that T.L. confided in her about Fowler inappropriately touching her, including coming up from behind her and putting his hands on her breasts. Also, Rebecca Smith, Mary's brother's fiancée, testified that T.L., "told me that [Fowler] had laid on top of her."

The youngest of the three children, S.L., also demonstrated disturbing behavior. Using her iPod, S.L. made a video of herself, which included scanning her naked chest and vaginal area, making kissing noises and saying, "do you want to have sex?" Mary argues there is no evidence connecting these videos to any abusive behavior by Fowler.

In addition to the allegations of sexual abuse, another incident, admitted by Mary, exposed the children to trauma. In January 2009 when Mary threatened to leave Fowler, he brandished a gun and threatened suicide. Mary quickly ushered the children into the bathroom to hide from Fowler. While he fortunately did not follow through with his threat, the event was upsetting for the children. This incident and other violence in the home was collaborated by Hope Hernandez, Mary's former close friend. She testified, "About a month or two before the gun incident, um, [Mary] had called me and said that Chris [Fowler]

had assaulted her, forced himself on her, and she ended up bleeding for a month.”

On our de novo review of all the evidence, we find Calvin has carried his heavy burden of proof, establishing a material and substantial change of circumstances, not contemplated under the original decree. We next move to determine whether Calvin has also shown that he can provide superior care of the children. See *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989). While we recognize that Mary has been the children’s primary caregiver, Calvin has shown he has consistently provided a more stable home environment. At the time of trial, Calvin had maintained the same employment for three years. His supervisor testified on his behalf, describing Calvin as hard-working with good work ethics. Calvin had been living with Rhonda for over five years, and they planned to marry October 2010. Rhonda has been a special education teacher for ten years. See *In re Marriage of Downing*, 432 N.W.2d 692, 695 (Iowa Ct. App. 1988) (“We note while remarriage itself does not constitute a substantial change in circumstances, the new relationship can and should be considered by the court.”). Rhonda has two children from a previous relationship, one seventeen years old, and one twenty-four, whom is no longer living at home. The district court made a finding that it was “impressed” with Rhonda. Calvin and Rhonda’s home is very suitable for the children. Calvin regularly exercises visitation with the children, including Wednesday evenings, every other weekend, and five weeks in the summer.

Calvin has shown he can provide stability for the children, continuity, and most of all, a safe place for them to reside, without the fear of potential abuse.

While we know Mary loves the children, she clearly has not put their best interests first. Through testimony and exhibits, Calvin has shown that since the time of the decree, a significant change in circumstances has occurred, and he can provide a safer, more stable environment for the children.

Finding both a substantial change of circumstances and Calvin's ability to provide superior care of the children, we reverse the district court's dismissal of Calvin's modification petition. This modification necessitates a remand for the district court to make the attendant orders such as child support and visitation.

III. Trial and Appellate Attorney Fees

Calvin seeks reversal of Mary's award of \$2500 toward attorney fees at trial. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 821 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay the fees and the fees must be fair and reasonable. *Id.* To overturn the decision of the trial court, Calvin must establish the trial court abused its discretion. *Id.*

The district court awarded Mary substantial attorney fees without any findings as to why the award was made. First of all we note that Calvin brought the modification action on his well-founded fears that the children were being physically and sexually abuse by their new stepfather. We have now granted him the relief he sought. Further, we find the incomes of the parties are not so disparate, so as to justify the award. Therefore, we reverse the discretionary award of the district court.

Both Calvin and Mary request appellate attorney fees. Just as with the district court, an award of attorney fees on appeal is not a matter of right but rests

within the court's discretion and the parties' financial positions. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Although Calvin has prevailed on appeal, we find it more equitable to not award appellate attorney fees.

Costs on appeal assessed to Mary.

REVERSED AND REMANDED.