IN THE COURT OF APPEALS OF IOWA

No. 1-605 / 11-0177
Filed October 5, 2011

IN RE THE MARRIAGE OF DENNIS A. PALS AND JACQUELINE K. PALS

Upon the Petition of DENNIS A. PALS,
Petitioner-Appellee,

And Concerning JACQUELINE K. PALS,
Respondent-Appellant.

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

Jacqueline Pals appeals a district court ruling modifying the physical care provision of a dissolution decree. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Marcy Lundberg of Marcy Lundberg Law Office, Fort Dodge, for appellee.

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

VAITHESWARAN, J.

Jacqueline Pals appeals a district court ruling modifying the physical care provision of a dissolution decree.

I. Background Facts and Proceedings

Jacqueline and Dennis Pals married in 1988 and divorced in 1996. Before, during, and after the marriage, Jacqueline waged an ongoing battle with alcohol.

At the time of the divorce, the parents stipulated that Jacqueline would assume physical care of their two children. Two years after the divorce, the parents reconciled. They remained together for approximately five years, separating in 2003, shortly after Jacqueline became pregnant with their third child.

Following the birth of this child, the parents agreed to a modification of the dissolution decree to have the child placed with Jacqueline. In 2009, the decree was again modified to provide for a specific visitation schedule and an increase in Dennis's child support obligation. Physical care remained with Jacqueline.

A year later, Dennis petitioned to modify the physical care provision of the dissolution decree. In a separate filing, he noted Jacqueline's multiple hospitalizations for substance abuse, including a recent effort at inpatient treatment. At the time of trial on this 2010 modification application, the oldest child was an adult, and the parents had agreed the seventeen-year-old second child could live with Dennis. Accordingly, the trial only involved the third child.

Following trial, the district court granted Dennis's modification petition. The court reasoned as follows:

> The most troubling issue in this case centers on Jacqueline's ongoing battle with sobriety. Notwithstanding that the current matter only concerns events that have taken place since the last modification in October of 2009, Jacqueline's past history in dealing with her sobriety issue is telling and can be used to reasonably predict future developments. . . .
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> It is the Court's FINDING that there has been a material change of circumstances since the custody modification between the parties in October of 2009. Jacqueline has had a major relapse into her alcoholic state. . . . This Court, as much as it wants to believe in and support Jacqueline in her battle with substance abuse, cannot and will not risk the safety and welfare of the minor child . . . in her continued exposure to Jacqueline's fragile state. [The child] requires stability in her environment and should not be subjected to the threat of her mother's unpredictable conduct. Driving while intoxicated, automobile accidents, passing out, severe mood swings, binge drinking, overuse of prescription drugs, any one of these proven past incidents could present a life-threatening scenario to [the child] considering Jacqueline's past history and this Court will not allow [the child's] innocent exposure to such severe risks. [The child's] best interests require her protection from such threats.

Jacqueline appealed.

II. Analysis

To change a custodial provision of a dissolution decree, the applying party is generally required to show (A) a material and substantial change in circumstances not contemplated by the decree that is essentially permanent, and (B) an ability to provide superior care. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Our review is de novo. Iowa R. App. 6.907; *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

A. Substantial Change of Circumstances

Jacqueline contends Dennis failed to prove a substantial change of circumstances, as (1) "Dennis knew of Jackie's alcoholism and her past relapses, yet permitted [the child] to remain in her mother's care," (2) her relapse was an

isolated event that was not likely to occur again, (3) "she took deliberate, positive acts to address her problem and demonstrated the results of her treatment at trial," and (4) the child showed no ill-effects from Jacqueline's alcohol abuse.

There is no question that Dennis agreed to have Jacqueline serve as primary caretaker of his youngest child despite his knowledge of her substance abuse history. He also did not seek to modify the physical care provision in 2009. But, in 2009, he believed Jacqueline was sober. He did not realize she had secretly relapsed that fall, after a four-and-a-half year period of sobriety.

Jacqueline's 2009 relapse was not a one-time occurrence, but a nine-month period of intermittent heavy drinking. *Compare In re Marriage of Montgomery*, 521 N.W.2d 471, 474 (Iowa Ct. App. 1994) (declining to modify physical care where father testified "he uses marijuana sparingly and never . . . in front of the children") *with In re Marriage of LeGrand*, 495 N.W.2d 118, 120 (Iowa Ct. App. 1992) (modifying physical care due to father's "serious criminal record and alcohol abuse," which involved the father leading police on a high speed chase while driving intoxicated with the children in the car). Jacqueline attempted to cover up the signs of alcohol abuse by telling the children they were side-effects of her medications. In fact, she also began taking significantly more than the prescribed dosages of those medications.

Jacqueline's actions did not go unnoticed. By her own admission, the children "figured out what was going on" after witnessing the effects of her repeated three to four-day periods of binge drinking.

In the summer of 2010, the second child decided he could take no more of his mother's drinking and moved in with Dennis. The youngest child was taken

to her grandmother's house during one of Jacqueline's binges. Based on this record, we conclude Dennis established a material and substantial change of circumstances since the time of the 2009 modification ruling.

In reaching this conclusion, we have considered the fact that Jacqueline entered inpatient treatment in June 2010. Her action, coming as it did on the heels of her two children's moves, can only be seen as a last-ditch effort to salvage her primary-caretaker status. It cannot erase the effect of her nine-month relapse.

We have also considered Jacqueline's assertion that the youngest child was unaffected by her drinking. The record belies this assertion. *See In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa Ct. App. 1993) (rejecting trial court finding that mother's alcohol abuse did not affect children where they were exposed to their mother's drinking). Jacqueline's second child testified that, on one occasion in early to mid-May 2010, Jacqueline was evidently drunk or under the influence of pills while driving to pick up the youngest child, as "she about fell asleep at the wheel" and "was almost running stop signs." Jacqueline's oldest child stated that "[a]lmost every time" her mother drank, she drank until she passed out, falling asleep in the afternoon and not waking up until the next day. During these episodes, the youngest child was left to her own devices. The oldest daughter also stated that when she attempted to extract her younger sister from Jacqueline's home during the summer of 2010, Jacqueline tried to prevent the removal by physically restraining the child. The child was "bawling hysterically" during and after the episode.

Jacqueline also failed to maintain a schedule or routine for the child and, when drinking, was angry, violent, scary, and at times, incoherent. Based on this record, we agree with the district court that Jacqueline's drinking adversely affected the child.

B. Superior Care

Jacqueline next argues Dennis did not have an established relationship with the child and, for that reason, failed to prove an ability to provide superior care. The record does not support this assertion.

Dennis exercised regular visitation with the child. He also cared for her while Jacqueline was in residential treatment in 2005 and 2010. He attended her soccer games and helped coach her in tee-ball. He communicated with Jacqueline about the child's welfare, and he had the older children call him if they became concerned about her welfare. In short, he did everything a non-custodial parent could do to maintain a relationship with his daughter and attend to her well-being.

We recognize that Dennis's time with the child was less than Jacqueline's, given her role as primary caretaker. But there may be circumstances, such as alcohol abuse, that outweigh this consideration. *See In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007) ("[I]f a primary caregiver has abandoned responsibilities or had not been adequately performing his or her responsibilities because of alcohol or substance abuse, there may be a strong case for changing the physical care relationship."). Jacqueline's extended relapse and the chaotic home environment this engendered was such a circumstance. As the second child testified, his sister was a different girl at Dennis's house:

> They have ground rules for her. If she would ever act like she did at Mom's house, she'd immediately be sent to bed. There wouldn't be any fussing, crying, nothing. There's strict ground rules. And they don't cater to her. She has strict bed times. She's . . . just all around better.

Based on this evidence, we conclude Dennis proved an ability to provide superior care.

We affirm the district court's modification ruling.

III. Appellate Attorney Fees

Dennis requests an award of $2000 in appellate attorney fees. Such an award rests within our discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Dennis earns more than Jacqueline and has not shown a need for an award. We accordingly deny his request.

AFFIRMED.