

IN THE COURT OF APPEALS OF IOWA

No. 1-868 / 11-0586
Filed December 21, 2011

Upon the Petition of
JENNIFER K. GREEN,
Petitioner-Appellant,

And Concerning
MARCUS W. ANDRE,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Duane Hoffmeyer, Judge.

Mother appeals the district court's modification of a dissolution decree.

AFFIRMED AS MODIFIED.

Tod Deck, Sioux City, and Jessica R. Noll, Sioux City, for appellant.

Kendra M. Olson, Sioux City, for appellee.

Considered by Sackett, C.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Jennifer Green appeals the district court's modification of the decree dissolving her marriage to Marcus Andre. Jennifer challenges: (1) overnight midweek visitation; (2) child support; and (3) Marcus receiving one dependency exemption. Additionally, Jennifer argues she is entitled to trial attorney fees. We conclude Jennifer should have both dependency exemptions and affirm as modified.

I. Background Facts and Proceedings.

In March 2008, Jennifer and Marcus were divorced in South Dakota. The dissolution decree awarded the parties joint legal custody of their two sons, five-year-old B.A. and four-year-old C.A., with physical care to Jennifer. B.A. has an individual education plan (IEP) and receives special education assistance at school.

Marcus was awarded visitation "as provided for in the South Dakota Visitation Guidelines" and was specifically awarded "visitation every other weekend." The South Dakota guidelines state: "if time and distance allow, one or two midweek visits of two to three hours." Marcus was ordered to pay child support, but not spousal support.

Subsequently, both Jennifer and Marcus moved to Iowa—Jennifer to Sioux City and Marcus to Ida Grove. Marcus's girlfriend lives with Marcus and helps care for the children during their visits. Marcus works for a roofing company owned by his father. Jennifer is an accountant.

In July 2008, therapist Sandy Jacobsma began working with the boys. Marcus and Jennifer were unable to put aside their hostility toward each other

and had significant disagreements concerning regular and summer visitation, summer school, and B.A.'s medication/diagnosis. Due to the hostility, grandparents frequently provided transportation between homes.

During Marcus's June 27, 2009 weekend visitation, he discovered a burn on C.A.'s leg. The Iowa Department of Human Services (DHS) conducted an investigation, and Jennifer and Marcus agreed to have the boys stay with their grandmother during the investigation. Eventually, C.A. stated he tripped and "Mom dropped a smoke on me." The DHS determined the burn to be an accidental cigarette burn, and on July 2 the boys were returned to Jennifer's care.

On July 8, 2009, Jacobsma, the boys' therapist, filed a lengthy report of suspected child abuse with DHS. She alleged Marcus was mentally abusing both children. Jacobsma requested Marcus's future contact with his children be supervised, stating:

[I am] very concerned that false allegations were made against their mother. [I believe] this was intentionally done by [Marcus] in an attempt to have the children placed with him

As reported this has been a very traumatic and unnecessary experience for the children In this therapist's opinion that constitutes emotional abuse. [I am] very concerned that the children will be punished by their father when he learns that they have made statements that he fabricated the abuse and that he spanked them until they said it

On July 22, 2009, Jennifer filed an action alleging domestic abuse by Marcus. The court issued a no-contact order. On July 29, 2009, Jennifer filed a petition to modify the South Dakota dissolution decree requesting Marcus only be allowed supervised visitation. On August 7, 2009, Jennifer's domestic abuse

case was dismissed, and the no-contact order was lifted. Thereafter, Marcus requested Jennifer allow him visitation for the remainder of the summer.

On August 14, 2009, Marcus filed an application for rule to show cause alleging Jennifer willfully failed to follow the decree's visitation guidelines. Marcus denied hitting the boys to get them to lie about the cigarette burn.

On August 18, 2009, Jacobsma sent the DHS an addendum to her July 8, 2009 report. Jacobsma stated: "As the children's therapist I am extremely concerned that any contact the children have with their father needs to be closely supervised." On September 1, 2009, DHS found Jacobsma's mental abuse complaint "not confirmed"; however, it informed Green it "anticipated requesting the initiation of a [child in need of assistance] action on behalf of the children."

At the September 15, 2009 hearing on Marcus's application for rule to show cause, the court granted Jennifer's motion for a stay, citing the CINA petition filed on September 10.

In December 2009, B.A. and C.A. were adjudicated to be children in need of assistance. On May 5, and June 7, 2010, Nicole Lidman, care coordinator for Boys and Girls Home, reported to the juvenile court:

The children's needs are . . . met at both Marcus's home and Jennifer's home. Child support has been paid consistently by Marcus. Jennifer continues to take the children to therapy sessions. Jennifer and Marcus attend therapy themselves and have been cooperative with services. Jennifer and Marcus have attended co-parenting sessions, but these have ceased due to them not being productive. Both parents have strong family support and have a strong and loving relationship with the children.

In her June 2010 report, Lidman reported both parents had concerns about B.A.'s medications and "an issue with [B.A.'s] summer plans for education

and his IEP. Jennifer and Marcus do not agree on what [B.A.'s] needs are for this." DHS established a summer education/visitation plan in conjunction with the juvenile court.

On November 19, 2010, Jennifer moved to dismiss her petition to modify visitation stating the concerns raised in her petition "have been addressed in the juvenile case." Jennifer acknowledged there "is no longer any need for [Marcus] to have supervised visitation with the children."

At some point the juvenile court granted concurrent jurisdiction to permit the district court to consider the application to modify the dissolution decree. The parties' December 1, 2010 joint pretrial stipulation states Marcus currently pays \$1123 in child support and seeks a reduction. Marcus also sought to provide physical care. Jennifer requested the dependency exemptions remain unchanged while Marcus requested the "noncustodial parent be permitted to claim one child if current on child support."¹

At the start of the December 2010 trial, the court orally granted Jennifer's motion to dismiss her petition. During trial, Jacobsma opined "the boys should live with Jennifer, but as I have stated to both Jennifer and Marcus, I think Marcus should have more involvement with the boys than he's had in the past," including a weekly visit.

In February 2011, the court denied Marcus's request to modify physical care, but ruled a material and significant change in circumstances justified a change in visitation. The court modified visitation to include overnight

¹ We therefore find no merit to Jennifer's appellate argument claiming Marcus failed to put her on notice he was seeking to modify the dependency deductions.

Wednesday visitation for Marcus until Thursday at 7:30 a.m. The court modified Marcus's summer visitation to four full weeks with no more than "two weeks at any one time." The court detailed holiday/special day visitation. The court found:

[Marcus's] visitation progressed from supervised to unsupervised to additional visitation above and beyond that provided in the decree and a suggestion it should expand further.

. . . .
[I]t was also apparent the parties need more specificity in their visitation. It was recommended by some counselors Marcus have expanded visitation, more phone contact and that his influence upon his children is positive. He has different areas of interest; i.e., outdoors, camping . . . that benefit his children. In listening to the testimony regarding visitation, it was clear the South Dakota visitation guidelines did not answer all of their questions and may at times have created more problems than they were intended to solve. The guidelines anticipate the parents will cooperate. That is not the case here. Hopefully, after this case is resolved, it will improve. The court finds Marcus should be entitled to expanded visitation, that visitation should be changed with more specific times and elimination of some of the vagueness that resulted in some of their visitation problems.

The court awarded Marcus the dependency exemption for B.A. as long as Marcus is current on his child support obligation. The court ruled "the amount of child support varies by more than 10% even if Jennifer were to be awarded both tax exemptions" and, accordingly, support is \$822 per month. The court declined to award trial attorney fees.

The court also dismissed Marcus's application for rule to show cause, finding Marcus failed to prove Jennifer "willfully and wantonly violated the court order for visitation." This issue is not before us on appeal.

Both parties filed Iowa Rule of Civil Procedure 1.904 motions, which the court granted in part and denied in part in March 2011. The court ruled "Marcus is entitled to the extraordinary visitation [credit] and his child support should be

credited accordingly” (fifteen percent adjustment on \$946.10). The court set child support for two children at \$830/month and denied Jennifer’s request to leave the child support unchanged.

Marcus’s request to increase his summer visitation was denied. The court also denied Jennifer’s requests to keep both tax deductions and to eliminate overnight midweek visitation. The court stated:

The court finds that Marcus should be entitled to an overnight visitation midweek The court finds the Wednesday start time shall be from when the kids are discharged from school to the next morning. When the children are out of school, it shall be from 4:00 p.m. to the next morning. The court finds Marcus shall be responsible for both picking up of the children and the dropping off of the children the next morning at school, Jennifer’s home, or where designated by her.

Jennifer now appeals.

II. Standard of Review.

“In this modification proceeding, we review the record de novo.” *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). We are not bound by the district court’s findings of facts, but we give them deference because the district court has a firsthand opportunity to view the demeanor of the parents and evaluate them as custodians. *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004).

III. Midweek Visitation.

Jennifer appeals Marcus’s overnight Wednesday visitation. Jennifer contends Marcus failed to prove a significant change in circumstances and argues overnight visitation is “too much of a burden for the children” and is disruptive to homework and extra-curricular activities. Jennifer points to the one-

hour travel time between homes. Jennifer requests Marcus's midweek visitation be limited to 5:00 to 8:00 p.m. on Wednesdays.

"Generally, a much less extensive change in circumstances need be shown" to change visitation. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa Ct. App. 1994). Our focus is the long-range best interests of the children. *Zebecki*, 389 N.W.2d at 398. "Those interests include the opportunity for a continuous relationship with both parents." *Id.* We find the overarching, post-decree hostility between Jennifer and Marcus, necessitating therapy for every family member and leading to juvenile court intervention, constitutes a significant change in circumstances. Our de novo examination of the record leads us to the same conclusion as the trial court—midweek overnight visitation with Marcus is in the best interests of the children. See *In re Marriage of Toedter*, 473 N.W.2d 233, 235 (Iowa Ct. App. 1991) (granting overnight visitation during the week).

IV. Child Support.

Jennifer argues child support should remain as ordered in the South Dakota dissolution decree. The district court found a ten percent deviation from the Iowa support guidelines and modified child support accordingly. The court utilized Marcus's 2009 tax return (\$54,661) and Jennifer's projected (paystub) 2010 income (\$25,034). We find no inequity. See Iowa Code § 598.21C(2)(a) (2009).

V. Dependency Exemptions.

Jennifer argues the dependency exemptions should not have been modified. Jennifer testified:

Q. In your original decree, what was your agreement in regards to the dependency deductions? A. The dependency deductions were negotiated because I was eligible for transitional alimony and basically it was a negotiating tool . . . that I would always claim the deductions . . . due to the fact that I had taken on all of my student loan debt So they used it as we weren't going to go into the dependency exemption with the children because she's willing to give up her alimony.

Marcus's testimony does not dispute Jennifer's description of the parties' negotiated agreement on the tax exemptions/alimony. Jennifer's financial affidavit lists significant student loan debt. Because we conclude Jennifer forfeited alimony in the original dissolution action in return for Marcus's agreement she would have both dependency exemptions, we modify the district court's ruling to award Jennifer both dependency exemptions. This change does not require a recalculation of Marcus's child support because the district court's calculations note an analysis of the effect of claiming the children as tax dependents is "not provided with extraordinary visitation."

VI. Trial Attorney Fees.

Jennifer argues she is entitled to trial attorney fees under Iowa Code section 598.36, which provides a court may award attorney fees to the prevailing party in modification proceedings. However, this award is within the district court's discretion. *McCurin*, 681 N.W.2d at 332. Here both parties prevailed—Marcus reduced his child support, and Jennifer retained physical care. We find no abuse of discretion.

Costs of appeal are divided equally between the parties.

AFFIRMED AS MODIFIED.