IN THE COURT OF APPEALS OF IOWA

No. 2-073 / 11-1397
Filed February 15, 2012

IN RE THE MARRIAGE OF
SARAH LUANN HOENIG AND
MATTHEW LAWRENCE HOENIG

Upon the Petition of
SARAH LUANN HOENIG,
Petitioner-Appellee,

And Concerning
MATTHEW LAWRENCE HOENIG,
Respondent-Appellant.

Appeal from the Iowa District Court for Lee County, Michael J. Schilling, Judge.

Matthew Hoenig appeals from the district court's order modifying a consent decree. **AFFIRMED.**

Robert J. Engler of Swanson, Engler, Gordon, Benne & Clark, L.L.L.P., Burlington, for appellant.

Robert N. Johnson III of Saunders & Johnson, L.L.P., Fort Madison, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Matthew Hoenig appeals from the district court's order modifying a 2005 consent decree of dissolution of marriage concerning his former spouse, Sarah Hoenig. Because Sarah proved there was a substantial change in circumstances such that modification of the decree was warranted and because Sarah proved she could more effectively minister to the needs of the children, we affirm the district court.

I. Background Facts and Proceedings

Matthew and Sarah were married in September 2001 and divorced in July 2005. The parties have two children, a daughter, S.H., born in 2002, and a son, M.H., born in 2003. When the parties' marriage was dissolved, the parties agreed to share joint legal custody, with physical care granted to Matthew, and Sarah having "reasonable visitation rights with the children, to be agreed upon by the parties." On August 23, 2010, Sarah filed an application for modification, alleging a "material and substantial change" affecting the care of the children since the original decree was entered in July 2005. Among the changes listed by Sarah was that Matthew was charged with a felony for third-degree sexual abuse of a child. A modification hearing was held on March 2 and 3, and April 5, 2011. On August 9, 2011, the district court modified the decree, granting Sarah physical care of the children. Matthew appeals.

II. Standard of Review

Our review of proceedings in equity is de novo. Iowa R. App. P. 6.907; *In re Marriage of Johnson*, 781 N.W.2d 553, 554 (Iowa 2010). While we give weight to the district court's findings—particularly with respect to the credibility of

witnesses, because the district court had the opportunity to observe the demeanor of the witnesses—we are not bound by them. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

III. Analysis

Matthew argues there has not been a substantial change in circumstances warranting modification and there has not been a showing that Sarah has a superior ability to minister to the children. Our supreme court has explained:

> A party seeking modification of a dissolution decree must establish by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since the entry of the decree or of any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief. Other well-established principles govern modification: (1) not every change in circumstances is sufficient; (2) it must appear that the continued enforcement of the decree would, as a result of the changed circumstances, result in positive wrong or injustice; (3) the change in circumstances must be continuous rather than temporary; and (4) the change in circumstances must not have been within the contemplation of the district court when the original decree was entered. The district court has reasonable discretion in determining whether modification is warranted, and we will not disturb that discretion unless there is a failure to do equity.

In re Marriage of Maher, 596 N.W.2d 561, 564–65 (Iowa 1999). The first and foremost consideration in determining physical care is the best interests of the children involved. *See In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992) (stating that in modifying a custody provision in a divorce decree, the best interest of the child is the "first and foremost consideration").

Under this guidance, the district court set forth a well-detailed analysis, including factual findings that called into question Matthew's credibility. While the district court recognized Matthew and Sarah each had shortcomings as parents, the district court ultimately concluded:

> The court believes the understatements and overstatements [by Matthew] undermine both Matthew's credibility and his overall character and fitness to parent for two young children. Of special concern to the court is the fact that Matthew's personal behavior has grown steadily more inconsistent with the best interest of the children. In 2008–2009, Matthew was regularly late getting the children to and from school in a timely fashion. This behavior has continued if not as frequent. He continues to be late picking up the children at the end of the school day. In 2009, he was watching pornography at times and places where the children could and did view it. Then, in 2010, he became intoxicated to the point he committed sexual assault upon a child babysitting his children. Matthew continues to drive without a license. Over the course of the last two years at least, Matthew's values, morals, and behaviors have been directly inconsistent with the best interest of his young, impressionable children. Matthew's lack of candor and respect for the law undermine his authority as a parent. Matthew's three year track record does not support a finding he can provide adequate security and stability for the children. In this court's judgment, these facts coupled with an increased stability in Sarah's life, mandate the conclusion that Sarah can provide superior care for the children. This is by no means an easy decision however.

We agree with the district court's modification of the consent decree, because there has been a substantial change in circumstances since the original decree was entered, which was not within the contemplation of the court at that time.

Most striking is Matthew's felony conviction for sexual abuse in the third degree. As noted by the district court, Matthew discounts the significance of the incident that occurred with the children's fourteen-year-old babysitter, while she was sleeping on the couch in Matthew's home in July 2010. On January 6, 2011, Matthew pleaded guilty to sexual abuse in the third degree under Iowa Code section 709.4(2)(c)(4) (2009). He was sentenced to a term of imprisonment not to exceed ten years; his sentence was suspended and he was placed on probation for five years. Matthew is required to comply with and successfully

complete all requirements of the sex offender treatment program and register as a sex offender under Iowa Code section 692A.103.

Our primary consideration in determining whether to modify physical care is the best interests of the children. *See Winnike*, 497 N.W.2d at 173. As the district court recognized, the Hoenig children do not have knowledge of Matthew's sexual abuse conviction. However, the district court did acknowledge that in the future, the children's well-being could be jeopardized based on the public's knowledge—including the children's classmates and friends—of Matthew's classification as a sex offender. Moreover, the court recognized, "Matthew's ability to appear at public and school events where minors are present, to secure child care in his home, and to interact with the parents of [the children's] friends has been seriously undermined." Additionally, the parties' daughter, S.H., is almost ten years old. The district court recognized that she will likely be affected by the incident based on her "emotional makeup, sex, and age."

"In determining what is in the best interests of the child we can look to a parent's past performance because it may be indicative of the quality of the future care that parent is capable of providing." *Id.* at 174. While Matthew did not sexually abuse S.H. or M.H., his past performance is indicative of lifestyle choices that do not support a finding that he would "minister more effectively to the well-being of the parties' children." *See In re Marriage of Thielges*, 623 N.W.2d 232, 237 (Iowa 2000). Moreover, behavior displayed by Matthew such as frequently arriving late to pick the children up from school, driving without a driver's license, and exposing the children to inappropriate entertainment—including pornography—support the conclusion that Matthew's past parenting

choices have not been in the children's best interests. This questionable past performance provided the district court with a good sense of the care Matthew would be able to provide in the future, questioning his ability to minister to the needs of the children. *Winnike*, 497 N.W.2d at 174.

We, like the district court, further recognize that since the time of the parties' divorce in 2005, Sarah has achieved greater stability in her life. The district court reflected,

> Now, at age 29, Sarah has a good job, good mental health, and a greater self-image. She is much better equipped now than in 2005 to meet the demands of parenthood and further, in the event the relationship with [her current paramour] does not work out, to live independently.
>
> . . . At this time, she is the parent better equipped to bring the children to physical, social, emotional, educational, and moral maturity.

Sarah further testified at the modification hearing,

> I'm in a position now—I've got my life together so well that I am able to care for them better than their father can at this point. They would be safer and have a better future in my care.

Based on this and other testimony and evidence provided at the modification hearing, as well as the findings of the district court, and our own review of the record, we agree that Sarah proved by a preponderance of the evidence that she is the parent who can more effectively minister to the well being of S.H. and M.H.

We agree with the district court that there has been a substantial change in circumstances, and further agree that Sarah met her heavy burden of proving that she can more effectively minister to the needs of the parties' children. We therefore affirm.

AFFIRMED.