IN THE COURT OF APPEALS OF IOWA

No. 2-099 / 11-1028
Filed May 23, 2012

Upon the Petition of
MICHAEL W. KONZEN,
Petitioner-Appellee,

And Concerning
EMALEE L. GOEDERT,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica L. Ackley, Judge.

A mother appeals from the district court order regarding custody, visitation, and child support. **ORDERS VACATED.**

Catherine Cartee of Cartee Law Firm, Davenport, and Natalia Blaskovich of Reynolds & Kenline, L.L.P., Dubuque, for appellant.

Jennifer Oetker (until withdrawal) and Alfredo Parrish of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry & Fisher, L.L.P., Des Moines, for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

A mother appeals from the district court's April 2011 order regarding custody, visitation, and child support of the parties' two children, and from the June 2011 order denying her motion to reconsider. On de novo review, we vacate all orders and judgments after the October 26, 2010 settlement conference, except the November 2, 2010 order concerning custody and visitation that memorialized the parties' settlement agreement.

I. Background Facts and Proceedings

The mother and father of two children, born in 2004 and 2007, never married but lived together until mid-2009. Disputes within the family and allegations of abuse led to the father having limited contact with the children.

In November 2009 the father filed a petition for physical care, alleging the parties "previously had a shared care arrangement" but now he should have "primary physical care" because the mother had "made false allegations against [him] and kept the children from him." On the same day, the father filed an application for temporary orders, seeking temporary placement of the children with him or with the paternal grandmother and a no-contact order between the maternal grandmother and the children.

In February 2010 the mother sought and obtained a temporary injunction preventing contact between the father and the children. The father's motion to vacate injunction came on for hearing in early March. In mid-April the court issued its order denying the father's motion and continuing the temporary injunction.

On April 26 the court entered a stipulated order on temporary custody, visitation, and child support. The order continued the children's placement with the mother, set the father's child support obligation, provided the parties would "engage in therapeutic reunification" through a therapist, and ordered the parties to cooperate with the therapist and to "follow her direction and recommendations in advancing [the father's] contact and communication with the minor children."

On August 15 the therapist recommended the therapeutic reunification process be delayed for approximately a year. On August 19 the father filed a motion for supervised visits, alleging he had not seen the children since November 2009, the April 26 order provided for therapeutic visitation, and no visitation had occurred. The same day, the father filed a motion for a no-contact order between the children and the maternal grandmother.

On October 25, 2010, the father's November 2009 petition came on for trial. At the start of the trial the mother presented an application for rule to show cause, alleging the father had violated the no-contact order. The mother also sought to have the father's attorney disqualified because she would be called as a witness to the alleged contempt. The court ordered the father's attorney to withdraw and gave the father the choice of representing himself or of continuing the trial to a later date. The father proceeded without an attorney but did not finish with all his witnesses. Attempts later in the day to arrive at an agreement failed.

When court reconvened the next morning, the father appeared with standby counsel. The court addressed the participants:

> THE COURT: I think we ought to settle this case. I know I haven't heard all of the evidence, but I have read quite a bit of what I have here in front of me. . . .
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> . . . .
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> So what I'm going to do is I'm going to leave you again, and I'm going to tell you, try to resolve this. . . .
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> . . . .
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> [FATHER]: I know you're not here for me here. Is there any chance that [the mother] and I and you can go to chambers and talk?
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> THE COURT: We certainly can. And if that's the case, then I'm off this case. You understand that. If I start getting into that with you, I am done. I can't try it. But I think you two need to resolve this, for the best interests of your children, ...
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> . . . .
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> THE COURT: Do it. You've got thirty minutes. I'll be back.

The parties had not reached an agreement by the time court reconvened. The judge then met with the parties and their attorneys in chambers in an attempt to reach a settlement. The settlement meeting was not reported. In its subsequent judgment, the court said, "After numerous hours, the parties finally reached an agreement." During oral argument, this court was told the meeting in chambers lasted at least three hours.

On November 2, the court filed its judgment concerning custody and visitation "to memorialize the agreement pertaining to custody and address initial visitation issues that are expected to be reassessed at a later point in time."[1] The judgment provided for joint legal custody of the children with the mother having "primary physical care" that was "subject to visitation" with the father. It further provided the court would reassess visitation at a future time and determine a schedule that would "maximize the contact between the parents and

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[1] The court filed a contemporaneous "order re: visitation" that was "to provide information to the individual counselor for the [father] and the visitation/integration supervisor for the family." It established a reintegration schedule for the father.

the children." The father was ordered to pay child support. The judgment further provided:

> In the event there is evidence of a change in circumstance such as a recommendation by a counselor for shared care, the parties agree that they will engage in mediation before filing a modification action. At the present time, they have agreed to seek the assistance of Retired Judge John Nahra as mediator.

The judgment stated it "resolve[d] all pending matters and motions with the exception of the [father's] application for rule to show cause." A review hearing was set for March 22, 2011.

The mother filed a motion to reconsider and a motion to vacate the order. Following a hearing on the motions in front of the same judge in December, the mother dismissed the motions, and the parties dismissed their reciprocal contempt actions. Neither party appealed from the November 2 judgment and order.

On March 18, after receiving reports from counselors, the court issued an order allowing the parties fifteen days to provide it with proposed enhanced visitation schedules that reduced supervision and included overnight visitation. On April 22 the court issued its order as "an addendum to the Court's previous orders regarding custody, visitation, and child support," to "serve as the final order regarding the petition" filed by the father.

The mother filed a "motion to enlarge and reconsider" on May 5. She challenged provisions of the November 2, 2010 order and the April 22, 2011 order as being "terms that were NOT stipulated by the parties through a settlement process." (Emphasis in original.) The motion raised many of the

same claims now raised on appeal. The father resisted. On June 21 the court denied the mother's motion in full, noting:

> The Court has given great consideration as to the remedies necessary to reunite this family. The Court has made personal observations of the parties, the extended family members, and has had extremely helpful information provided by counselors and independent third parties. The Court will not make any further modifications to the previous order entered herein.

II. Scope and Standards of Review

Review of equitable proceedings is de novo. Iowa R. App. P. 6.907. We give weight to the findings of the district court, especially concerning the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). This is because the district court has a firsthand opportunity to hear the evidence and view the witnesses. *See In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Merits

The mother raises seven claims on appeal. She contends the district court erred: (1) in violating her due process rights by denying her request for an evidentiary hearing on contested issues; (2) in accepting ex parte communications from counselors; (3) in modifying physical care without a change in circumstances; (4) in not honoring its own decree requiring mediation before seeking modification of custody; (5) in modifying physical care without considering the factors set forth in *In re Marriage of Hansen*, 733 N.W.2d 683, 696-700 (Iowa 2007); and (6) in terminating the father's child support obligation without notice or an opportunity to be heard. She also contends (7) the district

judge should have recused herself from considering contested matters after serving as a mediator for the parties.

We elect to address the mother's claim concerning recusal first because we find it dispositive.

Recusal. During the hearing on October 25, 2010, the father asked the judge if he and the mother could meet with the judge in chambers to talk about settlement. The judge correctly responded: "We certainly can. And if that's the case, then I'm off this case. You understand that. If I start getting into that with you, I am done. I can't try it." Most of the issues raised by the mother stem from the judge's failure to heed her own words and to disqualify herself as judge after meeting off the record with the parties to arrive at a settlement. All of the subsequent hearings were before the same judge.

The Iowa Code of Judicial Conduct guides our resolution of this issue. Comments two and three to rule 51:2.6 provide:

> [2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.
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> [3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality,

> but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See rule 51:2.11(A)(1).

Rule 51:2.11(A)(1) provides:

> (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably he questioned, including but not limited to the following circumstances:
> (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

The judge spent "numerous hours" with the parties and counsel in settlement discussions after strongly urging them to settle. None of the discussions were reported; we have no way of knowing what occurred. The court properly issued its order on November 2 "to memorialize the agreement pertaining to custody and address initial visitation issues that are expected to be reassessed at a later point in time."[2] Although the mother filed a motion to enlarge and reconsider indicating she did not concur in some of what the court set forth as the parties' "agreement," *see* Iowa Code of Judicial Conduct 51:2.6(A), she later dismissed the motion.

While we do not question the judge's desire to act in the best interests of the children at issue in these proceedings, the judge should have recused herself, *as she herself recognized*, once she participated in settlement negotiations with the parties and issued the order resulting from the settlement

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[2] Although we understand the settlement discussions were not reported, the preferred practice is to memorialize settlement agreements on the record immediately following a settlement conference so any continuing disagreements may be resolved at that time.

negotiations. Iowa Code of Judicial Conduct 51:2:11(A) provides "[a] judge *shall disqualify* himself or herself" under such circumstances. (Emphasis added.) All proceedings and orders after the settlement meeting—except the judgment memorializing the settlement agreement—are affected by the judge's disqualification under rule 51:2.11. Accordingly, we vacate all the orders and judgments issued after the October 26 settlement conference—except the November 2, 2010 "judgment re: custody and visitation."

Because in the resolution of this issue we have vacated the orders giving rise to the other issues on appeal, we need not address them.

ORDERS VACATED.