IN THE COURT OF APPEALS OF IOWA

No. 2-343 / 11-1746
Filed June 27, 2012

IN RE THE MARRIAGE OF PAMELA J. WALTERS AND CHAD J. WALTERS

Upon the Petition of

PAMELA J. WALTERS,
Petitioner-Appellant/Cross-Appellee,

And Concerning

CHAD J. WALTERS,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Poweshiek County, Myron L. Gookin, Judge.

Both parents challenge the district court's order modifying the physical care arrangement of their daughters. **AFFIRMED.**

Donald J. Charnetski of Charnetskui, Olson & Lacina, L.L.P., Grinnell, for appellant/cross-appellee.

Steven Gardner of Kiple, Denefe, Beaver, Gardner & Zingg, L.L.P., Ottumwa, for appellee/cross-appellant.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

This appeal involves a custody modification order that splits the physical care of two sisters: fourteen-year-old M.W. and ten-year-old C.W. Their mother, Pamela Cason, challenges the transfer of C.W.'s physical care to her father, Chad Walters. Chad contests the court's decision to leave M.W. in her mother's physical care. Recognizing the agonizing issues involved in this case, as well as the district court's superior ability to assess credibility given its opportunity to observe the witnesses first-hand, we affirm the modification order.

I. Background Facts and Procedures

Pamela and Chad were married in 1995 and divorced in 2006.[1] They have two daughters: M.W., who was born in 1997,[2] and C.W., who was born in 2001. The district court issued a modified decree of dissolution on May 31, 2007, granting Chad and Pamela joint legal custody of their daughters and placing physical care of the girls with Pamela.

Pamela's older daughter, K.W., also lived in the household. When Pamela separated from Chad in 2005, K.W.—who was then fifteen years old—accused her stepfather Chad of inappropriate contact, including touching her breasts, genitals and buttocks over her clothes, watching her while she was showering or bathing, and making sexual statements about her. In December 2006, Chad entered a plea of guilty to child endangerment in violation of Iowa

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[1] Chad and Pamela both have new partners since the divorce. Pamela is remarried and lives in Prairie City with her new husband, Shannon, and his teenage son. Chad lives in Eddyville with his girlfriend, Tara; they have a three-year-old daughter. Tara's two sons, ages ten and twelve, also live with them.

[2] Chad is not M.W.'s biological father. But he is the established father because M.W. was born during his marriage to Pamela. *See* Iowa Code §§ 144.13, 252A.3(4) (2011).

Code section 726.6(1)(a) (2009), admitting the following: "I did knowingly act in a manner to create a substantial risk to the emotional health of a child residing in my home."

The court entered an order prohibiting Chad from having contact with K.W. In August 2008, the State alleged Chad violated the no-contact order, based on K.W.'s assertion that Chad came to the convenience store where she worked. It appears from the record that Pamela may have orchestrated the encounter. The district associate court acquitted Chad, finding the "claimed contact" to be "imaginary." The court later found K.W. guilty of making a false report.

In July 2009, the district court held Pamela in contempt of court for interfering with Chad's visitation rights with M.W. and C.W.

In November 2010, M.W. decided to stop going to visitation with Chad. In her testimony, she described a physical argument she had with her father in September 2010 when he was trying to take away her cell phone. She also testified that Chad called her derogatory names and told her his whole family hated her. M.W. also relayed an incident where Chad kicked her sister C.W. down the stairs.[3] In his testimony, Chad denied saying such things or hurting C.W. Pamela has tried to cajole M.W. into abiding by the visitation schedule, and has taken away privileges when the teenager has refused to go, but Pamela has not tried to physically force M.W. to visit Chad. C.W. continued to keep scheduled visitations, but at the time of the modification hearing had started to express some reluctance to go to her father's house.

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[3] The Department of Human Services investigated the allegation that Chad caused a physical injury to C.W. and determined the abuse was "not confirmed and not founded."

On December 29, 2010, Pamela filed a combined application to modify the decree and petition to overcome paternity. The filing requested that Chad's visitation with C.W. be supervised and that Chad's paternity as to M.W. be overcome by DNA testing of the biological father.[4] Pamela also asked the court to appoint a guardian-ad-litem (GAL) to represent the girls.

On January 26, 2011, Chad filed an answer and counterclaim, alleging a material and substantial change in circumstances since the dissolution decree "in that [Pamela] has proven herself to be an unfit parent, committing emotional abuse upon the minor children of the parties" and trying to "destroy [Chad's] relationship with his children." Chad asked the court to grant him physical care of both M.W. and C.W.

On February 18, 2011, the court appointed a GAL to represent M.W. and C.W. The GAL provided the court with a comprehensive report following her review of dozens of documents and interviews with fourteen people over the span of several months. The GAL observed: "[T]his is a very difficult case." The GAL found that Pamela "has made it nearly unbearable for Chad to attend any of the children's school activities" because she informed school personnel and other parents that Chad is a "sex offender" and a "child molester."

M.W. told the GAL that she does not want to visit her father because she does not feel welcome at his house. M.W. recounted her father calling her names, but denied physical abuse. The GAL report shared a recommendation

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[4] Pamela told M.W. that Chad was not her biological father shortly after the divorce. Pamela also took M.W. to visit her biological father in prison in Wisconsin, where he is serving time for drug offenses. Pamela told the GAL that M.W.'s biological father was a "good person" and not "rapist" like Chad.

from M.W.'s counselor that "there would need to be some therapeutic intervention" before visits resumed between M.W. and Chad. For her part, C.W. told the GAL she enjoyed spending time at her father's house. C.W. also said Pamela told her when she was fourteen she could choose whether she continued visitation with her father.

The GAL concluded that Pamela's words and deeds have "no doubt . . . largely contributed to [M.W.'s] refusal to visit her father." The GAL believed the only way C.W. could maintain a relationship with both parents on a long-term basis was to be placed in her father's physical care. The GAL's report recommended that M.W. remain in Pamela's physical care, but that C.W.'s physical care be transferred to Chad.

The court held a hearing on September 21 and 22, 2011. During the proceedings, Pamela withdrew her application to overcome paternity and her application for sole custody of the children. On October 18, 2011, the court issued an order finding that Chad met his burden to show that a material and substantial change in circumstances justified modification of the physical care arrangement. The court largely adopted the reasoning and recommendations of the GAL report in concluding that Chad could provide superior care for C.W., but not M.W. Pamela appeals and Chad cross appeals.

II. Standard of Review/Burden of Proof

Because the district court tries modification actions in equity, our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

In this case, the district court properly placed the burden on Chad to prove a substantial change in circumstances supporting his request to have physical care of his daughters. *Thielges*, 623 N.W.2d at 237. Chad also was obliged to show by a preponderance of the evidence his ability to minister more effectively to the well-being of the girls. *See id.* at 235. We have characterized the burden in modification cases as "heavy" because once custody has been fixed, it should only be disturbed for "the most cogent reasons." *See id.*

We give weight to the district court's findings of fact, especially when considering witness credibility, but we decline to be bound by them. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009).

III. Analysis

A. Was modification of the physical care assignment warranted?

Iowa courts will modify the custodial terms of a dissolution decree only when the moving party has shown "a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered." *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). To qualify as substantial, the change must be "more or less permanent" and must "relate to the welfare of the children." *Id*.

In this case, Chad alleged that Pamela was working to sabotage his relationship with their daughters and that situation constituted a material change in circumstances from the time of the decree. The district court decided that "[M.W.'s] abrupt refusal to go to visitation with Chad or have phone contact with him since November 2010 is certainly a more or less permanent, material and

substantial change in circumstances." The court also found circumstances had changed in relation to C.W.'s physical care because "it appears to the court that Pam has created by her words, actions, and attitudes a very negative atmosphere concerning Chad" that "over time, can poison relationships and affections."

We agree with the district court's conclusion that Chad satisfied his burden to show a material and substantial change in circumstances. One parent's actions which undermine the children's relationship with the other parent can be the triggering event for modification. *See In re Marriage of Downing,* 432 N.W.2d 692, 694 (Iowa Ct. App.1988) (finding the mother's attempts to "drive a wedge" between the children and their father constituted a substantial change in circumstances warranting a modification). This record is replete with examples of Pamela's efforts to create a schism between the girls and their father. The district court was correct in deciding that Pamela's statements and conduct—which aimed to frustrate Chad's visitation rights—amounted to a material and substantial change in circumstances which merited a reevaluation of the physical care arrangement.

B. Did Chad Show He Could Provide Superior Care?

In the next step of the analysis we are faced with the thorny question of which physical care arrangement is in the best interests of sisters M.W. and C.W. Chad bears the heavy burden of showing that he has the ability to offer them superior care. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). Our determination whether he has satisfied that burden depends on at

least four competing principles. First, we recognize M.W.'s strong preference not to be in her father's care. *See* Iowa Code § 598.41(3) (2009) (calling for court to consider "[w]hether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity"). Second, we are mindful that physical care arrangements that are the least disruptive to the continuity of the primary caregiver are most often in the children's best interests. *See In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998). Third, we acknowledge the presumption in our law against separating siblings. *See In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992) (recognizing that split physical care deprives children of "benefit of constant association with one another"). And fourth, when we consider the best interests of the children, we do so in light of what custodial arrangement will assure "maximum continuing physical and emotional contact with both parents," and "will encourage parents to share the rights and responsibilities of raising the child." Iowa Code § 598.41(1); *In re Marriage of Brunch*, 460 N.W.2d 890, 891 (Iowa Ct. App. 1990).

In this case, M.W. not only wishes to live with her mother, but refused to have any contact with her father for almost one year leading up to the modification hearing. The district court was impressed with then fourteen-year-old M.W. as "bright," but also found her to be "very strong-willed and stubborn." The court characterized her "absolute refusal" to visit Chad as "unacceptable," yet concluded "little would be gained by forcing her to live somewhere she doesn't want to live."

Our case law stakes out a middle ground when considering the preference of a child to live with one parent over the other—the preference is relevant, but not controlling. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979) (holding that the custody preference of minor children, especially when they show a high level of maturity, "cannot be ignored"). We give less weight to a child's preference in a modification action than in the original custody decision. *In re Marriage of Jahnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). Even when a child unilaterally decides to disobey a custody order, our court has considered the deterioration of the parent-child relationship in deciding whether to change the custodial arrangement. *In re Marriage of Woodward*, 228 N.W.2d 74, 76 (Iowa 1975) (finding damage from hostility between mother and daughter outweighed value of teaching daughter not to "run from her problems").

We do not fault the district court's decision to give "significant weight" to M.W.'s adamant desire to stay with her mother. Because the trial judge had the advantage of hearing the girl's testimony and watching her demeanor in the courtroom, we defer to his factual findings regarding her parental preference. We agree that Chad has not shown a superior ability to provide for M.W.'s needs given her entrenched level of hostility toward him. We share the district court's hope that therapeutic intervention might help heal the rift over time.

The decision to leave the older daughter in her mother's care leads us to the second dilemma: Is it in C.W.'s best interest to be placed in her father's physical care without M.W.? As Pamela argues on appeal, the evidence in the record shows that she has been C.W.'s "primary nurturer." The GAL

recommended that C.W. be placed in Chad's physical care, but not without reservations. The GAL wrote:

> I do have some concern that if [C.W.'s] custody is transferred to Chad, he will limit [C.W.'s] telephone contact with Pam and will only allow Pam the time specific in the decree simply because he feels that is what has happened to him. Despite this concern, I still believe that living with her father is the only way [C.W.] will maintain a relationship with both parents on a long-term basis.

In deciding that compelling reasons existed to order split custody, the district court considered the following factors: (1) the sisters' difference in age; (2) whether they would have been together if split care was not ordered; (3) their relationship; and (4) the likelihood that one of the parents would turn the children against the other parent. *See Will*, 489 N.W.2d at 398. The court adopted the analysis of these factors set out in the GAL report. The GAL reasoned that the four-year age difference between the sisters weighed against split custody, while their already separate school and visitation routines did not. The GAL also found the sisters' relationship to be a neutral factor; while the girls enjoyed a sibling bond, M.W. was in high school and spent more time with her peers than with her family. The GAL also noted that C.W. would lose time with her younger half-sister if she stayed in the physical care of her mother. The most salient factor in the estimation of the GAL was the likelihood that Pamela would damage the relationship between C.W. and Chad if C.W. remained in her physical care.

We note the factors discussed in *Will* are not exhaustive, and the case refers to an article in the American Law Reports listing additional considerations. *Id*. at 398 (citing *Child Custody: Separating Children by Custody Awards to Different Parents*, 67 A.L.R.4th 354 (1989)). Additional factors worthy of

consideration here include (1) the child's relationship with stepparents and (2) the capability of the parents to care for the children, focusing on the child's previous experience residing with the custodial parent and the non-custodial parent's involvement in the child's upbringing.

On the stepparent issue, while M.W. expressed a dislike for her father's new partner, Tara, the record revealed a generally positive relationship between Tara and C.W. Tara testified she has always "adored" C.W., and that they generally have a "really good time" during her visits with Chad. Tara acknowledged that recently C.W. had "pulled back a little" but noted that the ten-year-old enjoys herself after she "lets down her guard." Chad also testified that Tara and C.W. were "still pretty close." We do not believe C.W.'s relationship with Tara would weigh against split physical care.

As to the parents' capability of caring for C.W., the record shows both Chad and Pamela are capable of attending to C.W.'s needs, though Pamela has been the predominant caregiver in her life. Chad has been far less involved in day-to-day parenting obligations such as scheduling doctor appointments and extra-curricular activities. We recognize that removing a child from the home where she has lived for years and from the company of her siblings is "discouraged under Iowa law." *In re Marriage of Mayer*, 347 N.W.2d 681, 684 (Iowa Ct. App. 1984).

The countervailing concern is Pamela's penchant to cast Chad in a negative light in conversations with her daughters. The GAL wrote: "Pamela has also begun sharing information with [C.W.] and I have little doubt that this will

continue as [C.W.] grows older." The GAL recounted C.W.'s revelation that Pamela told her that Chad "touched [K.W.] in the wrong spots." In her appeal brief, Pamela addresses this issue: "What is the 'responsible' reaction of a mother with young children to past conduct like this? To tell them, so they can be aware? To not tell them?"

It is uncontroverted that Chad entered a plea of guilty to child endangerment, admitting his conduct was emotionally damaging to his stepdaughter. While it is understandable that Pamela would be motivated to protect M.W. and C.W. from similar victimization, her campaign to demonize Chad in the community and in the eyes of their daughters has created an unhealthy environment, not conducive to cooperative parenting. The district court offered a very blunt assessment of Pamela's presentation, calling her testimony "exaggerated, if not completely untruthful, and highly dramatic." It is our practice to defer to such credibility determinations based on the closer vantage point of the trial court.

Both the GAL and the district court reached the conclusion that, over time, C.W. would not be assured maximum contact with Chad if she remains in the physical care of Pamela. Their opinions were informed by their first-hand interactions with both the parents and children involved in this case. Because we do not have the same advantage reading a cold appellate record, it is not wise for us to second-guess such observations. *See Loudon v. State Farm*, 360 N.W.2d 575, 583 (Iowa Ct. App. 1984).

While Chad's past indiscretions with Pamela's older daughter are concerning, they do not operate to forfeit his right to pursue positive parent-child relations with M.W. and C.W. The record shows Chad's relationship with M.W. will likely require therapeutic intervention if it is to be repaired. Accordingly, the district court correctly determined it is not currently in M.W.'s best interests to be placed in Chad's physical care.

But the district court found a different course was necessary for C.W. The district court determined that Chad met his burden to show that he could provide superior care for C.W. because he will maximize her continuing physical and emotional contact with both parents. Pamela has sent strong signals that she will not ensure an ongoing relationship between C.W. and Chad. We recognize that transferring C.W.'s physical care to Chad comes at the expense of the stability that C.W. has enjoyed with Pamela as her primary caregiver and at the expense of a more constant association with her sister M.W. While these are not ideal sacrifices, we find that the physical care arrangement ordered by the district court is the "least detrimental available alternative." *See In re Marriage of Wahl*, 246 N.W.2d 268, 271 (Iowa 1976). The district court weighed complex competing considerations and provided a well-reasoned explanation for its resolution. We opt not to disturb its determinations.

AFFIRMED.