

IN THE COURT OF APPEALS OF IOWA

No. 3-980 / 13-0469
Filed December 5, 2013

Upon the Petition of
VALERIE ANN BATES,
Petitioner-Appellant,

And Concerning
TIMOTHY GEORGE MYERS,
Respondent-Appellee.

Appeal from the Iowa District Court for Page County, Mark J. Eveloff,
Judge.

Valerie Ann Bates appeals the district court order modifying physical care.

AFFIRMED.

DeShawne Lee Bird-Sell of Sell Law, P.L.C., Glenwood, for appellant.

Jon H. Johnson of Johnson Law, P.L.C., Sidney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

BOWER, J.

Valerie Ann Bates appeals the district court order modifying physical care. Following Bates's attempted suicide, the district court determined there had been a substantial change in circumstances requiring modification. Bates argues the petition for modification did not allege a substantial change in circumstances, the district court erred in finding a temporary situation constituted a substantial change in circumstances, and the district court failed to give proper weight to Myers's history of domestic abuse. We find Bates's suicide attempt and her mental health issues support a modification of physical care. We also find Myers's history of domestic abuse, while serious, does not preclude granting his request for modification.

I. Background Facts and Proceedings

Valerie Ann Bates and Timothy George Myers are the unmarried parents of a child. Following the end of their relationship, they agreed to joint legal custody of the child and Bates was granted physical care.

Bates subsequently married. Since the order establishing custody and physical care, Bates has endured a number of tragedies. Her mother passed away in 2009 and a close personal friend died in 2012. After being informed by her husband that he would be seeking a divorce, Bates attempted suicide by shooting herself in the chest with a handgun.¹ Bates was taken to a local hospital leaving Myers to care for the child. The child was transferred to a school

¹ Bates claims the suicide attempt was her way of trying to make her husband feel some of her pain.

closer to Myers where an individualized education program was put in place to address concerns with the child's educational development.

Bates claims Myers strictly limited her contact with the child following her suicide attempt and exerted inappropriate control over the mother-child relationship. Myers expresses concern with allowing Bates unsupervised visitation with the child due to her suicide attempt, history of mood disorder, depression, anxiety, bipolar disorder, and her failure to seek professional help for her illnesses.

The parties' history is also complicated by two separate instances of domestic violence for which Meyers was convicted. Bates claims the child personally witnessed one of the incidents.²

On August 27, 2012, after the suicide attempt, Myers filed a petition for modification. In it, he requested a temporary and permanent order granting him physical care of the child. In granting modification on a temporary basis, the district court found a substantial change in circumstances based upon Bates's mental health issues. The court later granted Myers permanent physical care with supervised visitation to Bates until she is no longer a danger to herself or others.

II. Standard of Review

Our review of modification proceedings is de novo. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa 2000); Iowa R. App. P. 6.907. Our decision must be based upon the specific facts of this case; prior decisions are of

² The record does not contain any independent evidence of what the child saw.

little precedential value. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995).

III. Discussion

A. Procedural Issues

Bates raises arguments concerning the unusual history of the modification. She faults the district court for granting Myers temporary physical care during her time of need, which she argues skewed the facts in his favor.

Though we normally disfavor temporary care decisions, they may be permissible when employed with caution. See *Shipley v. Shipley*, 182 N.W.2d 125, 127 (Iowa 1970). Bates's suicide attempt placed the child, Myers, and the district court in an unusual and difficult position. The care of the child was paramount and Bates had placed herself in a situation where she was unable to physically care for the child. We agree with the district court that the temporary order was necessary.

Bates also argues the petition for modification was inadequate because it failed to allege a substantial change in circumstances. Upon review we find the petition describes the suicide attempt in general terms and raises other mental health concerns that, if true, would constitute a substantial change in circumstances. Bates's arguments concerning the contents of the petition are without merit.

B. Physical Care

Modification is appropriate where a substantial change in circumstances justifying the request is shown by the moving party. *In re Marriage of Frederici*,

338 N.W.2d 156, 158 (Iowa 1983). The moving party must also show an ability to more effectively care for the child. *Id.* Not every change in circumstances is sufficient to warrant modification. *Maikos v. Maikos*, 147 N.W.2d 879, 881 (Iowa 1967). The change must have been outside the contemplation or knowledge of the district court at the time the original decree was entered. *Id.* In assessing the best physical care arrangement, we are guided by the factors set out in section 598.41(3) of the Code. Iowa Code § 598.41(3)(a)–(k) (2011).

We agree with the district court there has been a substantial change in circumstances since the original custody order was entered. Bates's suicide attempt and mental health issues place the child at risk. *Id.* § 598.41(3)(j). Bates's attempt to punish her husband by attempting suicide indicates the needs of the child were not paramount. Until Bates has adequately addressed her mental health issues, we cannot say the best interests of the child would be served by remaining in her physical care. Bates's attempt to downplay the seriousness of the situation does little to alleviate our concerns.

C. Domestic Abuse

Bates argues the district court failed to properly consider the history of domestic abuse in her relationship with Myers.³ When considering joint legal custody, the code establishes that a history of domestic abuse, which is not rebutted, outweighs other factors in determining the award of custody. *Id.* § 598.41(2)(c).

³ The record shows an incident in 2004 where both parties engaged in a physical altercation. The second incident occurred in 2008.

There is no question a history of domestic abuse is an important consideration. See *In re Marriage of Forbes*, 570, N.W.2d 757, 759 (Iowa 1997). A court, considering a history of domestic abuse, is not to merely count incidents. *Id.* Instead, the court is to “weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed.” *Id.*

The district court noted Myers’s two convictions for domestic abuse and waived mediation due to the history of domestic abuse between the parties. The failure to specifically discuss the impact of a history of domestic abuse on the physical care decision, however, is not fatal. *Id.* As always, the primary concern is the best interests of the child. *In re Marriage of Junkins*, 240 N.W.2d 667, 668 (Iowa 1976). Considering the significant risk to the safety of the child created by Bates’s mental health condition, we find physical care of the child should continue with Myers despite the history of domestic violence.

AFFIRMED.