

**IN THE COURT OF APPEALS OF IOWA**

No. 6-355 / 05-1841  
Filed October 11, 2006

**IN RE THE MARRIAGE OF VALERIE K. McCULLEY  
AND MATTHEW A. McCULLEY**

**Upon the Petition of  
VALERIE K. McCULLEY  
n/k/a VALERIE K. NISSEN,**  
Petitioner-Appellant,

**And Concerning  
MATTHEW A. McCULLEY,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, Bobbie M. Alpers,  
Judge.

Valerie Nissen appeals from the denial of her request to modify the  
physical care provision of the decree dissolving her marriage to Matthew  
McCulley. **AFFIRMED.**

M. Leanne Tyler of Tyler & Associates, P.C., Davenport, for appellant.

Patricia Zamora of Zamora, Taylor, Clark, Alexander & Woods, Davenport,  
for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

**ZIMMER, J.**

Valerie Nissen, f/k/a Valerie McCulley, appeals following the district court's denial of her request to modify the physical care provision of the decree dissolving her marriage to Matthew McCulley. We affirm the district court.

**I. Background Facts and Proceedings.**

Valerie and Matthew were married in 1995. Their marriage was dissolved in February 2003. The dissolution decree placed physical care of the parties' two children, Ms.M., born in 1999, and Mx.M., born in 2001, with Matthew. Valerie was awarded extraordinary visitation, exceeding 167 days per year.

Soon after the divorce, each party entered into new a relationship. Valerie began cohabiting with her boyfriend, Robert, to whom she is now married. Matthew began cohabiting with his girlfriend, Ramona, to whom he is now engaged. Ramona's three children from prior marriages—M.M., born in 1990, D.B., born in 1996, and V.B., born in 1997—also resided in Matthew's home.

In September 2004 Valerie filed a petition to modify the dissolution decree requesting, in relevant part, that she be awarded sole physical care of Ms.M. and Mx.M. When the matter came on for trial in July and August 2005, Valerie continued to request that she be awarded the children's sole physical care, but further requested, in the alternative, an award of joint physical care. The alleged substantial changes in circumstances relied on by Valerie related primarily to the care and supervision the children were receiving in Matthew's home. Valerie expressed concern about an incident where Ms.M. and D.B. suffered minor injuries when they shot each other with BB guns that Matthew had purchased for the children. She also pointed to an incident where Ms.M. cut his thumb with a

small knife while he was supposed to be taking a nap in his room. However, Valerie's primary concern centered on an incident or incidents of sexual abuse that were perpetrated by Ramona's oldest child, M.M.

In June 2004 V.B. informed Ramona that she had been inappropriately touched by M.M. Ramona immediately confronted M.M., who admitted to inappropriate contact with all the children. Ramona then immediately notified both Matthew and M.M.'s father, Andrew. She also made arrangements to immediately remove M.M. to his father's home, where no other children reside. Ramona and Matthew informed Valerie of what had occurred, and Ramona and Andrew self-reported the incident to the Iowa Department of Human Services (DHS). At the recommendation of DHS, Ramona implemented a safety plan, which required M.M. to live with relatives until DHS's assessment was complete and a plan could be agreed upon for M.M.'s return to Matthew's home.

DHS conducted a thorough investigation in which all adults, including Matthew, Ramona, and Valerie, cooperated. M.M., on the advice of counsel retained by Andrew, declined to speak about the allegations of sexual abuse. Although there was some evidence M.M. had inappropriately touched and been touched by all four of the younger children, DHS confirmed abuse only as to V.B.

After DHS completed its assessment, Ramona and Matthew continued to limit M.M.'s contact with the younger children. Although Ramona and Andrew had entered into a consent order of modification that provided for joint physical care of M.M., M.M. was in the care of Andrew or other relatives the great majority of the time. On those occasions when M.M. was in Matthew's home, he was

never left unsupervised with the younger children, and was allowed to spend the night only when no other children were present.

These limitations on M.M.'s contact with the other children were consistent with the recommendations of his therapist, who proposed a gradual reintroduction of M.M. into Matthew's home over a six to twelve month period, while monitoring the responses of M.M. and the other children. According to the therapist, at the time of trial M.M. had progressed to bimonthly monitoring for relapse prevention, there had been no indicators of relapse or "red flags," and M.M. was at a low risk to reoffend.

In a detailed, thirty-three page ruling and order the district court concluded Valerie had failed to establish either that a substantial change in circumstances had occurred or that she could more effectively minister to the children's needs. The court expressly considered and rejected Valerie's alternative request for joint physical care. Regarding M.M.'s conduct, the court recognized that, "[i]f left unaddressed," it would likely constitute a substantial change in circumstances. However, the court found that "Matt and Ramona have responded to this situation completely appropriately and the risk to [Ms.M.] and [Mx.M.] has thus been addressed in every way as recommended."

Valerie appeals. She contends she established both a substantial change in circumstances and an ability to be a superior caretaker for the parties' children. While Valerie briefly references the BB gun and knife incidents, the focus of her contentions on appeal is once again the sexual abuse perpetrated by M.M. and the risk exposure to M.M. poses to the children.

## **II. Scope and Standard of Review.**

Our scope of review is de novo. Iowa R. App. P. 6.4; *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g). Our overriding consideration is the children's best interests. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997).

## **III. Physical Care.**

As the parent seeking to modify physical placement, Valerie bears a heavy burden. She must prove conditions affecting the children's welfare have so materially and substantially changed that it is in the children's best interests to transfer physical care. *In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). The change in circumstances cannot have been within the district court's contemplation when the decree was entered, *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999), and must be of a more or less permanent nature, *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). Valerie must also demonstrate a superior ability to minister to the children's well being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). "This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons." *Id.* Upon our de novo review of the record, we agree modification of physical care was not warranted in this case.

The district court considered both the BB gun and knife incidents. The court noted Matthew had bought the least powerful variety of BB gun, instructed

the children on the proper and safe use of the guns, and informed the children they were allowed to use the guns only when he was present. When he learned the children had disobeyed him, Matthew punished them by loss of the guns. We agree with the district court that neither this incident, nor the accidental cut to Ms.M.'s thumb, demonstrate a substantial change in Matthew's ability to care for and supervise the children.

Our opinion does not alter when we consider the presence of M.M. in Matthew's home. While it does appear M.M. perpetrated sexual abuse upon Ms.M. and Mx.M. in the form of reciprocal and inappropriate touching, and while we recognize the harm such abuse can cause and the need to protect the children from future exposure, we do not find that Matthew's home continued to pose a danger to the parties' children once the abuse came to light. As the district court noted, Matthew and Ramona addressed the abuse once it was revealed and have continued to limit M.M.'s contact with the younger children in accord with his therapist's recommendations.

Although Valerie can point to no affirmative evidence that Matthew and Ramona are allowing M.M. to have unsupervised contact with the younger children or to spend the night in Matthew's home while the younger children are present, she urges us to infer such contact and presence from the bare fact that Ramona and Andrew entered into a shared physical care arrangement which, if strictly followed, would necessarily place M.M. in the home at the same time as the younger children. We decline to make such an inference in light of testimony from Matthew and Ramona to the contrary, which was supported by the testimony of other witnesses and found to be credible by the district court. Giving

due weight to the court's assessment, we similarly find that Matthew and Ramona have taken and will continue to take reasonable and necessary steps to ensure Ms.M.'s and Mx.M.'s safety.

Nor can we credit Valerie's assertions that Matthew attempted to hide certain facts regarding the abuse during the course of discovery in this matter and that he is likely to hide any future abuse. The record credibly demonstrates that both Matthew and Ramona were immediately forthcoming about the abuse and have kept Valerie informed of relevant facts and circumstances. We see no basis for concluding that Matthew would be any less forthcoming in the future.

Moreover, like the district court, we conclude Valerie has not established that she would be a superior caretaker for the children. In addition to the above-noted assertions, which we have rejected, Valerie points to facts that she believes demonstrate a lack of concern for the children by Matthew. She notes that she was the one who arranged counseling for Ms.M.,<sup>1</sup> that she is the one who generally takes care of the children's medical needs, and that Matthew has missed some of the children's school events because he was working out of town. We cannot conclude the foregoing, even when considered in light of the remaining evidence, demonstrate that Valerie is the superior caretaker.

The record reveals that both Matthew and Valerie are able to provide the children with a loving and stable home. Both parents are able to provide the children with adequate and appropriate, albeit not perfect, care and supervision. Contrary to Valerie's suggestion, we are not willing to conclude M.M. was able to

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<sup>1</sup> Valerie also asserts that Matthew and Ramona failed to obtain counseling for V.B. and D.B. However, in support of this contention she relies solely on the fact that, according to M.M.'s therapist, Ramona had not brought the children to *him* for counseling. Ramona in fact testified V.B. had been seen by a counselor.

perpetrate the abuse on the younger children because Matthew and Ramona were overly lax in their supervision of all the children. Moreover, while the parties have experienced some difficulty in communication and cooperation following the dissolution, both bear at least partial responsibility for that fact. After considering the totality of the record, we find Valerie can provide comparable, but not superior, care for the children.

Because Valerie has not demonstrated a substantial change in circumstances or that she is better able to meet the children's needs, the district court appropriately declined to modify Ms.M.'s and Mx.M.'s physical placement. In light of the foregoing conclusion, it is not necessary to specifically address Valerie's claim that the district court should have granted her shared physical care of the children.

#### **IV. Attorney Fees.**

Finally, we consider each party's request for appellate attorney fees. Such an award is discretionary and is determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). Given that Matthew was required to defend against Valerie's unsuccessful appeal, and given that Valerie has a significantly higher income than Matthew,<sup>2</sup> we award Matthew \$500 in appellate attorney fees.

#### **AFFIRMED.**

Vaitheswaran, J., concurs; Vogel, P.J., dissents.

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<sup>2</sup> Valerie earns approximately \$77,000 a year as a project engineer at Alcoa. Matthew earns approximately \$28,000 a year from his safety consultant business.

**VOGEL, P.J.** (dissenting)

I respectfully dissent and would find that the sexual abuse perpetrated on Ms.M. and Mx.M., as well as the other children in the home, representing a pattern of abuse over the course of several years, is a substantial change of circumstances that warrants a change in physical care. See Iowa Code § 598.21(8). The fact that Valerie can provide a home without fear of sexual abuse, in and of itself, is sufficient to show that she can minister more effectively to the children. I would reverse the district court and grant physical care of the children to Valerie.