

IN THE COURT OF APPEALS OF IOWA

No. 7-542 / 06-1237
Filed October 12, 2007

**IN RE THE MARRIAGE OF PATRICK MAHONEY
AND ROSE MAHONEY,**

**Upon the Petition of
PATRICK MAHONEY,**
Petitioner-Appellee,

**And Concerning
ROSE MAHONEY, n/k/a ROSE KUEHL,**
Respondent-Appellant.

Appeal from the Iowa District Court for Buchanan County, John Bauercamper, Judge.

Rose Mahoney appeals the district court's denial of her request to modify the parties' joint physical care arrangement. **REVERSED AND REMANDED.**

Cheryl Weber of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

Jeffrey Clements, West Union, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

We must decide whether the district court acted equitably in denying Rose Mahoney's request for modification of a joint physical care arrangement.

I. Background Facts and Proceedings

Patrick Mahoney and Rose Mahoney, n/k/a Rose Kuehl, married and had two children: Kirsten, born in 1996, and Ian, born in 1999. They divorced in 2003. The decree approved a stipulated settlement that provided for joint physical care of the children.

Shortly after the decree was entered, Patrick moved to have it set aside on the ground that he was coerced into settling. The district court denied the motion, stating, "It is apparent to the court that petitioner simply changed his mind and no longer wants to be bound by the terms he negotiated"

The same month, Rose sought to have Patrick held in contempt for withholding visitation. The district court found Patrick violated the decree by denying Rose visitation on certain specified dates. The court stated: "It is clear that Patrick is in contempt of court for his willful and intentional violation of the court order regarding visitation, and his attempts to manipulate visitation during the last several months."

The very same month, the Department of Human Services began receiving complaints that Rose and her new husband were engaging in child abuse. Those complaints continued for more than two years.

Approximately two years after the dissolution decree was entered, Patrick sought a modification of the decree's joint physical care provision to afford him physical care of the children. Rose cross-petitioned for physical care.

Following trial, the district court found “communication problems . . . lack of civility between the parents, and related problems,” but concluded they did not “reach a level which requires the court to discard the child care plan the parents both agreed to accept three years ago.” Rose appealed.¹

Rose does not take issue with the district court’s fact findings. Instead, she asserts those findings warranted a modification of the decree to afford her physical care of the children. Our review of this issue is de novo. Iowa R. App. P. 6.4.

II. Physical Care Analysis

A. Substantial Change of Circumstances

Rose first had to establish a substantial change of circumstances since the time of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Parental discord having a disruptive effect on children’s lives may amount to a substantial change of circumstances. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

Rose established the existence of parental discord. Soon after the stipulated decree was entered, Patrick attempted to disavow the joint physical care provision. He also denied Rose visitation, forcing her to seek court intervention. And, he reported or instigated several child abuse complaints, all of which were deemed unconfirmed. The nature, timing, and disposition of these complaints are telling.

1. June, 2003: Indecent exposure. Three days after the court entered the dissolution decree, it was reported that six-year-old Kirsten saw

¹ Patrick did not file a responsive brief.

Rose's soon-to-be husband without clothes. Following an investigation, the Department determined the report was unconfirmed. An administrative law judge later found:

Appellants Patrick and Rose were engaged in a judicial custody dispute with one another in which one or both of them may have been motivated to persuade K.M. to say that something did or did not happen in order to gain some legal advantage.

2. July, 2003: Bruised arms. Patrick complained to the Department that Kirsten had a handprint-like bruise on her arm. This report was initially confirmed and Rose was found responsible for the abuse. On appeal, an administrative law judge reversed the Department, noting that Kirsten had recanted her story on two occasions following her initial interview with a child protection worker.

3. August, 2003: Lack of supervision. Patrick reported to the Department that Rose left Ian alone when she went to the store. This complaint was deemed unconfirmed. Rose advised the Department that she went to the store to pick up some milk, other children were with her son, and at least one of them was responsible enough to call 911 in case of an emergency.

4. November, 2003: Sexual abuse and physical abuse. The Department received a complaint that there was sexual and physical abuse in Rose's home. Patrick's sister testified she made a complaint along these lines "in '03 or '4." A child protection worker investigated the report. The complaint was deemed unconfirmed.

5. January, 2004: Bruises on Ian's cheek. A report was made that Ian had bruises on his face. Ian told an investigator that his mother hit him

with a hammer. When Kirsten was questioned about the bruises, she said their dad slapped Ian because he was “being goofy” and told the children to say their mom caused the injuries. The report was deemed unconfirmed.

6. *January, 2004.* Summary records reveal that a second abuse investigation was initiated in the month of January. Although the disposition of this investigation is not in the record, professionals testified that none of the reports relating to Kirsten and Ian were confirmed.

7. *April, 2004: Sexual abuse.* During an individual session with a therapist, Kirsten disclosed that she was being abused. The therapist reported this disclosure to the Department, which, in turn, conducted an investigation. According to a summary document in the record, this report was not confirmed.

8. *May, 2004: Physical abuse by Rose’s husband.* Patrick complained to the Department that Kirsten had a swollen ear and a bruise on her chin. When Kirsten was interviewed, she said Rose’s husband inflicted these injuries. After a lengthy and thorough investigation by the Department, a police officer, and child protection center employees, several inconsistencies were noted in Kirsten’s statements. The report was deemed unconfirmed.

9. *May, 2004.* Another complaint was filed in this month. The nature of this complaint is unknown but, based on the testimony in the record we conclude this complaint was also unconfirmed.

10. *(July) August, 2004: Sexual abuse.* At trial, an in-home service provider who furnished skilled counseling and supervisory services testified that she reported the two bruises on Ian in January. She stated that, in

August 2004,² she also made a report of possible sexual abuse based on statements Kirsten made to her. She questioned what the children told her about abuse because of “how they said it.” She said she told Patrick that the children’s reports to her were “verbatim what” Patrick told her in phone calls. She told him, “it appears that they have been coached, and if they have not been coached, they may have listened to his phone calls with me and repeated what he has been saying.” Finally, she opined that Kirsten’s statements about the abuse were “nothing like any abuse reports I had ever received in my life. [Kirsten] was celebrating that she was happy; she had never indicated any time previous she was afraid. It was not consistent to any report.” The provider stated she nevertheless felt obligated to report Kirsten’s statements to the Department because she was a mandatory reporter.

The record does not contain the Department’s disposition of this complaint, but the service provider testified it was her understanding that all complaints involving Kirsten and Ian were deemed unconfirmed.

11. November, 2004: Medical neglect. A complaint was filed concerning Rose’s failure to give Ian medication. The report was deemed unconfirmed.

12. December, 2005: Sexual abuse. Kirsten complained to her therapist that Rose’s husband liked to touch her private parts. Because of concerns that the children’s statements were being influenced, the child protection worker informed Patrick that she would transport the children to the child protection center. On the day of the trip, Patrick called the worker to tell her

² The record suggests that this complaint may have been filed in July.

that Kirsten tends to get “kind of confused” when she is anxious and that if some of her stories got mixed up during the interview it was because she was nervous.

At the child protection center Kirsten’s statements of abuse contained inconsistencies. Subsequent medical examinations of both children were within normal limits. Meanwhile, Rose’s husband was interviewed by police. He stated he distances himself from the children because he does not want to be falsely accused of abuse. This report of abuse was deemed unconfirmed.

In sum, Rose was repeatedly investigated for child abuse between 2003 and 2005, usually at the behest of Patrick. Commenting on the many investigations, one Department employee stated:

This worker is concerned regarding the state of mind of Patrick Mahoney. He appears desperate in his attempt to convince the department that Kirsten and Ian have been abused despite the fact that every professional that has had contact with these children has told him differently His influence on his children is suspect. His constant allegations of abuse are detrimental to Kirsten and Ian.

In a similar vein, a Department supervisor testified that Patrick told her he wished to use a confirmed finding of abuse against Rose in a custody proceeding.

We conclude the discord between the parents amounted to more than the expected tensions between divorcing parents. *Cf. In re Marriage of Bolin*, 336 N.W.2d 441, 447 (Iowa 1983) (“Although cooperation and communication are essential in joint custody, tension between the parents is not alone sufficient to demonstrate it will not work.”); *In re Marriage of Ellis*, 705 N.W.2d 96, 103 (Iowa Ct. App. 2005) (stating while appropriate cooperation and communication is required for joint physical care, “certain failures of cooperation and communication” are to be expected). Patrick’s grave allegations of abuse directly

threatened Rose's relationship with Kirsten and Ian. Even without Patrick's move to disavow the joint physical care arrangement or his denial of visitation, these unconfirmed reports amounted to a substantial change of circumstances.

B. Rose's ability to offer superior care.

Rose also had to prove she could minister more effectively to the children than Patrick. See *Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002).

Several professionals noted the detrimental effects of Patrick's vigorous and sustained charges against Rose. For example, a professional who evaluated Kirsten concluded:

Kirsten repeatedly denied physical or sexual abuse by [Rose's husband] Further, Kirsten alleges that her father told [her] to "lie" in Cedar Rapids and tell the investigators that [she] was "touched" by [Rose's husband]. Kirsten went on to state that her father "told me [Rose's husband] is bad, but no he is not!" When asked about how she felt about going to Cedar Rapids on three occasions for purposes of an evaluation, Kirsten responded, "Scared, scared, scared . . . they keep talking to me about [Rose's husband] and he is nice."

. . . .

Kirsten is becoming quite frightened by the recurring sexual abuse investigations conducted through St. Luke's Hospital in Cedar Rapids. To be repeatedly put through the procedure is potentially damaging to the child as the result of the accumulated fears associated with repeated examinations. Should the parents continue to have conflicts of the nature evaluated by the writer, the potential effect on the children could indeed become "mental abuse."

We conclude these detrimental effects rendered Rose the superior caretaker. Notably, Rose expressed a willingness to foster the children's relationship with their father, despite the repeated accusations he made against her. She testified, Patrick's "heart is in the right place." When asked about a confirmed child abuse report against Patrick based on physical abuse of his son from

another relationship, she declined to use it to counter his charges. Instead, she stated “he wouldn’t intentionally try to physically abuse [Kirsten and Ian].”

In concluding Rose should have physical care of Kirsten and Ian, we recognize and are troubled by the fact that Rose’s husband has two founded abuse reports against him for physical abuse of his biological children. However, the Department and police investigated him and were not persuaded that he abused Rose’s children. Based on that record, his background does not warrant a continuation of the status quo.

We conclude the joint physical care arrangement was not in the children’s best interests. *Melchiori*, 644 N.W.2d at 369. We reverse the district court’s denial of Rose’s cross-petition for modification of the joint physical care arrangement. The dissolution decree is modified to provide that Rose will assume physical care of Kirsten and Ian. We remand for further proceedings consistent with this opinion.

III. Appellate attorney’s fees

Rose requests \$3000 in appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rather rests within the appellate court’s discretion. *In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). Based on the parties’ financial circumstances, we decline this request.

REVERSED AND REMANDED.