IN THE COURT OF APPEALS OF IOWA

No. 1-263 / 00-806
Filed July 18, 2001

IN RE THE MARRIAGE OF RODNEY A. WALKER AND MARY JO WALKER

FILED
JUL 18 2001
CLERK SUPREME COURT

Upon the Petition of
RODNEY A. WALKER,
Petitioner-Appellant,

And Concerning
MARY JO WALKER,
Respondent-Appellee.

Appeal from the Iowa District Court for Boone County, William J. Pattinson, Judge.

The petitioner appeals a district court ruling granting the respondent's petition to modify the child custody provisions of the parties' dissolution decree.

AFFIRMED.

Ryan A. Genest of Borseth, Genest & Suddreth Law Office, Altoona, for appellant.

Vicki R. Copeland of Wilcox, Polking, Gerken, Schwarzkopf, Hoyt & Copeland, P.C., Jefferson, for appellee.

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

VAITHESWARAN, J.

Rodney Walker appeals a modification decree transferring physical care of his daughter to his former wife. He also raises certain evidentiary and proof issues relating to the modification trial. We affirm.

I. Background Facts and Proceedings

Rodney and Mary Jo married and had one child, Stacey, in 1992. When the parties divorced, the district court awarded Rodney physical care. We affirmed the award but doubled Mary Jo's summer visitation.

Several months later, Stacey disclosed to a counselor that she had been inappropriately touched. The Department of Human Services investigated the allegation and deemed it unfounded.

Mary Jo filed an application to modify the physical care arrangement, based in part on Stacey's disclosure. Before trial, the parties reached an agreement under which Rodney retained physical care of Stacey but Mary Jo received expanded visitation.

Soon after the district court approved the agreement, Stacey suggested to another therapist that Rodney inappropriately touched her. The Department again initiated an investigation. When Stacey refused to discuss the matter with a Department employee, the Department again deemed the report unfounded.

Mary Jo filed a second modification application. After a lengthy trial, the district court granted the application. This appeal followed.

II. Scope and Standards of Review

We review a modification ruling de novo. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50 (Iowa 1999). The standards governing such a proceeding are well established:

> A party seeking modification of a dissolution decree must establish by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since the entry of the decree or of any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief.

In re Marriage of Maher, 596 N.W.2d 561, 564-5 (Iowa 1999). In addition,

> (1) not every change in circumstances is sufficient; (2) it must appear that the continued enforcement of the decree would, as a result of the changed circumstances, result in positive wrong or injustice; (3) the change in circumstances must be permanent or continuous rather than temporary; and (4) the change in circumstances must not have been within the contemplation of the district court when the original decree was entered. The district court has reasonable discretion in determining whether modification is warranted, and we will not disturb that discretion unless there is a failure to do equity.

Id. (citations omitted).

III. Evidence Contemplated by Parties

To warrant a modification of a physical care arrangement, an applicant must rely on circumstances not contemplated by the parties at the time the decree or subsequent ruling was entered. *Maher*, 596 N.W.2d at 564-5. Rodney contends Mary Jo breached this standard by offering the first therapist's statements about inappropriate touching, as these statements formed the basis of her first modification application.

We agree with Rodney that the first sex abuse allegation cannot serve as grounds to support Mary Jo's second modification application. *See In re Marriage of Winnike*, 497 N.W.2d 170, 172 (Iowa Ct. App. 1992) (stating sex

abuse allegation raised and resolved in prior proceeding could not be re-litigated in subsequent modification action). However, the district court expressly stated it did not intend to "base its decision on any occurrence, controversy or episode that occurred prior to the modification petition." Instead, the court stated it considered the prior evidence of possible sexual abuse only to determine what had changed and to "understand the parties and their situation." We conclude the evidence could be considered for these purposes. *Cf. Warren v. Warren*, 191 N.W.2d 659, 661 (Iowa 1971) (noting best interests of child justified consideration of facts known or available to parties at time of prior proceeding).

IV. Reliance on Expert Testimony

The modification trial turned on Mary Jo's allegation that Rodney either sexually abused his seven-year old daughter or engaged in some other conduct that caused Stacey to fear him. Mary Jo's primary witness was Dr. Ana Lopez-Dawson, a clinical psychologist to whom the Department of Human Services referred the parties. Based on therapy sessions with Stacey, Mary Jo, and Rodney, analysis of pictures drawn by Stacey, and review of information from experts and service providers, she concluded Mary Jo would be better able to meet Stacey's long-term needs.

Rodney contends Dr. Ana Lopez-Dawson strayed from her role as neutral arbiter of Stacey's welfare and became an advocate for Mary Jo. He points to the fact she expended hundreds of hours of unpaid time on Stacey's case. Additionally, he suggests that, at trial, she emphasized only adverse information about him.

We disagree with Rodney's characterization of Dr. Lopez-Dawson's role. The record suggests she made every effort to include both parents in her counseling sessions and discussions about Stacey's welfare. She initially alternated sessions between Rodney and Mary Jo. Later, when Rodney's interest in the sessions waned, she continued to maintain phone contact with him.

While there is no question Dr. Lopez-Dawson spent much more time on this case than she billed, she explained that she did so:

> Because in Stacey's case I feel whether it's that her father is sexually abusing her or physically abusing her or just that he's not really quite getting that whatever he's doing is making her feel uncomfortable or afraid, I feel that this is a child that's fallen through the cracks; that she's trying to tell people--a lot of different people that some things are not right, and I don't think that--you know, the message that she's getting is nobody's hearing her.

Far from revealing a bias against Rodney, this statement suggests she gave him the benefit of the doubt with respect to Stacey's claim of inappropriate sexual contact. Her extensive investigation of Stacey's claim supports this view.

Several months after Dr. Lopez-Dawson began counseling the family, Stacey left her a picture of a naked person with arrows pointing to the groin and breast areas. Dr. Lopez-Dawson began her investigation by asking Stacey what the picture depicted. Stacey told her it showed her and her father. Later, Stacey told Dr. Lopez-Dawson that she wanted the therapist to tell her dad "to stop touching her privates . . . ."

Although Dr. Lopez-Dawson was "alarmed" by the picture, she did not jump to a conclusion that Rodney had sexually abused Stacey. Instead, she

referred this and other pictures to two art therapists. The therapists saw indicators of sexual abuse, emotional fragility, or personal safety concerns.

Dr. Lopez-Dawson did not stop there. She also referred the picture of a naked person to an art expert to confirm that Stacey drew the picture without coaching from her mother.

Even after obtaining this confirmation, Dr. Lopez-Dawson gave Rodney the benefit of the doubt, concluding Stacey's reactions to Rodney may have been caused by acts falling short of sexual abuse. She met with him to discuss the matter despite a recognition that she ran the risk of giving him "ammunition to use against the child."

We view Dr. Lopez-Dawson's contacts with third parties as ultimately inuring to the benefit of Rodney, who would otherwise have been faced with an assessment based solely on the statements of Stacey and her mother. *Cf. In re Marriage of Rebouche*, 587 N.W.2d 795, 799 (Iowa Ct. App. 1998) (affirming rejection of independent custody evaluator's report on ground of bias where evaluator obtained most if not all his information from the father and did not contact third parties as ordered by the district court to corroborate the father's information). For example, while she contacted Stacey's daycare providers and advised them to note only unusual behavior, we discern nothing sinister in this instruction, but rather an effort to focus on the issues she was charged with addressing. Indeed, the day care notes which Rodney now challenges as biased contain several positive references to Stacey's behavior, references which Rodney's attorney exploited on cross-examination of Dr. Lopez-Dawson.

In sum, we conclude Dr. Lopez-Dawson's testimony, while damaging to Rodney, was professional, reasoned, and unbiased. We further conclude the court acted equitably in relying on her "extremely credible" testimony. As the court noted, Dr. Lopez-Dawson was "qualified in terms of education and experience to venture an opinion on the pertinent issues" and "[h]er opinions and conclusions were well founded in observed fact."

V. Physical Care

Rodney next contends Mary Jo failed to satisfy her heavy burden of showing she was entitled to a modification of the physical care arrangement. We disagree. Dr. Lopez-Dawson's testimony alone goes far in satisfying this burden. In addition to assessing Stacey's disclosure concerning possible sexual contact with her father, she recounted disturbing incidents of violence by Stacey against others, including episodes where she struck the therapist with a string of beads, hit her pastor, and jumped on and killed the family cat. Dr. Lopez-Dawson cited Stacey's inappropriate social conduct at school, excessive crying, excessive masturbation, a poor understanding of social boundaries, and a tendency to become withdrawn. She opined that even if these behaviors were not precipitated by sexual abuse they suggested "a kid that, you know, hasn't felt safe for a very long time with her dad." *Cf. Bradford v. Bradford*, 704 So. 2d 440, 442 (La. App. 2 Cir. 1997) (noting child's fear of continuing in unsupervised relationship with father significant consideration for district court to weigh).

While there is no question Stacey loves her father, the record reflects her emotional well-being has deteriorated in his care. As the district court stated, even if the court could not "find with any certainty" that Rodney sexually abused

Stacey, there was nevertheless "something amiss and something unhealthy in the father-daughter relationship." This amounts to a material and substantial change in circumstances not contemplated when the decree was entered.

Stacey's emotional instability while in Rodney's care is also the basis for a finding that Mary Jo is the superior parent. The record reflects Mary Jo made a commitment to reduce the emotional turmoil experienced by her daughter. To that end, she continued to abstain from alcohol, a substance that contributed to her loss of physical care in the divorce proceeding. She remained in the same home she had occupied when the parties were married, situated near an established daycare center and school and close to her place of employment. Mary Jo participated fully in counseling sessions, heeding Dr. Lopez-Dawson's advise to set clear parent-child boundaries and to desist in crying or showing weakness that would require Stacey to take on a parenting role. Finally, and most importantly, she demonstrated a resolve to protect Stacey and to get to the heart of what was troubling her. The most that was said against Mary Jo during the proceeding was that she was over-protective, too enamored of health care professionals, and pampered Stacey too much.

The district court summarized the parties' positions as follows:

> Mary Jo presents the better opportunity for Stacey insofar as chances for adequate social, moral and emotional development are concerned. Mary Jo will also do a better job in supporting Rodney's relationship with Stacey than the converse. Mary Jo has made considerable strides towards enlightenment as a parent and a co-parent since the entry of the original decree and since the last modification thereof. Rodney's attitudes have taken a turn for the worse.

We agree with this assessment and the district court's conclusion that modification of the physical care arrangement was warranted.

VI. Admission of Polygraph Evidence

Over Rodney's objection, Dr. Lopez-Dawson testified that Mary Jo passed a polygraph test as to her statement that she did not encourage Stacey to make false allegations against Rodney. Rodney asserts the court should not have admitted this testimony. We need not rule on this issue, as we do not accord this evidence any weight on our de novo review of the district court's physical care determination. *See Wilker v. Wilker*, ___ N.W.2d ___ (Iowa 2001); *Cf. In re Daniel v. Noel*, 600 N.Y.S.2d 314, 317 (1993) (admission of polygraph test amounted to harmless error where record contained ample other evidence to support modification ruling).

We affirm the district court ruling transferring physical care of Stacey from Rodney to Mary Jo.

AFFIRMED.