FILED
JUN 25 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CHARLES STEVEN HILDENBRAND
AND LINDA MARIE HILDENBRAND

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Upon the Petition of)
CHARLES STEVEN HILDENBRAND,)
Petitioner/Appellee/Cross-Appellant,)
And Concerning)
LINDA MARIE HILDENBRAND, n/k/a)
LINDA MARIE McGRAW,)
Respondent/Appellant/Cross-Appellee.)

Filed June 25, 1986

6-136
85-1756

Appeal from the Iowa District Court for Polk County (No. CD8-4662) - Gene L. Needles, Judge.

Respondent appeals from trial court's order modifying her dissolution decree. **AFFIRMED AS MODIFIED.**

David J. Grace, of Davis, Grace, Harvey, Horvath, Gonnerman & Rouwenhorst, Des Moines, for appellant.

Joseph G. Bertogli, Des Moines, for appellee.

Heard by Snell, P.J., and Hayden, and Sackett, JJ.

SACKETT, J. 80

Linda Hildenbrand, now Linda McGraw, appeals from the trial court's order modifying her dissolution decree and transferring custody of the parties' son Michael to Charles Steven Hildenbrand.

The marriage of Charles Steven and Linda Hildenbrand was dissolved in November, 1975. Custody of Stephanie, born in January, 1972, and Michael, born in December, 1973, was awarded to Linda. The original decree provided Steven would have visitation every other weekend, every Wednesday, certain holidays and other visitation as agreed upon. The visitation provisions were modified slightly on at least two occasions.

Steven is now married to Cynthia Hildenbrand. Cynthia has two daughters from a prior marriage. Linda is now married to Greg McGraw and they have a son. Both families lived in the Des Moines area until July, 1985, when Linda moved with her husband and children to Westminster, Colorado, where they now reside.

After the entry of the dissolution decree Steven and Linda had numerous problems with visitation and support issues. There was court involvement and both parties were held in contempt of court on at least one occasion.

In October, 1984, Steven filed an application for modification claiming custody of Michael should be changed to him. After an extensive hearing the trial court entered an order modifying the decree and awarding custody of Michael to Steven.

We have examined the record de novo, Iowa R. App. P. 4, and agree with the following findings made by the trial court:

> [T]here have been occasions when Charles went to Linda's home to pick up the children and they would either not be home or the door would not be answered. Later he learned that the children were there but Linda

would not let them answer the door. During the last several years neither he nor his parents (who live four blocks from him) were allowed any "extra" visitation.

Indeed, for the period of time from September 1980 through June 1981 Linda refused Charles any visitation. She takes responsibility for that and acknowledged that she was wrong. During that period of time, however, Charles' parents had the children on at least one occasion. The grandmother allowed the children to stay overnight with Charles, and when Linda learned of this, she berated her former mother-in-law and informed her she would never see the children again.

Apparently she denied Charles visitation because he had not paid his child support. She explained to Charles' sister, Jane, that she was withholding visitation because Charles had not paid child support and he needs to be taught a lesson.

When his visitation was finally reinstated, he was required to see the children on a limited basis and have counseling by Dr. Silberman. He complied.

Both children had enjoyed their visits with their father. Each summer when he was allowed visitation they went with him on a summer vacation to Minnesota and a tubing trip down the Apple River in Wisconsin. They also camped together.

In the spring of 1984 Charles sent a note home with Michael informing Linda of his summer visitation schedule. He had reserved the Minnesota camping facilities. Linda and Greg deny receiving this note. Linda (or her husband) wrote Charles and informed him that they had the children in a swimming program during that period and they could not change it. He later learned that there were other swimming classes the children could take during the summer. He finally prevailed and was allowed to exercise the one week of summer visitation. As for the second week, he was denied that and had to go to court and obtain an order to enforce his second summer vacation week visitation.

In November of 1984 his attorney sent Linda a letter requesting additional visitation during the Christmas holidays because he had the opportunity to go to Texas. She denies receiving that letter, although her attorney had a copy of the letter in his file. She first testified that she denied the visitation because he informed her too late. She claims Charles called her Christmas Eve and asked for the extra visitation. Later she said that extra visitation was denied because the child would have been returned home after school had started

Linda further denied receiving the note concerning the 1984 summer visitation. Moreover, she denied being informed by her expert, Dr. Silberman, that she and her present husband and Charles and his present wife

should have counseling. Furthermore, on the day of the first session Charles and his wife showed up, but Linda and her husband did not. They were telephoned by Dr. Silberman or his secretary, and Dr. Silberman was informed that they would not be there. Linda also denied receiving that information and that phone call. Further, the Court observed a conflict in her testimony at trial and the testimony she had given previously in her deposition.

Charles had a scheduled visitation weekend for Mother's Day. He was contacted by Linda and at her request allowed the children to be with her. There was an understanding between the parties that he would have the children on Father's Day (this was not his scheduled weekend). However, when Father's Day came, he was denied visitation and Linda says there was no such agreement. He has never been able to telephone and talk with the children save one or two times. They have never been allowed by Linda to telephone him or his parents.

On Memorial Day 1985 he had the right to visit with the child. Memorial Day holiday for 1985 was Monday, May 27. He requested that he have the children for the long weekend because he had an opportunity to go out of town, and was denied. Michael participated in baseball one summer and was not allowed to tell his father. Thus, Charles did not have the opportunity to see his son play baseball that summer. Michael also participated in football program. Michael told him what his football schedule was, but he also said he was not supposed to tell him, but he wanted Charles to be there. Charles phoned Linda on one occasion to get a date and time, and she hung up on him. He called again and talked with her husband, Greg, who said there was no game scheduled for that weekend. When Charles informed Greg that Mike had already told him there was a game, he was given the wrong information. He was told the game was to be at an earlier time and a different school from where scheduled. After Charles made this application for change of custody, he continued to encounter visitation problems. On one occasion he went to the home on his scheduled weekend and attempted to pick up the child at 4:00 as called for in the decree. He was told, "Come back at five," not because there were other plans or the child wasn't available or not ready, but because Linda and her present husband thought the decree called for him picking the child up at 5:00. The spring of 1985 Linda's present husband, Greg, received a promotion which required him to move to Colorado. They told Michael not to tell his father of the move. Charles did not know that the children and Linda were planning to move to Colorado until after the fact. After they were

there, her attorney notified his attorney. He telephoned them at Colorado and was not allowed to talk to Michael. Further, after they were in Colorado he requested more than a three-week visitation the summer of 1985, and was denied. Michael has never been allowed to telephone him from Colorado. When this court proceedings were scheduled, he telephoned Linda and asked when she would be back in town so he could visit with the children. She told him it was "none of your business." He attempted to set up some visitation when they returned for the trial and was denied. They were in town for one week, and neither Linda nor her husband, Greg, would allow or made arrangements for the children to see their father or their paternal grandparents. The excuse Linda said while on the witness stand at the trial was that they took vacation time to come to this trial, and notwithstanding the fact it may have been his weekend, or something to that effect, "We had things planned with my folks and with Greg's folks, and there isn't time for you (Charles and the paternal grandparents) to see the children. Finally, after a motion by Charles' attorney, she allowed visitation. In addition to the interference with the children's visitation with their father, Linda has done other things to alienate them from Charles.

Coupled with the visitation problem, Linda's course of conduct has destroyed Charles' relationship with Stephanie and threatens Michael. She has involved the children in this dispute by discussing with them the status of the child support payments, by referring to Charles in a derogatory term in front of Michael, by enrolling the children in school under the name of McGraw, and by discussing with the children the desirability of they being adopted by Greg.

About June of 1984 the child Stephanie told her father she did not want further visitation. She said she wanted to be adopted by Greg. Up until that time she had visited with Charles in his home with the limited visitation that was allowed. Further, she had visited with his parents, and gone with he and his parents and cousins on summer vacations on several occasions to a like in Minnesota. Apparently she was happy and content with this situation. Further, on one occasion she asked her father if she could live with him because she wasn't getting along at home with her mother. He told her to tell her mother her concerns and try to work out the problems. Stephanie testified in the case. The Court asked her several questions, and it is inexplicable to this Court why she answered the several questions the way she did. After direct and cross-examination was completed, the Court asked whether or not she would like to have her father as a neighbor. She said, in effect, "Well I guess if he was my neighbor I could live with

> it." The Court then asked, "Would you like to have him as a friend?" To which she replied emphatically, "No." Other than not seeing her father for visitation for over a year, there is no competent evidence or testimony to explain this answer other than Linda's effort to destroy the parent-child relationship Charles had with his children.

Linda appeals contending no cogent reason existed for changing custody. The central issue on appeal is whether a noncustodial parent has met the burden of proof necessary to modify the custody provisions of a dissolution decree when he shows (1) he can give the child a good home; and (2) the custodial parent has engaged in a continual course of conduct designed to thwart visitation and alienate a noncustodial parent from a child. Linda, while tending to minimize the visitation and alienation problems, does not deny they exist. Rather she argues the trial court made its decision without giving proper consideration[1] to the good home she has given Michael and the relationship he has with his sister and half-brother. She contends evidence of alienation and visitation problems must be much more serious than that involved here in order to justify a change in custody. Further, she argues that even definite evidence of the custodial spouse's interference with visitation and attempts to alienate the children will not suffice where the children are happy and well adjusted in a custodial home.

To justify a modification Steven must show by the preponderance of the evidence there has been a substantial change in circumstances since the date of the dissolution decree materially affecting Michael's welfare. In re Marriage of Jerome, 378 N.W.2d 302, 304 (Iowa App. 1985). Furthermore, Steven must

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1 In her brief Linda addresses the issue in the following manner:

> The court made detailed findings regarding the visitation problem, but its opinion was only half-baked because it failed to go on and consider other aspects involved in the best interest of the children. (emphasis supplied).
>
> We consider this language inappropriate in addressing the trial court's decision.

show the changed circumstances were permanent and continuous in nature and not contemplated by the court when the decree was granted. Id. See In re Marriage of Gravatt, 371 N.W.2d 836, 838 (Iowa App. 1985); In re Marriage of Day, 314 N.W.2d 416, 417 (Iowa 1982); In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

Does the record Steven has made on withholding visitation and alienation of the children support this burden? Or do we, as Linda suggests, find these facts are not sufficient to support modification since Linda is providing the children a good home?

The past decade has brought changing concepts of family responsibilities and parental roles. This change is due in large part to the movement of women into the paid labor force[2] as well as the abandonment of the inference that the interest of young children is best served if their custody is awarded to their mothers instead of their fathers.[3] Today more fathers are involved in raising and nurturing their children. Also, parents are seeking to share the responsibilities of child raising. Thus, when a marriage is dissolved both parents want to continue to be involved in the child's life.

Our legislature and courts have responded to these changes. Iowa Code §598.1(6) (1985), added in the 1984 General Session, provides:

> 6. "Best interest of the child" includes, but is not limited to, the opportunity for maximum continuous physical and emotional contact possible with both parents, unless direct physical or significant emotional harm to the child may result from this contact. Refusal by one parent to provide this opportunity without just cause shall be considered harmful to the best interest of the child. (emphasis added).

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2 Women accounted for 43.8% of all workers in the paid labor force in 1984. U.S. Statistical Abstract for 1985.

3 In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974).

Section 598.1(6) codifies decisions emphasizing the importance of the child's physical and emotional contacts with both parents. See In re Marriage of Leyda, 355 N.W.2d 862, 866 (Iowa 1984); In re Marriage of Bolin, 336 N.W.2d 441, 445 (Iowa 1983) (court found father's conduct in alienating son from his mother reflected adversely on his custodial ability).

The need for children to maintain meaningful contact with the noncustodial parent was again demonstrated in In re Marriage of Vrban, 359 N.W.2d 420 (Iowa 1984), where the court determined a finding that the mother had attempted to isolate and alienate the children from their father was an important factor which should be given great weight if evidence establishes it will adversely affect minor children. Id., at 425. In In re Marriage of Gonzales, 373 N.W.2d 152, 154 (Iowa App. 1985), the court also determined a parent's conduct in depriving the other parent of contact with the child may warrant awarding sole custody to the other parent.

If parents are sincerely interested in the welfare of their children they will put their hostilities aside and strive to provide a loving environment. See In re Marriage of Phipps, 379 N.W.2d 26, 28 (Iowa App. 1985); In re Marriage of Melton, 256 N.W.2d 200, 207 (Iowa 1977). Linda's actions in refusing, without just cause, to allow the children to have contact with their father at times specified by the court as well as other reasonable times has been harmful to the best interests of both Michael and Stephanie. However, this is not the only element we consider in determining the best interest of Michael. We accept Linda's argument that alienation and visitation problems must not be considered in isolation, but must be viewed in the total spectrum of what is in Michael's best interest.

While Linda obviously should be reprimanded for withholding visitation and preventing maximum contacts between the children and their father, a change of custody should not be made merely to punish Linda. An award of custody is not made to reward or to punish a parent.

We must also consider parenting skills in determining what placement is in the child's best interest. In the instant case, a court ordered custody evaluation of the Hildenbrands stated:

> Both of these parents are loving and caring toward Michael and these observations and recommendations are not meant to reflect opinion about their abilities and endeavors in other areas of life. Nevertheless, it is clear from the data presented above that, at the present time, Mr. Hildenbrand has superior parenting skills, and from the standpoint of good parenting Michael's best interests would be served by a placement with his father.

In attempting to foster a child's best interest, we also need give very serious consideration to the fact the courts generally attempt to keep children of broken homes together. This rule is not immutable, however, and may be departed from if there exists good and compelling reasons. In re Marriage of Ellerbroek, 377 N.W.2d 257, 260 (Iowa App. 1985); In re Marriage of Grandinetti, 342 N.W.2d 876, 878-79 (Iowa App. 1983).

Linda points out Steven has not been current with his child support obligations. The requirement to pay child support is a basic obligation of a parent. In re Marriage of Day, 314 N.W.2d 416, 421 (Iowa 1982). We have determined the fact a father was substantially behind in his child support obligations weighed heavily against him in a modification of child custody matter. In re Marriage of Gravatt, 371 N.W.2d at 840.

Steven admits he was not always current with support payments, but he claims to have paid substantial support. Both parties direct us to a voluminous trial court file which they claim supports their position. While both parties

directed us to the file, neither directed us to the pertinent parts of the file as required by Iowa R. App. P. 14(a)(5). In addition, neither party made any attempt to summarize the support issue or give us guidance as to what the court file shows.

Steven was to pay $60 per week support. Additionally, Steven was to pay certain medical bills and child care fees. However, Steven was not to pay support during summer visitation. On November 2, 1979, support payments were increased by $20 per month. Depending upon the weeks of summer vacation, Steven was to pay support of approximately $3,000 per year. From 1976 through 1984 (excluding 1981), Steven paid an average of about $3,000 per year in support. In 1981, Steven only paid $210. This apparently was the year visitation was withheld for an extended period.

Steven also was to carry medical insurance on the children and pay the medical bills not covered by insurance. He also was to keep life insurance in force on his life. The record reflects the medical bills were not always promptly paid and the life insurance amount was decreased when Steven changed employment. We are unable to determine the amount Steven expended for medical insurance, medical bills and life insurance but would consider it to be substantial.

While recognizing Steven has made substantial contributions to his children's support, we are very critical of him for not being current with all support payments and consider this fact in our review. Withholding of visitation is not grounds for withholding support.

We have carefully looked at the following:

1. The relationship of Michael with his sister and half-brother both in determining the best interests of Stephanie and Michael.
2. The fact Michael has spent most of his life in Linda's custody.

3. The fact Michael has had his physical needs very adequately provided for in Linda's home.
4. The constant efforts by Linda to limit and restrict visitation and contact by the children with Steven.
5. The fact there appears to be little chance of improving the visitation situation. Linda has been found in contempt for visitation violations. In addition, Linda moved the children to Colorado without Steven's knowledge. The move effectively deprived Steven of substantial visitation. When Michael returned to Iowa with Linda for a week for this hearing and when Linda was facing loss of custody for withholding visitation she still refused to let Steven see Michael, claiming it was not convenient.
6. The fact Linda's testimony lacked credibility.
7. Linda's action in alienating Stephanie from Steven was Stephanie's strong influence over Michael.
8. Linda's failure to maintain the children's identity with the name Hildenbrand. She registered them in school under the name of McGraw.
9. Linda's restriction of the children's telephoning privileges. Evidence indicates Michael had not been shown how to use the telephone because he was not to call his father.
10. Linda moving the family to Colorado without notifying Steven. We determine the move was necessary because of her husband's employment and not made to jeopardize visitation privileges. However, a custodial parent who knows a move of some distance will be made and the move will make current visitation impossible has not considered the best interests of their children when they fail to make the intended move known immediately to the noncustodial parent and attempt to renegotiate visitation periods to allow visitation to continue.
11. The testimony of family and professionals which support a finding Michael has maintained a close relationship with his father.
12. The fact Steven is equipped to meet Michael's emotional as well as physical needs.

Linda complains the reasonable and liberal visitation established by the trial court will not work. The record does not reflect Steven contributed to

visitation problems. Furthermore, Steven has always been fair in returning the children after visitation.

We affirm the trial court's modification of the dissolution decree awarding custody of Michael to Steven. We will, however, modify the trial court's order on visitation in the following manner to ensure access by each parent to both children and to assure the two children have time together. Steven shall have visitation with Stephanie from June 15 to July 15, and Linda shall have visitation with Michael from July 15 to August 15, in odd years. In even years the situation shall be reversed. Steven shall have Stephanie for ten days during Christmas vacation in even years and Linda shall have Michael for ten days during Christmas vacation in odd years. Each parent shall be responsible for the transportation expenses of the child in their custody. In addition to the specified visitation, both parties shall have such other visitation as is reasonable.

Linda has requested attorney fees on appeal. Her request is denied. The costs on appeal are taxed to Linda.

AFFIRMED AS MODIFIED.