IN THE COURT OF APPEALS OF IOWA

No. 9-111 / 98-630

IN RE THE MARRIAGE OF KAREN HARRIS AND COURTNEY HARRIS

Upon the Petition of
KAREN HARRIS,

APR 30 1999

Petitioner-Appellant,

And Concerning
COURTNEY HARRIS,

Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, August F. Honsell, Judge.

The petitioner appeals a district court ruling denying her request for modification of physical care of the parties' minor children. **AFFIRMED.**

Marc A. Humphrey of the Humphrey Law Firm, P.C., Des Moines, for appellant.

T. Todd Becker of the Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellee.

Considered by Huitink, P.J., Mahan, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Karen Harris (now Karen Humphrey) appeals the decision of the district court which denied her application for modification of the custody provision of the parties' dissolution decree. We affirm.

Karen and Courtney Harris were previously married. They have two children, Cameron, born in May 1987; and Taylor (Tess), born in August 1988. During the marriage the parties lived in Iowa City. Karen is an attorney and Courtney a physician.

The parties' stipulation was incorporated by the district court into their dissolution decree which was entered on September 24, 1992. The dissolution decree provided the children were to be placed in the primary physical care of Courtney. Specific visitation rights were set forth for Karen.

While Karen, prior to her present marriage (that took place in July 1997), was involved in several relationships of varying duration, Courtney entered into a relationship shortly after the divorce with Rebecca Kennedy. In April 1995, Rebecca and her two children moved in with Courtney and his two children. By early 1996, their relationship deteriorated to the extent that conflicts, for which the two of them must share responsibility, followed in court action in Minnesota and Iowa. Rebecca claims Courtney drank to excess and was physically abusive to her. On the other hand, Courtney claims Rebecca drank to excess and was physically abusive to him.

The end of the Courtney-Rebecca relationship came shortly after an incident that occurred in August 1996. Courtney and Rebecca had driven the children to a French language camp in Minnesota. After dropping the children off, they drove to Minneapolis where they intended to stay the night. Each had been drinking, although neither was intoxicated. An argument developed and Courtney persuaded Rebecca to stop at a motel. He went in to register the two of them. When he returned, Rebecca stated she was going to drive away and stay in the park. Courtney pulled her from the van[1] and she fell to the ground. Rebecca reported the incident to motel security, who called the police. Courtney was arrested for misdemeanor domestic assault. Rebecca tried to prevent Courtney's arrest and was herself arrested for obstructing the legal process. The motel security director later testified Rebecca appeared to be more aggressive than Courtney. Courtney subsequently pled guilty to creating a public disturbance.[2]

Rebecca moved out in October 1996 and went to a domestic abuse shelter. Based on Rebecca's application, the district court entered a protective order pursuant to Iowa Code chapter 236, finding Courtney had physically abused Rebecca and prohibiting him from contacting her. Courtney and Rebecca each filed suit against the other claiming damages due to physical abuse, infliction of emotional distress, and conversion.

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[1] Courtney testified he was afraid she would drive away and harm herself and others.

[2] Raul Lopez, the security director at the motel, testified Courtney appeared to be docile, while Rebecca was verbally aggressive to him and police officers.

Rebecca reported Courtney to the Iowa Board of Medical Examiners for alcohol problems. Courtney admitted he sometimes drank while on call. The Board referred him to Rogers Memorial Hospital in Wisconsin for evaluation. Dr. David Benzer determined he could not rule out alcohol abuse. He diagnosed Courtney with an adjustment disorder with anxious features. Courtney was to return to Rogers in July 1997 for treatment, but instead sought a second opinion. A colleague in Iowa City, Dr. J. C. N. Brown, found no evidence of alcohol or psychiatric problems. On the Board's recommendation, Courtney had another evaluation at Abbott Northwestern Hospital in Minnesota. Dr. Kent Neff found no evidence of alcohol abuse. He felt Courtney's adjustment disorder had been caused by stress and was now resolved.

In October 1996, Karen filed an application for modification of the custody provision of the parties' dissolution decree claiming there was a substantial change in circumstances due to Courtney's recent problems. In July 1997, Karen married Marc Humphrey, an attorney in Des Moines. She left the practice of law and moved to Des Moines to become a homemaker.

Karen hired Mary Hilliard, a social worker, to interview the children and evaluate her home. Courtney refused to participate in the evaluation. Cameron did not indicate a preference for either parent. Tess stated she wanted to live with her mother. Hilliard found no problems with Karen's new home. Karen also presented the testimony of Dr. John Garfield, who examined the Minnesota Multiphasic

Personality Inventory-2 (MMPI-2) scores of each parent. Dr. Garfield found Karen's tests did not show any psychological problems, while Courtney's tests showed a pattern of avoidance and denial.

The chief administrator at the children's school testified the children are doing well in school. The school counselor testified the children did not appear to have any problems. Three previous child care providers testified Courtney was involved with the children. Cameron's soccer coach testified Courtney was more supportive than Karen regarding Cameron's interest in soccer. Also, a neighbor who worked for the Department of Human Services testified Courtney appeared to have a good, healthy relationship with the children.

The district court found Courtney was actively involved with the children and they were doing very well in his care. The court determined the evidence did not show Courtney was a violent person or that he had an alcohol problem or a personality disorder which prevented him from parenting the children. The court concluded Karen had not met her burden to show modification was in the best interests of the children. Karen appealed.

I. Modification proceedings are reviewed de novo. Iowa R. App. P. 4. In child custody cases, the governing consideration is the best interest of the children. Iowa R. App. P. 14(f)(15). To change the custody set by a dissolution decree, the party seeking the modification must establish by a preponderance of the evidence conditions have so materially and substantially changed since the decree the children's

best interests make the requested change expedient. *In re Marriage of Moore,* 526 N.W.2d 335, 337 (Iowa App. 1994). The parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. *In re Marriage of Whalen,* 569 N.W.2d 626, 628 (Iowa App. 1997). This heavy burden comes from the principle that once custody has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Downing,* 432 N.W.2d 692, 693 (Iowa App. 1988).

II. Karen contends Courtney has a history of domestic abuse. She claims he was abusive to her during the marriage, and then abusive to Rebecca during their relationship. She believes the district court did not give sufficient consideration to Iowa Code sections 598.41(2)(c) and (3)(j).[3] Karen points out domestic abuse is, in every respect, dramatically opposed to a child's best interests. *See In re Marriage of Daniels,* 568 N.W.2d 51, 55 (Iowa App. 1997).

The violent tendencies of a parent adversely impact on the fitness of that parent to be the primary caretaker of a child. *In re Marriage of Brainard,* 523 N.W.2d 611, 615 (Iowa App. 1994). Domestic abuse is a factor in determining the custodial parent. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa App. 1995). Section 598.41(2)(c) provides:

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[3] Karen also cites to section 598.41(1)(b), which provides in pertinent part:

> [I]f the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists.

Iowa Code § 598.41(1)(b).

> A finding by the court that a history of domestic abuse exists, as specified in subsection 3, paragraph "*j*", which is not rebutted, shall outweigh consideration of any factor specified in subsection 3 in the determination of the awarding of custody under this subsection.

Section 598.41(3) sets forth several factors for the court to considering in making an award of primary physical care, including:

> *j.* Whether a history of domestic abuse, as defined in section 236.2, exists. In determining whether a history of domestic abuse exists, the court's consideration shall include, but is not limited to, commencement of an action pursuant to section 236.3, the issuance of a protective order against the parent or the issuance of a court order or consent agreement pursuant to section 236.5, the issuance of an emergency order pursuant to section 236.6, the holding of a parent in contempt pursuant to section 236.8, the response of a peace officer to the scene of alleged domestic abuse or the arrest of a parent following response to a report of alleged domestic abuse, or a conviction for domestic abuse assault pursuant to section 708.2A.

In interpreting what is sufficient to constitute a "history of domestic abuse," the supreme court has held a "history" is not necessarily established by a single documented incident. *In re Marriage of Forbes,* 570 N.W.2d 757, 760 (Iowa 1997). Nor does more than one minor incident automatically establish a "history of domestic abuse." *Id.* It is for the court to weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed, not just to be a counter of numbers. *Id.* Furthermore, evidence of domestic abuse merely creates a rebuttable presumption against an award of custody. *See In re Marriage of Ford,* 563 N.W.2d 629, 632 (Iowa 1997).

Here, the district court considered the evidence of domestic abuse and concluded the credible evidence did not support a conclusion Courtney was a violent

person.[4] In making this conclusion, the court must have found many of the allegations raised by Karen and Rebecca were not credible. In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7). Giving deference to the district court's findings on credibility, we find there is not sufficient evidence to show Courtney has a history of domestic abuse.

III. Karen claims Courtney has not supported her relationship with the children. She has often asked Courtney for visitation time in addition to that specified in the dissolution decree. Courtney usually denied these requests. At the modification hearing, Courtney testified he believed additional contact with Karen would be potentially deleterious and disruptive to the children.

The applicable portion of section 598.41(1)(c) provides:

> The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.

If visitation rights of the noncustodial parent are jeopardized by the conduct of the custodial parent, such acts could provide an adequate ground for a change of custody. *In re Marriage of Quirk-Edwards,* 509 N.W.2d 476, 480 (Iowa 1993); *In re*

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[4] Karen took Cameron and Tess to be interviewed by Mary Hilliard. Ms. Hilliard testified that based on her interviews with the two children, neither of them had ever seen Courtney get physical with anyone. There is testimony the children did witness an occasion when Rebecca threw food at Courtney and Courtney responded by taking the children from the home. In this voluminous record, consisting of two large volumes of the appendix and five volumes of the transcript, there is at least one other incident when the children may have witnessed one or both parties losing their temper.

Marriage of Gratias, 406 N.W.2d 815, 817-818 (Iowa App. 1987). Generally, claims of denied visitation rights have been included with other charges of misconduct by the custodial parent. *Quirk-Edwards*, 509 N.W.2d at 480.

There are some situations where one parent will seek to put the other parent in an unfavorable light. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa App. 1994). Some cases are slight and should be expected in our less than perfect society. *Id.* Some cases are serious and should not be tolerated. *Id.* A custodial parent's flagrant and continuing interference with a child's opportunity to associate with the noncustodial parent may be cause for modification of physical care. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 475 (Iowa 1989).

In the present case, Courtney has not denied Karen visitation as specified in the dissolution decree. He has denied her requests for additional visitation. We determine this does not rise to the level of interference with the noncustodial parent's rights found in other cases where physical case has been modified. *See Udelhofen*, 444 N.W.2d at 474-475; *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984); *Rosenfeld*, 524 N.W.2d at 215; *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659 (Iowa App. 1991).

IV. The weight of the evidence in this case does not show Courtney has an alcohol problem. The Wisconsin evaluation did not find Courtney had a problem, but felt further inquiry was needed before alcohol abuse could be ruled out. The Minnesota evaluation found no evidence of alcohol abuse. Additionally, several of

Courtney's professional associates testified they had never seen Courtney intoxicated or been concerned about his use of alcohol.

The evidence shows Courtney had a stress-related adjustment disorder at the time of the Wisconsin evaluation, but the disorder had resolved itself by the time of the Minnesota evaluation. There was no evidence to show Courtney was unable to care for the children due to the adjustment disorder. The evidence does not show Courtney's psychological problems prevented him from caring for the children.

The weight of the evidence shows the children have been doing well in Courtney's care. Testimony from school officials, child care providers, a soccer coach, and a neighbor all showed Courtney had a good relationship with the children. This important factor shows the children have not been affected by Courtney's recent problems.

V. We conclude Karen has failed to show she can offer the children superior care. We find she has not met her heavy burden to show by a preponderance of the evidence conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award her primary physical care of the children.

We affirm the decision of the district court denying the application for modification. Costs of this appeal are assessed to Karen.

AFFIRMED.

No. 98-630. [9-111] IN RE MARRIAGE OF HARRIS

Appeal from the Iowa District Court for Johnson County, August F. Honsell, Judge. **AFFIRMED.** Considered by Huitink, P.J., Mahan, J., and Habhab, S.J.. Opinion by Habhab, S.J. (10 pages $4.00)

Karen and Courtney Harris had previously been married and had two children, Cameron and Taylor (Tess). The September 1992 dissolution decree provided the children would be placed in the primary physical care of Courtney, with visitation rights for Karen. Courtney began a relationship with Rebecca Kennedy; by 1996 the relationship was deteriorating to the extent both were claiming physical abuse and excessive drinking on the part of the other. After an argument one evening, Courtney and Rebecca were involved in an incident that led to Courtney's arrest for misdemeanor domestic assault, later he pled guilty to creating a public disturbance. After the relationship ended between the two, Rebecca reported Courtney to the Iowa Board of Medical Examiners for alcohol problems. After several evaluations, Courtney was found not to have an alcohol problem, but rather a stress related disorder, which had resolved itself. In October 1996, Karen filed an application for modification of custody claiming there had been a substantial change in circumstances due to Courtney's recent problems. The reports from the Department of Human Services showed the children were doing well in school and that Courtney had a good, healthy relationship with the children. Karens's application was denied. Karen Harris (now Karen Humphrey) appeals the decision of the district court which denied her application for modification of the custody provision of the parties' dissolution decree. We affirm. **OPINION HOLDS:** Karen claimed Courtney had a history of domestic abuse, both in their relationship and his relationship with Rebecca. Domestic abuse is a factor in determining the custodial parent and if proven it could be dramatically opposed to the children's best interest. However, one incident alone is not sufficient to establish a history of domestic abuse. The district court concluded the evidence did not support a conclusion Courtney was a violent person. We gave deference to the district court's findings on credibility of the testimony and agreed there was not sufficient evidence to show a history of domestic abuse. Karen also contended Courtney had not supported her relationship with her children by denying her requests for additional visits. We found Courtney's actions did not rise to the level of interference with the noncustodial parent's rights found in other cases where custody had been modified. Karen's final contention was that Courtney had a drinking problem. The evaluations showed there was no evidence of alcohol abuse and several associates testified they were not concerned with his use of alcohol. The evidence also showed Courtney had made adjustments and the stress related disorder that had appeared during the first evaluations had been resolved. Karen failed to show she could offer the children superior care. She failed to meet the heavy burden of showing by a preponderance of the evidence conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award her primary physical care of the children.