

IN THE COURT OF APPEALS OF IOWA

No. 8-178 / 97-1686

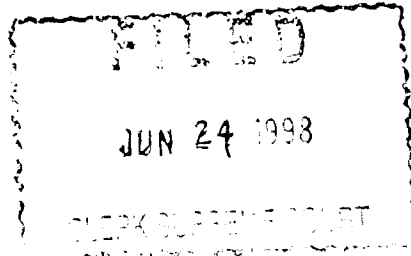
NICOLE DAWN WIGNALL,

Appellant / Cross-Appellee,

vs.

JASON LEE POCHINSKI,

Appellee / Cross-Appellant.



Appeal from the Iowa District Court for Hamilton County, Kurt L. Wilke,
Judge.

The mother appeals and the father cross-appeals the district court decision
modifying the parties' paternity decree to award the father custody of the parties'
minor child. **AFFIRMED ON APPEAL. MODIFIED ON CROSS-APPEAL.**

Leonard R. Holland, Dayton, for appellant.

Dorothy L. Dakin of Dakin Law Office, Boone, for appellee.

Considered by Cady, C.J., and Huitink, and Vogel, JJ.

CADY, C.J.

This is an appeal by a mother claiming the district court should not have modified the parties' paternity decree to award the father primary physical care of the parties' minor child. The father cross-appeals, claiming the mother was awarded excessive summer visitation and she should be required to pay a greater amount of child support. We affirm as modified in this memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Nicole Wignall and Jason Pochinski are the parents of Skylor. Skylor was born out of wedlock on October 16, 1993. In June 1994, Nicole filed a petition for paternity and support. On March 29, 1995, the parties filed a stipulation. The stipulation gave Nicole primary physical care of Skylor and provided Jason would not be responsible for child support. The parties were living together at the time. The stipulation was approved by the district court.

The parties separated shortly after the stipulation was filed. Skylor remained in the primary care of Nicole. Nicole, however, became involved in an irresponsible lifestyle, which included the use of alcohol and illegal drugs.

Jason filed a petition to modify the custody provision of the paternity decree in December 1996. The parties agreed to a custody evaluation by Dr. Carroll Roland, a psychologist. Dr. Roland concluded Skylor should be placed with Jason. Dr. Roland felt Nicole was not able to discipline Skylor.

Jason married shortly before the modification hearing. His wife, Jo Ann, had developed a good relationship with Skylor. Jason was employed as a shift supervisor at Tasler, Inc., and earned a net monthly income of \$1079. Nicole was employed at Seedorff Masonry, where she earned \$7.50 per hour. At the time of the hearing, however, she was planning to return to school.

The district court modified the prior order and placed Skylor in the primary physical care of Jason. It determined Nicole should have visitation on alternating weekends and holidays, and six weeks during the summer. The court ordered Nicole to pay child support of \$100 per month until she became gainfully employed. Both parties appealed.

I. Our scope of review is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

II. Nicole contends the district court should have placed primary physical care of Skylor with her. She states she has seen the error of her ways and is now involved in parenting classes and individual therapy. She points out she has been Skylor's primary caretaker throughout his life.

The criteria for determining custody are the same whether the parents are dissolving their marriage or are unwed. *Langner v. Mull*, 453 N.W.2d 644, 649 (Iowa App. 1990). A party seeking modification of custody has the burden to show a

substantial change in circumstances. *In re Marriage of Weidner*, 338 N.W.2d 351, 361 (Iowa 1983). A parent must also prove an ability to minister more effectively to the child's well-being. *In re Marriage of Howe*, 471 N.W.2d 902, 903 (Iowa App. 1991).

In our de novo review, we find Jason established a substantial change in circumstances. After the paternity decree, Nicole became involved with alcohol and illegal drugs. There was evidence she provided alcohol to minors and sold illegal drugs to a minor. At the time of the hearing, Nicole had not yet attended any treatment for substance abuse. Nicole was not able to effectively discipline Skylor and she gave in to his temper tantrums. We determine Jason can minister more effectively to Skylor's well-being. We affirm the district court decision to place Skylor in the primary physical care of Jason.

III. In his cross-appeal, Jason asks us to reduce the amount of Nicole's summer visitation with Skylor. Jason is concerned about Skylor's safety if he is in Nicole's care for an extended period of time.

The governing consideration in determining visitation rights for a noncustodial parent is the best interests of the child. *In re Marriage of Bunch*, 460 N.W.2d 890, 891 (Iowa App. 1990). We determine it would be in Skylor's best interests to limit summer visitation to four weeks. This visitation shall be exercised in two two-week intervals.

IV. Jason claims the district court should not have deviated from the child support guidelines in setting Nicole's child support obligation. There is a rebuttable presumption child support should be set according to the guidelines. *In re Marriage of Bergfeld*, 465 N.W.2d 865, 869 (Iowa 1991). A court cannot vary the amount of the child support without a written finding the guidelines would be unjust or inappropriate under the facts of the case. *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991).

The district court made no written finding in this case to justify deviation from the child support guidelines. Nevertheless, in our de novo review, we do not find application of the guidelines would be unjust or inappropriate. Nicole cannot circumvent the standard child support expectations of a parent based on a vague claim of her desire to pursue additional education. We determine Nicole's child support obligation should be based on her earning capacity. The evidence reveals she can reasonably expect to earn \$7.50 per hour. Under our calculations, Nicole should be able to earn a net monthly income of \$1028.71. She should pay child support of \$231. We modify the paternity decree to increase Nicole's child support obligation to \$231 per month.

We affirm the decision of the district court, except we modify the provisions concerning summer visitation and the amount of Nicole's child support obligation. Costs of this appeal are assessed one-half to each party.

AFFIRMED ON APPEAL. MODIFIED ON CROSS-APPEAL.