

IN THE COURT OF APPEALS OF IOWA

No. 3-194 / 92-1384

FILED

JUN 29 1993

CLERK SUPREME COURT

ALAN RAY CARR,
Petitioner-Appellee,

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v.

RUTH ANN PROCK, a/k/a FRAN A. MALFARA,
Respondent-Appellant,

RUTH M. GRAHAM and RICHARD E. GRAHAM,
Intervenors-Appellees.

Appeal from the Iowa District Court for Polk County,
Donna Paulson, Judge.

Respondent appeals a decision of the district court
refusing to modify a previous decision granting petitioner
physical care of their child. **AFFIRMED.**

Eric Borseth of Borseth & Holmes, Pleasant Hill, for
appellant.

Thomas P. Schlapkohl, Des Moines, for appellees Graham.

Brett I. Anderson, Des Moines, for appellee Carr.

Heard by Schlegel, P.J., and Sackett, J., and Keefe,
S.J.*

*Senior judge from the 1st Judicial District serving on
this court by order of the Iowa Supreme Court.

KEEFE, S.J. 000034

Rachel Carr was born on September 9, 1988, to Alan Ray Carr (Ray) and Ruth Ann Prock (Fran). Ray and Fran had a brief relationship which ended before Rachel's birth. Ray and Fran were never married. At the time of Rachel's birth, Fran was living with her mother and father, Delores and Frank Meinke, in Des Moines. Fran was employed full-time as a waitress. Fran's mother took care of Rachel when Fran was at work. Ray had little contact with Rachel during this period due to Ray's alcoholism and drug addiction.

After Rachel was born, Fran began a relationship with Mike Malfara. Fran and Mike moved to California in April 1989. Upon the urging of her parents, Fran agreed to leave Rachel with them until she had a job and a home in California. Several months after they moved, Fran discovered Mike was a heroin addict. She decided to help him overcome his addiction. The couple moved to Denver and Mike entered a treatment program. Later the couple moved to Portland, and Mike once again began using heroin. Both he and Fran used marijuana. Mike helped support his drug habit by shoplifting. Fran also tried shoplifting on at least one occasion. Fran and Mike were married in November 1989, and she then became known as Fran Malfara.

During this time Fran made three trips to Des Moines to see Rachel. However, she was only able to see Rachel on one occasion due to interference by Ray and his relatives,

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and her own parents. Ray had filed a paternity action in May 1989. In December 1989, Fran and Ray agreed they would have joint legal custody of Rachel, with Ray having primary physical care. The district court approved the stipulation on December 19, 1989.

At that time Ray was living with his sister, Ruth Graham, and her husband, Richard Graham. Most of the actual physical care of Rachel was done by Ruth. Ruth was employed part-time cleaning houses, and thus was usually able to take care of Rachel during the day. Richard is a truck driver, who is often gone from the home due to the nature of his job.

Fran moved back to Des Moines in March 1990. She again became employed full-time as a waitress. Fran and Mike separated, but then reconciled for a period of time. Once she moved back to Des Moines, Fran regularly exercised visitation with Rachel. Fran and Mike were divorced in March 1992.

Ray was in a diving accident on June 29, 1991, and he is now a quadriplegic. Ray admitted the accident was probably due to his use of alcohol and marijuana. However, since the accident he has become sober.

The prior decree was modified on July 1, 1991, to give Fran more specific visitation, and included six weeks of visitation during the summer. Fran then took care of Rachel for six weeks soon after Ray's accident.

On July 23, 1991, the Department of Human Services (DHS) received a report that Rachel had told Fran, "Rick was playing with my pee pee." DHS investigated and determined the reference was to Richard Graham. DHS concluded the report of sexual abuse was founded. Fran also took Rachel to the Des Moines Child & Adolescent Guidance Center, Inc., which made the determination that Rachel had been sexually abused. Rachel began individual therapy with Gladys Noll Alvarez of the Center.

On August 29, 1991, Fran filed an application to modify the custody provision of the previous decree. She stated there was a substantial change in circumstances since the earlier decree because Ray was now a quadriplegic. Ruth and Richard Graham filed a petition for intervention. They claimed they had continually cared for Rachel since Ray obtained custody. In his answer, Ray also requested that Ruth and Richard continue to care for Rachel.

On September 5, 1991, the district court refused to temporarily modify the custody provision of the decree. The court did order that Richard should have no contact with Rachel. Fran filed a motion for reconsideration. On September 16, 1991, the court denied her motion, but did order the juvenile department to conduct a custody investigation into the parenting abilities of Fran, Ray, and Ruth. The child custody investigator, Jim Duncan, concluded there should be no modification of Rachel's custody.

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Ruth and Richard were not happy with Rachel's therapy at the Center. In November 1991 they took her to Dr. Steven C. Dawdy, a pediatric and family psychologist. Dr. Dawdy came to the conclusion that Rachel had not been sexually abused.

The district court issued its decision on August 7, 1992. The court noted that Ray planned to move into the Grahams' home when it has been modified to accommodate his handicaps. The court found that Ruth had cared for Rachel for most of her life, and that a close bond had developed between them. The court also found that in the past, Fran had put her own needs before those of Rachel.

The court concluded Fran had failed to establish a material change in circumstances necessitating a change in custody. The court determined there was insufficient evidence to show Rachel had been sexually abused and vacated the no-contact order against Richard. The court then determined it would be in Rachel's best interests to continue living with Ruth, with Ruth providing for her day-to-day needs under the legal supervision and with the consent of Ray.

Additionally, the court modified Fran's visitation to give her every other weekend and two nonconsecutive two-week periods during the summer. Fran was ordered to pay child support of \$100 per month. The parties were ordered to pay their own attorney fees. Fran has appealed.

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I. Our scope of review in this equity case is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the district court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). However, we are not bound by these determinations. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II. Fran contends the district court should have transferred physical care of Rachel to her. She claims there has been a substantial change in circumstances because Ray is no longer able to physically care for Rachel. Fran also claims she is better able to care for Rachel than Ray. She points out she is no longer involved with Mike and his drug-related lifestyle.

The supreme court has stated:

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the child's well-being. In re Marriage of Scott, 457 N.W.2d 29, 31 (Iowa App. 1990). This burden stems from the

principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. Id.

In this case, there has been no actual change in the care of Rachel. During the entire time Ray has had physical care of Rachel, he has delegated much of that care to his sister, Ruth. However, even if we found there had been a substantial change in circumstances due to Ray's accident, Fran has not proven an ability to minister more effectively to the child's well-being. Fran's past deeds speak more eloquently than her current testimony that she has changed. Fran has consistently placed her own needs before those of Rachel.

We agree with the district court's decision that there should be no modification of Rachel's custody. We affirm the district court on this issue.

III. In the alternative, Fran contends the district court should not have modified the visitation schedule to reduce her time with Rachel.

We first note that none of the parties raised the issue of visitation prior to the trial. However, the district court ruled upon it. In order to modify visitation, there must be a substantial change in circumstances which relates to the welfare of the child. In re Marriage of Smith, 471 N.W.2d 70, 72 (Iowa App. 1991).

In our de novo review, we find there has been a substantial change in circumstances which warrants the modification of visitation. Rachel will soon be in school

and the present schedule, which gives Fran visitation on Monday, Tuesday, and Wednesday, will be unworkable. We therefore affirm the district court's decision giving Fran visitation every Tuesday evening, every other weekend, and alternating holidays. In addition, Fran has visitation on two nonconsecutive two-week periods each summer.

IV. Fran claims the district court abused its discretion in not awarding her trial attorney fees. She asked for attorney fees of \$5,000. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show that the trial court abused its discretion. Id. We find no abuse of discretion here.

V. Fran also asks for attorney fees for this appeal. She states her appellate attorney fees are \$3,000. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. Id.

Fran's net monthly income as a waitress is \$635. Ray receives a disability income. Together, Ruth and Richard have net monthly income of \$2,250. We determine appellees should be jointly and severally responsible to pay Fran \$1,000 towards her appellate attorney fees.

We affirm the decree of the district court. Costs of this appeal are assessed one-half to appellant and one-half to appellees.

AFFIRMED.