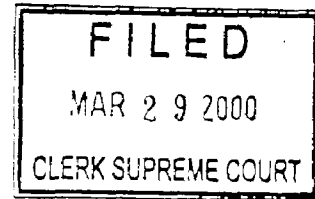


IN THE COURT OF APPEALS OF IOWA

No. 1999-456 (9-713) / 98-1916
Filed March 29, 2000



ROBERT M. HALE,

Petitioner-Appellant,

vs.

SARA J. HOOVER,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison
Judge.

Robert Hale appeals the court's order setting visitation and awarding
attorney's fees to Sara Hoover. **AFFIRMED.**

James H. Waters, Des Moines, for appellant.

Deanna L. Moore, Ankeny, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

HUTNIK, P.J.

I. Background Facts and Proceedings.

Robert Hale and Sara Hoover are Samuel Hoover's parents. In March 1996 Robert initiated proceedings to establish paternity and secure joint custody of Samuel. Robert conceded physical care to Sara and also asked the court to establish reasonable child support and visitation arrangements. Following a February 12, 1997, trial the district court entered the following order:

It is therefore ordered, adjudged, and decreed that the Petitioner shall have unsupervised visitation as follows:

One week night per week from 5:00 p.m. to 7:30 p.m.; Every other weekend, Saturday 9:00 a.m. to 5:00 p.m. and Sunday 9:00 a.m. to 5:00 p.m. beginning February 22, 1997. During said visitation periods, the Petitioner shall not allow any animals in the house and shall refrain from consuming any alcoholic beverages. There shall be no overnight visitation until such time as the Petitioner has enrolled in and has successfully completed a formal parenting class and has made any necessary household structural modifications as dictated by the parenting class instructor which will enhance the child's safety.

Although Robert successfully completed the required parenting class, Sara refused to allow overnight visitation. At an October 27, 1997, hearing the court ordered Robert to complete another parenting class concerning child safety. In the interim, the court increased Robert's visitation to one overnight visitation per month and set the matter for another hearing on January 8, 1998.

Following the January 8, 1998, hearing the court ordered both parties to attend a YWCA parenting class. The court also ordered that prior to and upon completion of the class Bob's visitation would include one weeknight per week from 5 p.m. to 7:30 p.m., every other weekend on Saturday from 9 a.m. to 5 p.m.,

and Sunday 9 a.m. to 5 p.m. and during one weekend visit per month, one overnight visit as provided by the October 27, 1997, order.

Robert's August 14, 1997, petition to modify the court's February 12, 1997, decree was reached for trial on July 29, 1998. His demands for expanded visitation were premised on compliance with the court's conditions predicate to visitation and Sara's refusal to allow visitation beyond that provided in the court's February 12, 1997, and subsequent orders.

In its resulting decree entered on August 18, 1998, as modified by the September 22, 1998 order, the court ordered the following visitation schedule:

1. Alternate weekends from Saturday morning at 9:00 a.m. to Sunday evening at 5:00 p.m.
2. Each Tuesday from 5:30 p.m. to 8:30 p.m.
3. Alternate holidays, which shall include Easter, Memorial Day, July 4, Labor Day, Thanksgiving, Christmas Eve, Christmas, New Year's Eve, and New Year's Day. Holiday visitation shall be from 9:00 a.m. to 9:00 p.m.

The district court also ordered Robert to pay \$500 of Sara's trial attorney's fees.

On appeal Robert contends the district court should have modified the February 12, 1997, decree by ordering more extended visitation with Samuel. He also disputes the equity of the district court's attorney fees award to Sara.

II. Standard of Review.

Our review of these equitable proceedings is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Visitation.

Iowa Code section 598.41(1)(a) provides:

The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.

To justify a change of visitation, the petitioning party must show there has been a change of circumstances since the relevant decree was entered. *In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa App. 1994). The burden in a modification of visitation rights is different from the burden in proceedings to modify child custody. *Id.* Generally a party has the burden to show a less-extensive change of circumstances to modify visitation. *Id.*

In its modification decree the district court stated:

The question of how much visitation Robert should have with the child is a hard one. Sara is, in the Court's view, overprotective and too picky with regard to Robert's care of the child. However, her attitude has been conditioned by Robert's past behaviors and lack of adequate care for the child. While Sara's attitude may not be wholly correct, it is understandable. On the other side of the coin, Robert's desire for an increased relationship with his son is laudable. However, Robert remains unable to perceive and deal with his shortcomings as a parent, and is too willing to gloss over Sara's concerns. In short, it is extremely difficult to specify a visitation schedule and monitoring system that will maximize Robert's relationship with the child while satisfying Sara's safety concerns.

The Court cannot accept petitioner's proposal for visitation as set forth in Exhibit 1. Robert's requested schedule of visitation would be considered liberal and expansive for any noncustodial parent. It is not justified given the history of the parties and of this case. Foremost in the Court's mind is petitioner's extensive history of alcohol abuse. Robert testified that he has been sober since November 1996; the Court has no reason to disbelieve that statement. However, Robert has ten or more OWI convictions. He has been in treatment four times. His background suggests that his

~~desires not to abuse alcohol and a period of sobriety are no~~
~~guaranteed that he will not relapse into his old behaviors. To protect~~
~~the child from that danger, it is necessary that Sam not have~~
~~extended time where is he without contact with his mother.~~

These findings of fact find abundant support in the record, and we adopt them as our own. We believe the resulting visitation schedule ordered by the court accomplishes the purposes of section 598.41(1)(a) while addressing reasonable concerns about Robert's history of alcohol abuse.

We affirm on this issue.

IV. Attorney Fees.

Robert argues the district court erred in awarding Sara trial attorney fees of \$500. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). An award of attorney fees is based on the parties' respective needs and ability to pay. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa App. 1997). The district court has considerable discretion in awarding trial attorney fees. *Id.* We will not interfere unless there is a manifest abuse of discretion. Under these circumstances we are unable to say the district court abused its discretion and see no reason to disturb the district court's award of trial attorney fees.

~~In determining~~ an award of appellate attorney fees, we are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Garst*, 573 N.W.2d at 608. We affirm the district court's trial

~~attorney fees and~~ award Sara \$500 in appellate attorney fees. Costs are taxed to Robert.

AFFIRMED.