IN THE COURT OF APPEALS OF IOWA

No. 6-253 / 95-1047

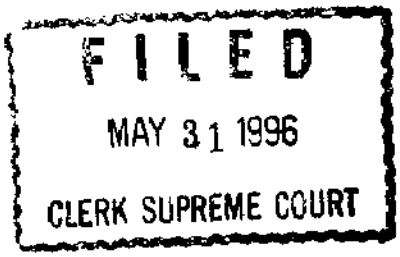
IN RE THE MARRIAGE OF DAWN ELAINE SWIPIES AND KENNETH HAROLD SWIPIES

Upon the Petition of
KENNETH HAROLD SWIPIES,

Petitioner-Appellee-Cross-Appellant,

And Concerning
DAWN ELAINE SWIPIES,

Respondent-Appellant-Cross-Appellee.



Appeal from the Iowa District Court for Plymouth County, Richard J. Vipond, Judge.

Dawn Swipies appeals from the district court order allowing Kenneth Swipies visitation with the parties' child without requiring him to first attend counseling. **AFFIRMED.**

Kendra M. Zirbel Olson, Sioux City, for appellant.

Kenneth Swipies, Oto, pro se, appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ. Huitink and Vogel, JJ., take no part.

SACKETT, P.J.

Respondent-appellant/cross-appellee Dawn Swipies appeals from a trial court order modifying the visitation provisions of her dissolution decree. Petitioner-appellee/cross-appellant Kenneth Swipies cross appeals contending the trial court should not have denied his petition to modify the dissolution decree to provide he have the child's physical care. We affirm.

Dawn contends the trial court should not have provided Kenneth visitation with the parties' child without requiring him to first attend counseling. She further contends the district court improperly revisited an issue already decided. Kenneth contends Dawn's interference with his visitation rights constitutes a substantial change of circumstances warranting modification.

The marriage of Kenneth and Dawn was dissolved in March 1990 and custody of the parties' daughter, Kendra, born October 22, 1987, was awarded to Dawn. Kenneth filed a petition to modify the custody and visitation provisions of his dissolution decree on September 21, 1990.

On April 15, 1991, the Department of Human Services issued what they termed a "founded child abuse report." The report stated Kenneth had sexually abused Kendra, then three years old.

On April 25, 1991, after Kenneth filed his petition for modification and before the petition for modification came on for hearing, Dawn filed a petition for domestic abuse alleging Kenneth had sexually abused Kendra. On May 17, 1991, less than one

month after Dawn filed the domestic abuse petition, a hearing was held and on May 22, 1991, the district court entered an order granting relief requested in the domestic abuse petition restraining Kenneth from having any contact with Kendra until it could be determined, through counseling of Kenneth and Kendra, Kenneth did not pose a threat to Kendra.

On March 20, 1992, acting on Kenneth's request for correction or expungement, the Department of Human Services modified its earlier child abuse report to the extent it found Kendra had been sexually abused or denied critical care by someone, but not by Kenneth or Dawn.

The hearing on Kenneth's petition for modification of the dissolution decree was not held until April 22, 1992, nearly one year later.

On April 30, 1992, acting on cross-petitions for modification of the dissolution decree, the district court concluded there was no substantial evidence Kenneth posed a threat of sexual abuse to Kendra. The decree was modified to allow Kenneth four hours of supervised visitation every other week with Kendra. These visits were to be supervised by a person affiliated with or designated by the Department of Human Services, or by Katie Boley or a person designated by her, or some other person the parties could agree to be the supervisor. The court further provided visitation could be "unsupervised when the parties so agree or, in the absence of such agreement, when ordered by a court."

On December 29, 1993, this court affirmed this modification of the decree, concluding there was ample evidence to support the requirement visitation between Kenneth and Kendra be supervised and the change of physical care be denied. The court found Kendra had reported sexual contact between herself and Kenneth. On appeal, we acknowledged the dispute between the experts as to whether she was being coached to make such accusations, but said significant findings of experienced experts indicated she had, in fact, been sexually abused by Kenneth. *In re Marriage of Swipies*, 526 N.W.2d 580 (Iowa App. 1993) (Sackett, J., dissenting, would have reversed for a full hearing on whether Kenneth sexually abused Kendra.)

Kenneth subsequently attempted to set up supervised visitation. Dawn was extremely uncooperative. In June 1994, the district court denied Kenneth's application to have Dawn held in contempt. The court found, though no visitation had occurred, Dawn had not provided visitation as called for in the April 30, 1992 modification. The court also found the order was restrictive. The district court said the domestic abuse order should not be given preclusive effect and invited a petition to modify the visitation provisions of the decree.

Kenneth filed a petition to modify the visitation and custody provisions of the parties' decree. A hearing was held and the court asked the parties to submit proposed visitation plans. On May 12, 1995, the district court then entered its ruling on the petition for modification. The court found Kenneth and Kendra had had no contact during the last four years and Kendra had made statements Kenneth sexually abused

her, but those accusations were not trustworthy and were possibly a result of unintentional coaching by Dawn. The court specifically found "Kenneth has not sexually abused the child" and "the child has not been sexually abused by anyone." The court concluded supervised visitation was not necessary to protect Kendra from Kenneth, but was appropriate due to the time since visitation had last occurred. The court ordered a four-month term of two-hour supervised visits each week, followed by a five-month term of four-hour unsupervised visits on alternating weekends, which was then to be followed by overnight, unsupervised visitation.

Dawn contends the trial court reversed this court in finding Kendra had not been sexually abused by Kenneth. We disagree. The issue we addressed in the first case was whether visitation should have been supervised. We found there was a dispute between experts whether Kendra was coached and there was evidence from experienced experts that Kendra had been abused. We made no specific finding that Kenneth had sexually abused his daughter.

Additionally, the order establishing visitation provided visitation could be unsupervised when the parties agreed or, in the absence of such agreement, when ordered by the court.

The trial court, in modifying the visitation order, said:

> A child's allegations of sexual abuse should always be seriously considered and should not be rejected except for good reason. Good reason, however, exists in this case. The court finds that Kenneth has not sexually abused the child.

Kenneth contends that the child has been sexually abused by a person other than him. The evidence, however, does not support that contention. The court finds that the child has not been sexually abused by anyone.

Coaching a child to make false allegations of sexual abuse is seriously detrimental to the child. The court believes that such coaching occurred in this case. It is therefore necessary to determine whether the coaching was intentional or unintentional and whether under all of the circumstances it justifies a change in custody.

There is some reason to suspect that the coaching was intentional. Dawn once made a threat to accuse Kenneth of child abuse. She hates Kenneth and is not adverse to harming him in any way possible.

Dawn loves the child, however, and she genuinely wishes to act in the child's best interest. It is unlikely that she would intentionally afflict the child with a false belief that the child has been sexually abused. Coaching is not always intentional. It can occur through inappropriate but well-intentioned questioning as well as through intentional indoctrination. The court finds that Dawn did not intentionally coach the child to make false allegations of sexual abuse.

This is a very difficult case because it involves strong emotions on both sides and it involves charges of serious misconduct on the part of both parties. The court has carefully observed the witnesses and considered all of the evidence. The evidence convinces the court that neither party has been guilty of serious intentional misconduct. Each of the parties has attempted to act in the child's best interest, but the child has become the victim of the intense animosity and mistrust which exists between the parties.

Dawn is opposed to visitation between the child and Kenneth. Her opposition to visitation creates a serious doubt as to whether the child can ever have an adequate relationship with both parents while she is in Dawn's custody and physical care. Dawn, however, has not violated any court order with respect to visitation. A change in the child's physical care would subject the child to a period of intense readjustment. Such a change should not be made without first establishing a workable visitation schedule and giving Dawn an opportunity to show that visitation can proceed successfully while the child remains in Dawn's physical care.

> The suspension of visitation, however, has continued much too long. A change in custody and physical care should be made soon if visitation is not successfully established under the present custodial arrangement
>
> The success of visitation is affected to some extent by the conduct of the noncustodial parent, and Kenneth should consider very seriously his obligation to provide the child with proper care and supervision. Dawn should be aware, however, that the primary burden of making visitation successful rests on the custodial parent. In most cases visitation is successful if the custodial parent wants it to be successful. The success of visitation in this case will depend on what Dawn says to the child and the way in which she says it. It will also depend on what Dawn says to others when her statements may be heard by or reported to the child. It is clear from the evidence that the child's views and reactions are very strongly influenced by Dawn. The success of visitation will depend primarily on whether the child thinks that Dawn wants visitation to be successful.
>
> Compliance with visitation rights is the obligation of the custodial parent. Decisions as to compliance with visitation rights cannot be delegated to the child.
>
> Kenneth does not constitute a danger to the child. Supervision of visitation is therefore not necessary in order to protect the child from Kenneth. It is desirable, however, because visitation has been suspended for such a long time and because the child has become convinced that she was abused by Kenneth.
>
> The requirement that visitation be supervised should continue for only a limited time. The child should then have unsupervised visitation with Kenneth. The periods of unsupervised visitation should gradually increase in length until a reasonably normal visitation schedule has been achieved.

Our 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). In reviewing a district court's award of custody, we are not bound by its findings but give them deference

because the district court had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa App 1993).

We find no reason to disagree with the findings of the trial court on this issue and affirm the modified visitation order.

Kenneth, on cross appeal, claims custody should have been modified and he should have been made the physical custodian of Kendra.

To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence conditions since the decree was entered have so materially and substantially changed 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 children's well being. *Id.; see also In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa App. 1994); *In re Marriage of Gravatt*, 371 N.W.2d 836, 838-40 (Iowa App. 1985).

While we are troubled by Dawn's lack of cooperation in visitation, we recognize, as did the trial court, her primary concern is with her daughter. Kenneth has failed to meet the heavy burden of proving he is the superior custodian.

AFFIRMED.