FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-249 / 89-1227

ROBERT VERN EMBREE,

Appellant,

vs.

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JUDY ANN NICHOLL,

Appellee.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Robert Embree appeals a district court order refusing to modify the custody decree to grant primary care of the parties' child to him. **AFFIRMED.**

Ray Sullins, Des Moines, for appellant.

Lylea Dodson Critelli of Nick Critelli Associates, P.C., Des Moines, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

PER CURIAM

Robert Embree and Judy Nicholl are the parents of a son, Stephen, born on March 26, 1980. Robert and Judy have never been married to each other. Judy has had the primary care of Stephen since his birth. In 1983 Robert petitioned the court for custody of Stephen. In 1984 a stipulated decree was entered awarding the parties joint legal custody of Stephen and primary care to Judy.

In 1985 Robert filed a petition to modify custody by granting him primary care of Stephen. The case was tried for five days in 1989. The district court found that there was no change in circumstances to warrant a change in the primary care. The court did grant Robert more liberal visitation. The court noted that both Robert and Judy cannot communicate with each other and ordered the parties to participate in custody mediation counseling. The court also found Judy in contempt for withholding visitation and threatening to withhold visitation. Robert appeals.

Robert contends that he established a change of circumstances by presenting evidence showing Judy's uncooperative behavior concerning all issues involving Robert and Stephen. Robert asserts that he is better able to provide primary care to Stephen.

Our review of this case is de novo. Iowa R. App. P. 4. To change a custodial provision, the applying party must establish by a preponderance of the evidence that

conditions since the stipulation was entered into have so materially and substantially changed that the child's best interest make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). A parent seeking to take custody from the other must prove an ability to administer more effectively to the child's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of the child is fixed, it should be disturbed only for the most cogent reasons. Id.

Upon reviewing the record, we conclude the trial court was correct in refusing to change custody to the father, Robert Embree. The primary problem appears to be an unwillingness on the part of the mother to allow the father visitation. However, neither party appears blameless. Both have contributed to the problem and exacerbated it. The son, Stephen, is caught in the middle.

Stephen appears to be doing well in school. He has, however, had some social problems. The record shows that he fights or attacks other children. The parents have been fighting over whether to seek professional help for Stephen. The trial court ordered the parties to seek professional counseling for the child and to split the cost.

The trial court did find Judy in contempt for her violation of the visitation provisions. However, her

sentence of thirty days was suspended for a year on the condition that she comply with visitation and other provisions of the court's order. This is a warning to Judy she must fulfill her obligations. Otherwise, she could risk losing custody. In re Marriage of Zabecki, 389 N.W.2d 396, 399 (Iowa 1986).

Additionally, the trial court ordered the parties to participate in mediation. Mediation, one form of alternative dispute resolution (ADR), appears to be ideally suited to this case. The tension and bitterness between the two parties will not disappear overnight. Nor will the problem go away, as Stephen is caught in the middle. They must work to achieve a decent, realistic solution to their troubles.

The trial court's findings and judgment are adequately supported by the record and existing law. The solution arrived at appears to be the best for all the parties involved.

We agree that Robert has not met his heavy burden to show a substantial change in circumstances that would justify a custody change, nor has he demonstrated an ability to minister more effectively to Stephen's well being. We leave this issue with admonition to both parties to modify their behavior in conformance with the trial court's decision and this opinion if further costly and traumatic litigation and other problems are to be avoided. We affirm the trial court.

Each party shall pay his or her own costs and attorney fees on appeal.

AFFIRMED.