

IN THE COURT OF APPEALS OF IOWA

No. 4-023 / 93-458

FILED

APR 26 1994

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DONNA SUE HAMILTON AND
ROGER PAUL HAMILTON

Upon the Petition of

DONNA SUE HAMILTON, n/k/a DONNA SUE PETTIBONE,

Appellee/Cross-Appellant,

And Concerning

ROGER PAUL HAMILTON,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Appanoose
County, James D. Jenkins, Judge.

Husband appeals and wife cross-appeals decision of
district court refusing to find either party in contempt of
court and refusing to modify the custody provision of their
dissolution decree. **AFFIRMED.**

Gregory G. Milani of Keith, Orsborn, Bauerle, Milani &
Neary, Ottumwa, for appellant.

Victoria L. Herring, West Des Moines, for appellee.

Heard by Oxberger, C.J., Sackett, J., and Critelli,
S.J.*, but decided by Donielson, C.J., Hayden, Sackett,
Habhab, Cady, and Huitink, JJ.

*Senior judge from the 5th Judicial District serving
on this court by order of the Iowa Supreme Court.

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PER CURIAM

Roger and Donna Hamilton's marriage was dissolved in the state of Texas in 1989. Primary custody of their three children--Tiffany, born January 23, 1980, Brettany, born June 4, 1986, and Kelsey, born June 13, 1987--was awarded to Donna. Roger was awarded specified visitation which included the first and third weekends of each month from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. Roger was also ordered to pay \$60 in child support per week for the three children.

In 1989 Donna and the children moved to Iowa. Roger moved to Rockford, Illinois, in 1991. In February 1992, a hearing was held in Iowa district court on Donna's petition for modification of visitation and child support. The district court determined Roger was a danger to his children and had not exercised visitation since November 1991. Visitation was terminated, but the level of child support remained unchanged.

Roger subsequently filed a petition for reinstatement of visitation and modification of the decree. He was awarded supervised visitation for May and June 1992, and unsupervised visitation beginning August 1992. In June 1992 Roger filed a contempt action against Donna over visitation. Donna filed a resistance, together with her own petition for contempt based on nonpayment of child support by Roger. The district court ruled Donna was in contempt for willfully attempting to thwart Roger's right

to visitation. The court ordered a fourteen-day incarceration period but afforded Donna the chance to purge herself of the contempt by encouraging and allowing visitation.

In July 1992 Roger filed a petition of mittimus against Donna alleging she interfered with visitation. Donna was again held in contempt and Roger was awarded an additional fourteen-day visitation period. The court noted Roger should request a change of custody if Donna interfered with visitation again.

In September 1992 Roger filed a petition for contempt and change of custody. Donna filed an answer and a petition to modify the decree to increase child support. At trial, Roger testified Donna was in contempt for refusing him visitation on Labor Day weekend and interfering with visitation on several other occasions. Donna testified she believed Roger was not entitled to visitation on the holiday weekend. She further testified Roger was in arrears with child support and the support should be increased. Both parties asked the court to reconsider the Texas decree visitation requirements.

The district court held: (1) it was in the children's best interests to maintain primary care with Donna; (2) Donna was not in contempt regarding visitation because she had misunderstood the Texas decree; (3) Roger was not in contempt for nonpayment of support during the time he was not gainfully self-employed; (4) Roger was to pay \$624

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per month in child support; (5) Roger was to pay \$3,500 in attorney fees within sixty days of the ruling; and (6) the Texas decree was interpreted to mean the children should be back at home in Iowa from visitation by 6:00 p.m. on Sundays.

Roger appeals and Donna cross-appeals.

Roger argues, among other things, that the trial court erred in awarding attorney fees to Donna and in interpreting the Texas decree. He contends if custody remains unchanged, the visitation provisions should be interpreted to require Donna to pick the children up at 6:00 p.m. on Sundays. He requests attorney fees on appeal and for the underlying action.

Donna contends Roger should be held in contempt for willful and contumacious nonpayment of child support. She requests payment towards attorney fees on appeal.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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).

Our courts have repeatedly recognized that while in cases of equity the reviewing court is not bound by the fact findings of the trial court, factual disputes which depend heavily on the credibility of witnesses are best resolved by the

trial court which has a better opportunity to evaluate credibility than we do.

Maisel v. Gelhaus, 416 N.W.2d 81, 86 (Iowa App. 1987).

DONNA IN CONTEMPT

An action for contempt of court is treated in the nature of a criminal proceeding. Amro v. Iowa Dist. Court, 429 N.W.2d 135, 140 (Iowa 1988). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Id. Contempt is sufficiently shown if some of the default was willful. Id.

The trial court found Donna was not in contempt for failing to offer visitation to Roger on September 4, 1992, November 20, 1992, and a weekend in October 1992. In its ruling, the court observed the weekend visitation improved after Donna accepted her own psychologist's opinion that Roger was not abusing the children. Even Roger admitted visitation improved since the third weekend in December.

The denied visitation in September 1992 coincided with the Labor Day weekend. Donna claimed a misunderstanding of the Texas decree. The decree contains several different visitation schedules, depending on how far Donna and the children live from Roger. Labor Day weekend is specifically awarded to Roger in odd-numbered years under the first plan, but is not mentioned under the remaining schedules. Donna thought the Labor Day weekend was hers because it occurred in an even-numbered year. Although her

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interpretation of the decree was incorrect, her confusion was understandable. Consequently, she cannot be found in contempt. Contempt requires that the court find willful behavior beyond a reasonable doubt. The trial court found no such proof, and we agree.

Roger next complains he was denied a weekend visit in October of 1992. Donna claims he had been drinking when he arrived for the children. For that reason, she would not give the children to him for the weekend visit.

Donna and Roger transfer the children for visitation at a restaurant on Interstate 80, midway between their homes. Shortly after Donna arrived at the restaurant with the children for an October visitation, an argument began. Donna then saw two beer cans in the front portion of Roger's motor vehicle. This heightened the argument and the police were threatened to be called. Roger wanted to avoid any further confrontation, and returned to Rockford without the children. He admitted he had a beer with his lunch while waiting in the parking lot of the restaurant. We agree Donna was not in contempt.

The final claim of denied visitation was on November 20, 1992. Roger drove to Donna's residence to pick up the children for his scheduled visitation. He was late in arriving, however, after he was arrested on a warrant involving the October incident. Roger did not notify Donna he would be late, and neither she or the children were home when Roger finally arrived. Although there was evidence to

suspect Donna knew Roger was late because of the arrest, we agree the record is insufficient to support a finding of contempt.

MODIFICATION OF DECREE CHANGING PHYSICAL CUSTODY

Roger wants the prior decree modified to award him physical custody of his three children. Iowa Code section 598.41 sets forth the responsibility of the court in a dissolution proceeding to make appropriate orders concerning the physical and joint custody of children and to prescribe visitation rights. In particular, it provides:

The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent without just cause a significant factor in determining proper custody arrangement

We have not been reluctant to affirm a trial court's change of custody to the noncustodial parent based on the flagrant denial of visitation by the custodial parent. See In re Marriage of Downing, 432 N.W.2d 692, 694-95 (Iowa App. 1988); In re Marriage of Graybill, 414 N.W.2d 852, 853-54 (Iowa App. 1987) (modified trial court decision to change custody to noncustodial father).

In support of his request for change of custody, Roger relies on the three denied visits in September, October, and November 1992. He also relies on other problems over visitation, including the incident resulting in the June 29, 1992, contempt hearing.

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We are unable to conclude the evidence supports a change in custody. Donna's conduct concerning the incidents during September, October, and November 1992 was not contemptuous, and visitations have improved since December 1992. The evidence, as a whole, does not support a disruption of the custodial arrangement.

MODIFICATION OF DECREE CONCERNING PICK UP

REQUIREMENTS ON VISITATION DATES

The trial court modified the decree by requiring the children to be ready to return home at 1:00 p.m., rather than at 6:00 p.m., on Sunday when Donna or her designee pick them up at Roger's residence following their weekend visitation. The court also placed restrictions on the number of vehicles Roger could use. These changes are proper under the current circumstances, and in the best interests of the children. These new guidelines, however, would not prohibit the parties from following their prior arrangement of exchanging the children at a location midway between their residences.

In summary, we find the modifications imposed by the trial court are reasonable, proper, and consistent with the record made in these proceedings. We will not disturb them and they are affirmed.

ATTORNEY FEES AND COSTS AWARDED TO DONNA'S ATTORNEY

The last issue raised by Roger in his appeal is the award of attorney fees to Donna in the sum of \$3500. The court denied Roger's request for attorney fees.

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Donna prevailed in her action to modify child support. The court had discretion to award attorney fees. We find they were properly granted based on the record.

ROGER'S CONTEMPT FOR FAILURE TO PAY

COURT-ORDERED CHILD SUPPORT

In her cross-appeal, Donna argues the trial court erred in not finding Roger in contempt of court for his failure to pay child support. We do not agree. When Roger resumed gainful employment he resumed paying his child support payments. Most of the delinquency occurred while Roger was self employed and generating little, if any, income. Upon our examination of all evidence, we cannot conclude Roger was in contempt of court.

AWARD OF APPEAL ATTORNEY FEES TO DONNA

Donna, through her counsel of record, requests an award of appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). Both parties have incurred substantial attorney fees. We believe the parties should be responsible for their own attorney fees on appeal. Costs are taxed one-half to Roger and one-half to Donna.

AFFIRMED.