IN THE COURT OF APPEALS OF IOWA

No. 8-655 / 98-0295

IN RE THE MARRIAGE OF KARLA TREIBER AND JOHN TREIBER

Upon the Petition of KARLA TREIBER,

Petitioner-Appellee,

And Concerning JOHN TREIBER,

Respondent-Appellant.

FILED
DEC 28 1998
COURT

Appeal from the Iowa District Court for Monona County, Gary E. Wenell, Judge.

Respondent appeals a modification of the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Edward Bjornstad of the Bjornstad Law Office, Spirit Lake, for appellant.

Joseph J. Heidenreich of Dresselhuis and Heidenreich, Odebolt, for appellee.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

SACKETT, C.J.

Respondent-appellant John Treiber challenges a trial court order modifying the custodial provisions of a dissolution decree dissolving his marriage to petitioner-appellee Karla Treiber. John contends Karla failed to show the required change of circumstances to modify the decree and it was modified merely to punish him for hitting Karla. We affirm.

The marriage of John and Karla was dissolved in February of 1997. Three children had been born to the marriage: Mitchell in 1990, Austin in 1992, and Cole in 1993. The decree provided John have physical care of the children during the school year and Karla have physical care during the school summer vacation. Each parent had visitation rights during the term the other had physical care.

In May of 1997, Karla returned the children to John's home and he and she began arguing about visitation for Karla on Mother's Day. John contended Karla was the aggressor and Karla contended it was John.[1] What is not disputed is John hit Karla in the face. She suffered a laceration above her eye and her jaw was broken in two places.[2] John was charged with domestic abuse assault. The criminal case had

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[1] The trial court found, "Some pushing back and forth of the door then occurred when the respondent suddenly struck the petitioner three times about the face with his closed fist. One blow struck her eye, another her right ear and the last her mouth or jaw."

[2] The trial court specifically found, "The respondent (John) contends the petitioner (Karla) was the aggressor in this altercation and came at him with clenched fist, and that he was in danger of falling backwards down a cement stairs if he did not defend himself. Although the petitioner had been 'grabbed' before by the respondent, she had never been previously struck, ... The respondent is at least six feet tall and weighs approximately 200 pounds. In the domestic abuse hearing on July 11, 1997, he admitted hitting the petitioner 'two, maybe three times,' however, he now contends he struck her only once."

not been resolved at the time of the modification hearing.

Following the incident, Karla petitioned for a modification asking the court grant her permanent physical care of the children. The trial court, finding John's assault of Karla was serious, modified the decree to award physical care of the children to John from July first until school began in the Fall and awarded physical care of the children to Karla during the school year. John and Karla were each awarded liberal visitation. John was ordered to pay child support of $350 a month.

John's premise on appeal is Karla failed to show changed circumstances necessary to modify the custodial provisions of a dissolution decree, and the trial court's decision was a manner of punishing him rather than addressing the needs of the children.

We review de novo. Iowa R. App. P. 4; *In re Marriage of Bolin*, 336 N.W.2d 441, 444 (Iowa 1983). In doing so, we are not bound by the district court's findings of fact; however, we are deferential to the district court's assignment of credibility. Iowa R. App. P. 14(f)(7).

In this case the parties originally agreed to joint custody, and despite modifying the primary care award, the trial judge left the joint custodial award intact. Our task, like the district court's, is to determine whether there are changed circumstances and whether, if changed circumstances are shown, the evidence supports a finding Karla will be the superior custodian.

As the party seeking to change the status quo, Karla bears the burden of proof on both issues. Karla was named a joint custodian and is benefitted in seeking

physical care by the inference she has met the joint custody tests set forth in *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979). *See In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984). In seeking to change physical care, she carries the burden similar to that imposed on a parent seeking a change of custody. *Id.* Karla has the burden to establish by a preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed the children's interest make it expedient to transfer their physical custody to her. *In re Marriage of Behn*, 416 N.W.2d 100, 101 (Iowa App. 1987).

This court has considered incidents of domestic abuse as a factor in an initial custody proceeding in assessing which parent will be the better custodian. *See In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995). John's decision to hit his children's mother in their presence is a factor bearing on his ability to handle situations without resorting to violence and is relevant in assessing Karla's claim she is a superior parent.

We agree with John the bottom line is whether Karla has the superior ability to provide, as a divorced parent, the more nurturing and stable environment where the children's needs will be put in a primary position and the other parent's place in their lives will be recognized, respected, and encouraged. Making this assessment demands a judge look at both the affirmative and negative attributes of each parent and their plans for future care of the children.

John's refusal to rationally consider Karla's request for visitation on Mother's Day and his unacceptable behavior in reacting to Karla's request show him to be a

poor role model for his children. John contends the district court was punishing him for hitting Karla. We disagree. While we have elevated no single negative behavior to the point where it has become the sole dispositive factor or it cleanses the other spouse of prior sins, we find Karla has met her burden to modify custody.

The statutory scheme of presumptions favoring an award of sole custody to an abused spouse is not applicable because the award of joint custody is not contested on appeal. *See* Iowa Code § 598.41(4).

AFFIRMED.