IN THE COURT OF APPEALS OF IOWA

No. 8-379 / 97-2332

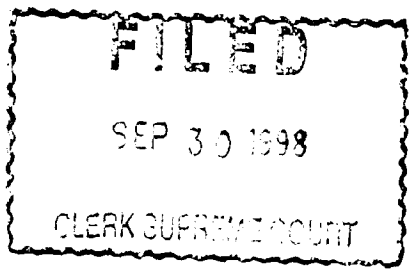
IN RE THE MARRIAGE OF MARY E. PAHNISCH AND SHELDON R. PAHNISCH

Upon the Petition of MARY E. PAHNISCH,

Petitioner-Appellee,

And Concerning SHELDON R. PAHNISCH,

Respondent-Appellant.



Appeal from the Iowa District Court for Chickasaw County, Margaret L. Lingreen, Judge.

Respondent appeals from the entry of the order modifying the visitation provisions of the dissolution decree. **AFFIRMED AS MODIFIED.**

Russell H. Schroeder, Jr. of Schroeder Law Office, Charles City, for appellant.

Christopher F. O'Donohoe of Elwood, O'Donohoe, O'Connor & Stochl, New Hampton, for appellee.

Considered by Cady, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Sheldon Pahnisch appeals the district court's modification of the parties' visitation schedule. Sheldon contends the district court erred in its award of increased visitation to Mary Pahnisch. We affirm as modified.

The parties have two minor children. At the time of trial, Andrew was six years old and Ashley was three. At the time of the original decree, the parties stipulated they would have joint legal custody of the children and Sheldon would have primary physical care. Mary was granted liberal visitation as follows:

(1) Monday through Friday Sheldon dropped the children off on his way to work and Mary returned the children prior to going to work;
(2) alternate weekends;
(3) three one-week visits during the children's summer vacation;
(4) birthdays and Fourth of July, 5:30 p.m. until bedtime;
(5) Easter, Thanksgiving, and Christmas, 10:00 a.m. until 5:30 p.m.

Sheldon subsequently filed a petition for modification requesting the district court modify the original decree to reduce Mary's visitation with the children. He also requested that Mary be ordered to pay child support. Mary answered and counterclaimed, requesting the court continue visitation as it was or modify the original decree to award her primary physical care.

The district court found a substantial change in circumstances had occurred. It continued primary physical care with Sheldon, but increased the amount of visitation Mary had been awarded in the original decree. Mary was also ordered to pay child support. The increased visitation awarded by the district court is as follows:

(1) September through May, if Mary and Sheldon reside in the same school district, alternating weekends, 7:00 p.m Thursday through 6:00 p.m.

Sunday; otherwise, alternating weekends, 5:00 p.m. Friday through 6:00 p.m. Sunday;

(2) January through December, one evening per week, no earlier than 4:00 p.m. and no later than 8:00 p.m.;

(3) Mother's Day (Sheldon was awarded Father's Day);

(4) the court divided New Year's Day, Easter, Memorial Day, Fourth of July, Labor Day, Thanksgiving, Christmas Eve, Christmas Day, and New Year's Eve on a schedule of alternating years, commencing at 10:00 a.m. on the day of the holiday and concluding at 8:00 p.m. the same day.

(5) one-half of Christmas school holiday;

(6) on the children's birthdays, for one and one-half hours with both children (if the children are in Mary's care on a birthday, then Sheldon is entitled to one and one-half hours); and

(7) six weeks during the summer months of June, July, and August, but not for more than two weeks at one time.

Sheldon appeals only the award of visitation.

I. STANDARD OF REVIEW. Our review of this equitable proceeding 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 Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). 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).

II. VISITATION. To justify a change in visitation, a party must show there has been a change of circumstances since the dissolution decree. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa App. 1994). The burden in a modification of visitation rights is different than the burden in a child custody case. *Id.* Generally, a much less extensive change in circumstances need be shown in visitation rights cases. *Id.*

Generally, we have considered liberal visitation rights to be in the child's best interest. *Id.* at 4. Iowa Code section 598.41 (1995) 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, 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.

Thus, we will not restrict a parent's visitation unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact. *Rykhoek*, 525 N.W.2d at 4.

Sheldon contends the best interests of the children require visitation to be limited to alternate weekends from Friday until Sunday, on alternate legal holidays, and for a period not to exceed two weeks in the summer. Sheldon offered evidence concerning, and gave the following reasons for requesting the reduction in Mary's visitation:

(1) bad check charges;
(2) eviction from her home;
(3) disregard for her children's property items;
(4) not providing appropriate medical care or nutrition;
(5) allowing sexual abuse to be perpetrated on Ashley;
(6) not spending time with the children during her visitation periods;
(7) not promptly paying bills for the children's care;
(8) not providing adequate clothing;
(9) refusing to cooperate with Sheldon regarding the children's schedules;
(10) Mary's failure to attend the children's counseling sessions;
(11) sleeping while the children are outside playing unsupervised;
(12) allowing numerous men to sleep at her house while the children are there;

(13) inappropriate behavior at a local bar, including fighting with a pregnant woman and customer complaints that Mary had a man's pants undone and her hands down his pants while they were dancing;
(14) heavy drinking;
(15) fighting at home; and
(16) after-hours parties in her home.

In making its ruling, the district court stated:

[W]ith [Mary's] change of employment to day shift, she is no longer able to exercise visitation with Andrew and Ashley in the summer on weekday mornings.

Since the dissolution, [Mary] has written bad checks and has been convicted of theft. She has been involved in several verbal and physical altercations. She frequents a particular bar in Charles City and on occasion invites people to her home after the bar closes for further socializing. The credible evidence indicates that the children, on occasion, have been present in the home during these social gatherings.

[Mary] was evicted from her home for non-payment of rent in the summer of 1997. When she vacated the premises, she left some of the children's clothing, toys, photographs and mementos. She testified she intended to return to the home to get these items, but was unable to get a truck to complete her move. The Court does not find this to be a legitimate excuse for [Mary's] failure. [Mary] could easily have removed the children's items with her own car; furthermore, her father testified he would have made his pickup available to assist [Mary] in her move.

From the foregoing evidence, the Court finds [Mary] to frequently be irresponsible and place her needs before the children's.

. . . .

On or about October 7, 1996, Ashley complained of her genital area hurting. She reported Carrie Streich, [Mary's] roommate, had touched her there and inserted her finger. [Mary] did not believe this report; however, the Iowa Department of Human Services did find this to be a founded report of sexual abuse. Following this report, [Mary] has been precluded from exercising visitation with the children in the presence of Carrie Streich. The evidence introduced at trial indicates that [Mary] and Streich have since separated.

Testimony was introduced regarding an occasion when Ashley's hand was burned while in the care of her maternal grandmother. Following the incident, [Mary] delivered Ashley to the babysitter without seeking any treatment for the burn. The sitter, upon observing

the burn to be red and blistering, contacted [Sheldon's] wife and arrangements were made for treatment of the burn.

. . . .

Evidence was introduced that the children play outside at [Mary's] home unsupervised. There was evidence that Andrew reported playing with a gas can and reported an occasion when Ashley had access to a knife. Andrew has also reported that he has been in charge of Ashley when his mother has been otherwise occupied.

[Mary] frequently leaves the children in her parents' care on weekends when she has visitation. She frequently fails to advise her parents where she will be spending the evening, thereby making it difficult for them to contact her should an emergency develop.

Andrew has been tardy two times thus far this school year while in [Mary's] care.

. . . .

In the instant case, the Court finds [Mary's] change in work hours no longer allows her to care for the children while [Sheldon] is at work and before [Mary] goes to work. This is a change in circumstances since the original Dissolution Decree was entered. Furthermore, the children, at least Andrew, now appear to be confused with the scheduling of the visitations with [Mary]. This, likewise, is a change in circumstances not contemplated by the Trial Court. The Court concludes it is now necessary to modify the visitation provisions of the original Dissolution Decree.

. . . .

In the instant case, the Court finds the best interest of the children are served by continuing their primary physical placement with [Sheldon]. [Mary] has not shown a superior ability to minister to the children. In fact, the evidence shows [Sheldon] to be the more responsible parent. [Mary] is frequently irresponsible, as evidenced by her bad check charges, her eviction and her failure to move many of the property items of the children. The evidence further shows that on occasion [Mary] has exercised bad judgment which has placed the children at risk. This is evidenced by her failure at times to properly supervise the children, to provide appropriate medical care or treatment to the children and to assure that they do not go hungry.

Mary argues she has maintained a good relationship with the children and provides more than adequate care for them when she is exercising her visitation. Mary contends she engages in constructive and beneficial activities with the children

which they enjoy and are consistent with the types of activities a dedicated parent would participate in with his or her children. Mary further argues she makes effective use of her visitation time. Mary admits she does leave the children with her parents, but only because her parents desire to maintain their own relationship with the children. Mary's brief does not deny the allegations raised by Sheldon nor the findings of the district court. Mary does argue Sheldon has consistently attempted to reduce her contact with the children and attempts to limit her time with the children to the specific allotted times. Mary cites an incident at Andrew's preschool graduation where Sheldon told Mary and her family they should not be having contact with the children because it was his family's time with the children. Mary also argues Sheldon agrees the children should be permitted to spend some time with Mary, so he does not really believe Mary presents a danger to the children.

We have carefully reviewed the evidence in this case and agree with the district court that a material and substantial change in circumstances was shown. However, we agree with Sheldon this change in circumstances would dictate a reduction, as opposed to an increase, in Mary's visitation with the children. We therefore modify the visitation granted by the district court to alternating weekends from 5 p.m. on Friday through 6 p.m. on Sunday, and one two-week period of visitation during the summer. We affirm the visitation schedule in all other respects.

AFFIRMED AS MODIFIED.