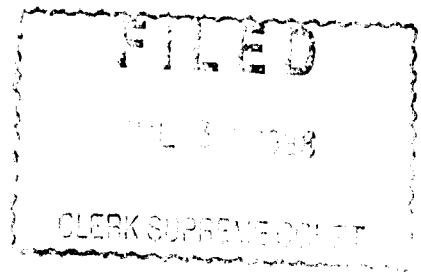
IN THE COURT OF APPEALS OF IOWA

No. 8-302 / 97-1802
Filed July 31, 1998



IN RE THE MARRIAGE OF LAURA L. HILL AND TODD A. HILL

Upon the Petition of
LAURA A. HILL,
Appellant,

And Concerning
TODD A. HILL,
Appellee.

Appeal from the Iowa District Court for Polk County, Darrell J. Goodhue, Judge.

The petitioner appeals a district court order granting respondent's petition to modify the parties' dissolution decree by transferring physical care of the parties' minor child to respondent. **AFFIRMED.**

Brent D. Hege of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Ryan A. Genest of Borseth & Genest, Pleasant Hill, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

Laura Hill appeals the district court's order modifying the custodial provisions of the decree dissolving her marriage to Todd Hill. We affirm.

I. Background Facts and Proceedings.

Laura and Todd were divorced November 27, 1990. They have one child, Chelsie, born on November 10, 1989. The dissolution decree awarded the parties joint legal custody of Chelsie. The court granted Laura primary physical care and provided Todd the right of reasonable visitation. The parties, however, continued to live together until early 1994.

In late summer of 1994, Laura began a relationship with Jessy Rombou. Laura and Chelsie moved in with Jessy. Laura and Jessy's child, Presley, was born on December 1, 1995. Laura's relationship with Jessy ended in December 1996, following Jessy's arrest for domestic abuse. Laura continues to have primary physical care of Presley.

In November 1996, Todd sought modification of the dissolution decree's custodial provisions. Todd alleged Chelsie's excessive tardiness to school, Laura's failure to cooperate with Todd's exercise of his visitation rights, and Laura's unstable lifestyle, including several job and residence changes, constituted a change in circumstances sufficient to warrant modification.

The district court modified the 1990 decree by awarding Todd physical care of Chelsie subject to Laura's right of reasonable visitation. The court found Laura's

lifestyle, marked by financial distress, an abusive domestic relationship, and frequent job and residential changes, no longer provided the stability essential to Chelsie's well-being.

On appeal, Laura argues Todd has failed to meet his heavy burden to show a substantial change in Chelsie's custodial circumstances warranting modification of the physical provisions of their dissolution decree. She also argues Todd's history of domestic abuse precludes transfer of Chelsie's physical care to him.

II. Standard of Review.

We review modification proceedings de novo. *In re Marriage of Jacobo,* 526 N.W.2d 859, 864 (Iowa 1995). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the district court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Physical Care.

Our first consideration in custodial modifications is the best interests of the child. *In re Marriage of Junkins*, 240 N.W.2d 667, 668 (Iowa 1976). A party seeking to change a custodial provision of the dissolution decree must establish by a preponderance of the evidence there has been a material and substantial change in circumstances not contemplated by the court at the time of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (quoting *In re Marriage of Mikelson*,

299 N.W.2d 670, 671 (Iowa 1980)). Additionally, the party seeking physical care must prove an ability to minister more effectively to the children's well-being. *Id.* This burden is premised on the principle that once custodial arrangements for a child have been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d at 671.

The record includes abundant evidence of Laura's declining performance as Chelsie's physical care provider. Most notable is Laura's neglect of Chelsie's educational needs. At the time of modification, Laura had allowed Chelsie to be tardy for school seventy-four times to accommodate Laura's work schedule. Laura's refusal to acknowledge the significance of this failure and inability to take remedial measures only compounds the problem. Her interference with Todd's visitation rights has also frustrated the purposes inherent in the original joint custody award. The record indicates Todd was denied visitation on at least nine occasions, and was required to obtain a writ of habeaus corpus to complete summer visitation in 1994. We also share the district court's concerns for Laura's growing instability demonstrated by frequent job (six) and residential (seven) changes.

The credibility of Todd's physical care demands are enhanced by the propriety of his motives. He initiated this action out of concern for Laura's failure to meet Chelsie's educational needs and her continued interference with his visitation rights. To his credit, Todd has enrolled in parenting classes to compensate for his lesser primary care experience. He has made arrangements for Chelsie's day care and

transportation to and from school. Todd also enjoys the benefits of a stable and adequate residence, employment, and extended family support. We find Todd had met his heavy burden by proving his ability to minister more effectively to Chelsie's well being.

We reject Laura's argument that Iowa Code section 598.41(1(b), (2)(c), and (3)(j), presumptively disqualify Todd as Chelsie's physical care provider. These statutory provisions establish a presumption against an award of joint custody if the record discloses a history of domestic abuse. *See In re Marriage of Forbes,* 570 N.W.2d 757, 760 (Iowa 1997). Here, however, Laura does not dispute the joint custody provisions of the modified decree or seek sole custody of Chelsie. Her challenge is limited to the district court's modification of the decree's physical care provisions. The statutory presumption against an award of joint custody is accordingly not implicated in this case.

Even if it were, Laura has failed to establish the predicate history of domestic abuse. A history of domestic abuse requires more than an isolated or remote incident. *In re Marriage of Forbes*, 570 N.W.2d at 760. "It is for the court to weigh the evidence of domestic abuse, its nature, severity, repetition, and to who directed, not just to be a counter of numbers." *Id.* Laura cites two incidences of domestic abuse, Todd's 1991 arrest and guilty plea to domestic assault, and a 1992 incident in which similar charges against Todd were dismissed. We, like the district court, find these

incidents, without additional factual specificity, insufficient to establish a history of domestic abuse necessary to invoke the statutory presumption.

Moreover, the presumption Laura seeks to invoke is rebuttable. *See* Iowa Code section 598.41(1)(b). The foregoing discussion and our conclusions concerning Laura's declining performance as Chelsie's physical care provider adequately rebut the presumption to the extent it could be legitimately applied in this case.

IV. Attorney Fees.

Todd requests the court award him $2500 in appellate attorney fees and tax costs of this appeal to Laura.

An award of attorney fees is not a matter of right, but rests with the court's discretion. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995). We consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996).

Todd has successfully defended the district court's decision on appeal. After consideration of the foregoing factors, we award Todd $500 in appellate attorney fees. Costs of this appeal are assessed to Laura.

AFFIRMED.