IN THE COURT OF APPEALS OF IOWA

No. 1-156 / 99-2056
Filed April 27, 2001

IN RE THE MARRIAGE OF VICKY L. POTTER AND LAWRENCE D. POTTER, JR.

Upon the Petition of
VICKY L. POTTER,
Petitioner-Appellee,

And Concerning
LAWRENCE D. POTTER, JR.,
Respondent-Appellant.

FILED
APR 27 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, R. J. Curnan, Judge.

A husband appeals the modification of the visitation provisions of the parties' dissolution decree and the imposition of a no-contact order. **AFFIRMED AS MODIFIED.**

Stuart G. Hoover of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

Mary M. Schumacher, Dubuque, for appellee.

Heard by Vogel, P.J., and Mahan and Vaitheswaran, JJ.

VOGEL, P.J.

A husband appeals the modification of the visitation provisions of the parties' dissolution decree. He also claims the district court did not have statutory authority under chapter 598 to enter a no-contact order between the parties. We affirm as modified.

Vicky Potter and Lawrence Potter, Jr. were previously married. They have one child, Daniel (Logan), born on October 10, 1994. A dissolution decree was entered for the parties on October 25, 1996, which incorporated the parties' stipulation. Logan was placed in Vicky's physical care. Lawrence was granted visitation on alternating weekends, and every Wednesday. Each year Lawrence was scheduled to have visitation on Memorial Day, Labor Day, and Fourth of July weekends, Father's Day and Christmas Eve.[1] In alternating years, he was to have visitation on Easter, Thanksgiving, and the child's birthday. No provision was made for summer visitation.

In April 1998, Lawrence wiretapped Vicky's telephone and criminal charges ensued. A no-contact order was entered as part of the criminal case. A separate domestic abuse no-contact order under Iowa Code section 236 was also entered. The relationship between the parties became very strained.

In June 1998, Lawrence filed a petition for modification of the visitation provisions of the dissolution decree. He asked to have Logan in his care on weekends and evenings when Vicky was working. He also sought summer visitation for up to thirty consecutive days. On October 27, 1998, the court

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[1] Due to her employment with the Department of Natural Resources, Vicky works every year on Memorial Day, Labor Day, and the Fourth of July. The parties agreed Lawrence should have visitation on these holiday weekends.

denied Lawrence's request for modification, finding there had not been a sufficient change in circumstances.[2]

On November 30, 1998, in the criminal proceedings, the district court ordered the parties to participate in a supervised visitation exchange program at a church in Dubuque. Visitation was changed to the first and third weekends of the month.[3] On February 1, 1999, the court determined Lawrence had not received adequate notice prior to the November 30, 1998, order. The court scheduled a hearing on the matter for February 11, 1999, but left the November order in effect.

The visitation schedule was modified in an order dated February 12, 1999.[4] The district court determined Lawrence's "visitation rights should remain as close as possible to the visitation rights that he was awarded in the original decree of dissolution of marriage." At the same time, the court determined the visitation exchange site should continue to be the church. The court determined Lawrence should have two make-up weekends each year, to compensate for the fact his weekend visitation was reduced from twenty-six visits per year (alternating weekends) to twenty-four visits per year (twice per month). The court reinstated Wednesday visitation, and determined holiday visitation should continue as set out in the decree.

On May 4, 1999, Vicky filed an application to modify the parties' visitation schedule. Vicky moved with Logan from Dubuque County to Allamakee County.

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[2] This ruling was modified and remanded on the appeal of a separate child support issue. *In re Marriage of Potter,* No. 98-2256/9-648 (Iowa Ct. App. Dec. 13, 1999).

[3] Apparently, these were the only times the church provided the visitation exchange program.

[4] This order was entered in the criminal, domestic abuse, and dissolution proceedings.

Lawrence lives in Scott County. The drive between the parties' locations takes about three hours.

On November 4, 1999, the district court entered a modification decree finding there had been a substantial change in circumstances due to Vicky's move. The court modified visitation to be on the first and third weekend of each month, except for December, when it will be the first weekend and the weekend closest to Christmas Day. If that weekend incorporates Christmas Eve or Christmas Day, then Lawrence will have visitation on that holiday, otherwise he will not have visitation on Christmas. Lawrence was granted two specific non-consecutive weeks of visitation in the summer, one of which includes the Fourth of July. In addition, Lawrence is to have visitation over three-day weekends for Memorial Day and Labor Day.

The district court also ruled, "the parties shall have no contact other than such incidental contact pursuant to visitation." In addition, the court ordered, "Neither party shall be negative by word or deed towards the other party in front of Logan."

Lawrence filed a motion pursuant to Iowa Rule of Civil Procedure 179(b), seeking clarification of the no-contact order and asking for additional visitation. The court reiterated the no-contact order was not made pursuant to Iowa Code chapter 236. The court stated it had not prohibited all written and telephone contact, "but clearly prohibited any such contact not relating to and incidental to the transfer of Logan for visitation purposes." The court denied Lawrence's motion in all other respects. Lawrence appeals.

I. SCOPE OF REVIEW

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 district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. VISITATION

Lawrence contends the district court should have granted him visitation on alternating weekends. He also asks for Christmas visitation on alternating years, and asserts some provision should be made for Thanksgiving visitation. In addition, he requests a greater amount of summer visitation.[5]

To justify a change in visitation, a party must show there has been a change of circumstances since the dissolution decree. *In re Petition of Holub,* 584 N.W.2d 731, 733 (Iowa Ct. App. 1998). The burden in an action to modify visitation rights is different than the burden in a child custody case. *In re Marriage of Spears,* 529 N.W.2d 299, 302 (Iowa Ct. App. 1994). Generally, a much less extensive change in circumstances need be shown in visitation rights cases. *In re Marriage of Rykhoek,* 525 N.W.2d 1, 3 (Iowa Ct. App. 1994).

While there was evidence the parties did not get along, the evidence related to financial and communication matters. There was no evidence the

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[5] Lawrence also asserts he was granted visitation on Memorial and Labor Day weekends only until Logan is in school, which was August 2000. We find the paragraph in the modification decree concerning visitation on these holidays applies to the time periods both before and after Logan is in school.

parties were unable to comply with the visitation schedule.[6] Furthermore, the parties' inability to communicate is not sufficient reason to punish Logan by limiting his visitation time with his father. Under section 598.41(1)(a), we are to order visitation "which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . ." A restrictive visitation schedule fails to promote the goal of maximum continuing physical and emotional contact. *See In re Marriage of Stepp,* 485 N.W.2d 846, 849 (Iowa Ct. App. 1992).

We find it would be best to continue with the visitation the parties had already agreed to in the stipulation which became incorporated into the dissolution decree, with some modifications. Thus, we modify the parties' dissolution decree to provide Lawrence should be granted visitation on alternating weekends from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. We agree with the provision giving Lawrence visitation on Memorial Day and Labor Day weekends from 6:00 p.m. on Friday until 6:00 p.m. on Monday. Lawrence will have visitation each year on Father's Day from 10:00 a.m. until 6:00 p.m. If Mother's Day should fall on a weekend of Lawrence's regular visitation, his visitation shall terminate at 10:00 a.m. on that day. In odd numbered years, beginning in 2001, Lawrence will have visitation with Logan from 6:00 p.m. on December 23 until 6:00 p.m. on December 25. In even numbered years, beginning in 2002, he is to have visitation on Easter beginning 6:00 p.m. on Friday until 6:00 p.m. on Sunday; and Thanksgiving weekends, beginning 6:00

[6] A review of the record shows only two contempt actions filed in the dissolution case prior to the present notice of appeal, both alleging Lawrence had failed to pay amounts due under the dissolution decree.

p.m. on Wednesday until 6:00 p.m. on Sunday. In addition, Lawrence should receive four continuous weeks of visitation in the summer, beginning on July 1 at 10:00 a.m., or another time mutually agreed upon by the parties. Where not otherwise specified, the time and location of transfers will be as set forth in the modified decree of November 4, 1999.

III. LAWRENCE'S MOTHER

Lawrence asserts the district court should not have required his mother, Mary Lou Potter, to act as an intermediary between the parties for the exchange of Logan on some occasions. The decree states the parties should work out a time for the transfer for Memorial and Labor Day weekends, "either through their counsel or through the Respondent's mother or in some other method." Thus, Mary Lou is mentioned only as a suggestion. Furthermore, Mary Lou was not a party, and neither the district court nor this court has the ability to require her to act. *See In re Marriage of Halvorsen*, 521 N.W.2d 725, 729 (Iowa 1994).

IV. ADDITIONAL VISITATION

Lawrence asks to have the dissolution decree modified to require Vicky to give him extra visitation during times she is working and unable to care for the child. The court refused to enter such an order. The court stated, "Nothing in this order prevents other and/or additional visitation if somehow agreed to by the parties." At the modification hearing, Vicky testified she had allowed Lawrence extra visitation in the past, and would continue to do so. We determine a court order requiring Vicky to give Lawrence additional visitation is unnecessary.

V. LOGAN'S ADDRESS

Lawrence also asks to be given information about Logan's address and telephone number. Due to the previous no-contact orders, Vicky has been reluctant to allow Lawrence to know exactly where she is living in Allamakee County. She has given him only her cellular telephone number and not her home telephone number. Logan's address and telephone number should be given to Lawrence so he can contact Vicky in an emergency, for the exchange of necessary information regarding visitation, and for Lawrence to maintain reasonable contact with Logan.

VI. NO-CONTACT ORDER

As noted above, no-contact orders were entered in the criminal and domestic abuse proceedings involving these parties. The domestic abuse no-contact order expired in April 1999. The criminal no-contact order expired at least by September 23, 2000.[7] In the modification decree, the district court ruled:

> Thereafter, by the terms of this Decree, the parties shall have no contact other than such incidental contact pursuant to visitation. This will remain the status quo during Logan's minority unless either party petitions for and successfully shows by a preponderance of the evidence that the parties can have contact that will not negatively impact Logan. When Logan reaches adulthood or is no longer eligible for support, whichever occurs first, this no contact order becomes null and void. It is not a Chapter 236 protective order. It is an order to protect Logan and not the parties from each other.

The court further clarified the no-contact order in its ruling on the rule 179(b) motion, again stating the no-contact order was not made pursuant to chapter 236.

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[7] If Lawrence's probation was revoked or terminated sooner than September 23, 2000, then the no-contact order also ended at an earlier date.

Lawrence contends the district court did not have authority to enter a general no-contact order which extends until the child is an adult. Vicky asserts that included in the power to make visitation orders under section 598.41(1), is the power to create a no-contact order, if the order is in the best interests of the child. We have held a court may place conditions on a parent's visitation rights only when visitation without the placement of conditions is likely to result in direct physical harm or significant emotional harm to the child, other children, or a parent. *Rykhoek,* 525 N.W.2d at 5. *See also* Iowa Code § 598.41(1). Generally, we have not imposed conditions on a parent's visitation. *Id.* at 4. Any conditions which are imposed must be in the best interests of the child. *Id.* at 5.

It is very apparent the immature actions of both Vicky and Lawrence have consequences that adversely affect the happiness and welfare of Logan. The various no-contact orders served a purpose when emotions between the parties ran high and hostile contact between Vicky and Lawrence was detrimental to Logan. However, a continuation of the no-contact order until Logan is eighteen years old is not in his best interests. "A child should be assured the opportunity for the maximum continuing physical and emotional contact with *both* parents." *In re Marriage of Ruden,* 509 N.W.2d 494, 496 (Iowa Ct. App. 1993). The no-contact order harms Logan by limiting his opportunity for contact with Lawrence. We modify the decree of November 4, 1999, to eliminate the no-contact order in its entirety from the date procendendo issues in this case.

We affirm the decision of the district court which modified the parties' dissolution decree, except as we have here expressly modified. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.