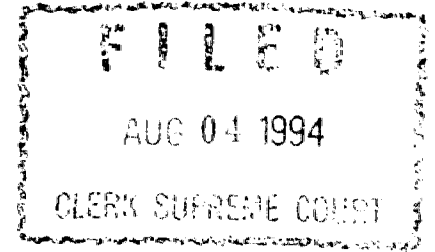


IN THE COURT OF APPEALS OF IOWA

No. 3-432 / 92-1712



IN RE THE MARRIAGE OF SUSAN BETH HEIN
AND CRAIG ALAN HEIN

Upon the Petition of
SUSAN BETH HEIN,

Petitioner-Appellant,

And Concerning
CRAIG ALAN HEIN,

Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County,
Richard D. Morr, Judge.

The petitioner appeals from a judgment of the district
court denying her application to modify the visitation
provisions of the divorce decree. **AFFIRMED.**

Artis I. Reis of Reis & Bowman, West Des Moines, for
appellant.

John O. Reich and Bryan R. Jennings of the Reich Law
Firm, Adel, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HABHAB, J.

Susan and Craig Hein were married in 1976 and divorced in March 1990. They have two children: Courtney, born on February 7, 1980; and Natalie, born on July 11, 1982. The parties entered into a stipulation which was approved by the district court and incorporated into the dissolution decree. The parties agreed to joint legal custody, with Susan having primary physical care. Craig was awarded reasonable visitation, which included, at a minimum, every other weekend, every Thursday evening, and two weeks during the summer.

On March 31, 1992, Susan filed an application for modification of Craig's visitation. She asked that Craig no longer be allowed to have overnight visitation. This request was based on her concerns that Craig had driven with the children in the car after he had been drinking. Craig denied her allegations and asked that Susan be found in contempt of court because she had denied him visitation.

Prior to a modification hearing on July 15, 1992, the parties entered into an agreement they would each participate in counseling on the issue of visitation. They also agreed to abstain from the use of alcohol while in the presence of the children. The district court ruled from the bench approving the agreement. The court ordered the modification and contempt actions would be continued to allow the parties to participate in counseling and attempt to resolve their problems. On August 6, 1992, the district court issued an order memorializing its ruling.

On August 27, 1992, Susan filed an application seeking a hearing on the modification. She claimed Craig had consumed alcohol on August 8, 1992, at the Adel Sweet Corn Festival when he had the children for visitation. She also claimed he smelled of alcohol on August 23, 1992, when he came to pick up the children. Susan refused to allow the children to go with Craig on this second occasion.

A hearing was held on September 24, 1992. The district court entered an order on that date dismissing the modification action. The court determined Susan had not met her burden to show a substantial change in circumstances. The court also dismissed the contempt proceedings against Susan. Additionally, the court ruled the August 6, 1992, order was no longer binding on the parties. Susan appealed.

I. The appellate courts of this state have consistently held that to justify a modification of visitation rights, the plaintiff must show there has been a change of circumstances since the filing of the decree. In re Marriage of Jerome, 378 N.W.2d 302, 305 (Iowa App. 1985). The burden upon the petitioner in a modification of visitation rights differs from the burden upon him or her in a modification of custody. Id. The degree of change required in a modification of visitation rights is much less than the change required in a modification of custody. Id.

II. A noncustodial parent should be allowed liberal visitation in order to afford the children the opportunity to maximize continuing physical and emotional contact with both parents. In re Marriage of Farrell, 481 N.W.2d 528, 531 (Iowa App. 1991). Under section 598.41(1), a noncustodial parent should be allowed visitation unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact. In re Marriage of Gilliland, 487 N.W.2d 363, 366 (Iowa App. 1992). As always, the governing considerations are the best interests of the children. Farrell, 481 N.W.2d at 531.

III. Susan contends Craig's use of alcohol during visitation is a substantial change in circumstances and this change warrants a modification of the visitation provisions of the dissolution decree. Susan stated Craig had consumed alcohol occasionally during the marriage. She related an incident which had occurred in August 1991 when the children had expressed concern about Craig's driving after they had attended the Adel Sweet Corn Festival. She and Courtney, the oldest child, assumed he had also consumed alcohol August 8, 1992, at the Adel Sweet Corn Festival, although there was no evidence that he had.

Another incident occurred over the 1992 Memorial Day weekend. Courtney called her mother and expressed concern because Craig was drinking beer with some other relatives at his parents' house in Boone. There was no evidence

Craig was intoxicated or planned on driving. However, Susan and her boyfriend, Randy Jones, came to Boone to pick up Courtney, shortening Craig's visitation time.

On August 23, 1992, Craig came to Susan's residence to pick up the children. Jones told Susan he smelled alcohol on Craig's breath. Susan told Craig she would not allow the children to go with him. She then called the police. There is no evidence as to what transpired between Craig and the police officers. Craig left without having visitation with the children.

Susan tape recorded all of Craig's telephone calls to the children. Susan presented a transcript of some of the tapes as evidence that Craig had made harassing calls. We find that recording the telephone calls hindered Craig and the children's ability to communicate with each other. We also find the telephone calls were not harassment, but showed Craig's disgust and displeasure at the fact the calls were being recorded and Susan's reluctance to cooperate with visitation.

IV. We determine Susan has failed to show a change in circumstances since the issuance of the dissolution decree which would warrant a modification of visitation. She has not shown Craig's visitation is harmful in any way to the children. We believe it is in the children's best interests to have contact with both parents. Furthermore, each parent should encourage the children's relationship with the other parent.

While there is insufficient evidence in the record of a change in circumstances warranting a modification, we feel compelled to point out that many of the parties' present problems concerning visitation would be abated if Craig abstained from the use of alcohol while in the presence of the children. The testimony of Courtney showed the use of alcohol by Craig made the children uncomfortable.

Our supreme court in In re Marriage of Fite, 485 N.W.2d 662 (Iowa 1992), deleted certain conditions imposed upon visitation, i.e. the noncustodial parent should not be permitted visitation with his minor child if he has been drinking excessively, because they were demeaning and an invitation to abort scheduled visitation based on subjective determinations. Accordingly, we do not impose those conditions in our ruling. However, like in Fite, if Craig behaves irresponsibly in the manner specified in the deleted portion of the Fite case, his conduct, although it did not rise to that level in the facts before us in the case at bar, may be made the subject of further proceedings and may be grounds for reduction or elimination altogether of his visitation rights.

V. Susan contends the district court abused its discretion in not awarding her trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show the trial court abused its discretion.

Id. We find no abuse of discretion in the present case.

Susan also asks for attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. Id. We determine each party should pay his or her own attorney fees for this appeal.

VI. We affirm the decision of the district court dismissing the petition for modification. Costs of this appeal are assessed to appellant.

AFFIRMED.