IN THE COURT OF APPEALS OF IOWA

No. 4-472 / 94-610

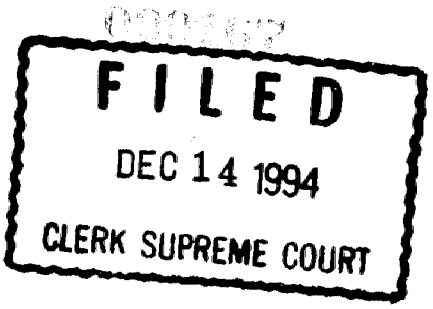
IN RE THE MARRIAGE OF TERESA A. NEUENDORF AND ROBERT P. NEUENDORF

Upon the Petition of
TERESA A. NEUENDORF,

Appellee,

And Concerning
ROBERT P. NEUENDORF,

Appellant.



Appeal from the Iowa District Court for Linn County, Harold J. Swailes, Judge.

Robert Neuendorf appeals the district court's ruling granting Teresa Neuendorf's application for modification of child support and denying his counterclaim for modification of physical custody. **AFFIRMED.**

Mark H. Rettig of Hines, Pence, Day & Powers, P.C., Cedar Rapids, for appellant.

Jack C. Paige and David A. Elderkin of Elderkin and Pirnie, P.L.C., Cedar Rapids, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

CADY, J.

This is an appeal from the district court in an action to modify a decree for dissolution of marriage. The district court denied the request to change physical care, and increased the monthly child support obligation. In our de novo review of the case, we affirm the district court and award appellate attorney fees.

Robert and Teresa Neuendorf dissolved their marriage in 1988. The dissolution decree granted them joint legal custody of their then two-year old daughter Amanda, with physical care to Teresa. Robert was awarded visitation every other weekend, specified holidays, and six weeks during the summers. Robert was ordered to pay child support in the amount of $35 per week.

In March 1993 Teresa filed an application for modification of the decree. She requested an increase in child support. Robert responded with a counterclaim for modification of primary physical custody of Amanda.

Teresa works as a secretary for the YMCA and earns $6.50 an hour. At the time of the divorce, and until 1993, she performed secretarial and bookkeeping services for a conservatorship. Her annual income in 1992 was $19,631. She voluntarily terminated the employment. Robert works as a serviceman for Thermogas Company of Marion. He earns $9.50 an hour. Robert was employed by another gas company at the time of the divorce. His gross annual income at the time was $15,954.

Robert and Teresa have remarried. Teresa's husband, Kent Duby, is a self-employed carpenter. Kent is a recovering drug abuser. Robert is now married to Melanie Neuendorf, a nurse.

The relationship between Robert and Teresa is strained. The friction between them stems from a time in their marriage when Robert was suspected of having sexually abused Amanda. Investigators believed Amanda was abused, but the abuser was never identified. Robert became a suspect after he refused to speak with investigators. Teresa initiated additional sexual abuse investigations since the divorce, which were concluded as unfounded or undetermined. Amanda has been provided counseling and other professional services in response to the sexual abuse. Teresa has been slow to involve Robert in the services, and to share educational and other information with him.

Robert testified Teresa has interfered with his relationship with Amanda and thwarted his visitations on several occasions. Robert believes Teresa has instilled a fear of him in Amanda.

The district court found some of Teresa's actions had impaired Robert's ability to have maximum continuing contact with Amanda. Nevertheless, the court found Amanda was doing well. It also observed Teresa had exhibited an awareness of the necessity to avoid making negative comments about Robert to Amanda. Robert's request to modify physical care was denied.

The court increased Robert's child support obligation to $302 a month. It determined Teresa was underemployed and attributed to her a gross annual earning capacity of $19,631. The court included some overtime in determining Robert's net monthly income to be $1,340.

Robert argues on appeal that the district court once it found Teresa interfered with his relationship with Amanda, should have awarded him either primary or shared physical custody. Robert further contends the district court erred in calculating his income by failing to properly consider his employer's overtime practices, and in further failing to consider the expenditures he and Melanie have made in health care insurance for Amanda, as well as the funds they have spent on Amanda's uninsured health costs. Teresa requests appellate attorney fees.

I. Modification of Custody

The parent seeking to change a physical care arrangement is required to establish by a preponderance of evidence that conditions since the decree have so materially and substantially changed that it is in the best interest of the children to make the requested changes. In re Marriage of Leyda, 355 N.W.2d 862, 864 (Iowa 1984); In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The circumstances supporting modification must not have been contemplated by the original court. Frederici, 338 N.W.2d at 158. They must be more or less permanent, and relate to the welfare of the children. Id.

The rather stringent burden placed on the applying party arises from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons. In re Marriage of Weidner, 338 N.W.2d 351, 360 (Iowa 1983).

Our courts recognize that acts by the custodial parent which tend to discredit or alienate the other parent, or otherwise interfere with the rights of the non-custodian and are adverse to the interests of the children, can support modification. In re Marriage of Quirk-Edwards, 509 N.W.2d 476, 480 (Iowa 1993). Deprivation of court ordered visitation by the custodial parent may also support a change in physical care. Id. When these factors are present, however, it is important to consider whether the custodial parent is amenable to improving the adverse conditions. See Id.

The evidence in the case reveals Teresa's conduct and feelings have adversely impacted Robert's relationship with Amanda. At the same time, we recognize it has been difficult for Teresa, in light of the apparent history of sexual abuse perpetrated against Amanda, to be fully cooperative with Robert and to overcome her feelings of mistrust. Her struggle does not justify her conduct, but it helps distinguish it from other modification cases where the mistrust is predicated on allegations found by a court to be untrue. See In re Marriage of Winnike, 497 N.W.2d 170, (Iowa App. 1992). Moreover, Teresa has involved

the help of professionals, and has exhibited an awareness of many of the problems. She has made efforts to reduce the anxiety experienced by Amanda and understands the need to avoid negative comments about Robert in Amanda's presence. Robert's relationship with Amanda has improved.

It is also significant that Teresa and Amanda are very close. Furthermore, Amanda is well adjusted, polite and personable. She does well in school. There was no suggestion by the professionals involved in the case that physical care of Amanda should be changed.

We conclude Robert has failed to establish a sufficient change in circumstances since the decree to justify modification. Furthermore, a change in custody would not promote the best interests of Amanda. We affirm the district court on this issue.

II. Modification of Child Support

Child support provisions of a dissolution decree may be modified where there has been a substantial change in circumstances. In re Marriage of Reedholm, 497 N.W.2d 477, 478 (Iowa App. 1993). A substantial change in circumstances exists when the amount of child support previously ordered by the court deviates by ten percent or more from the amount which would be required under the current child support guidelines. Iowa Code § 598.21 (9) (1993).

Robert does not contest the basis for modification of child support only the manner the court applied the

guidelines. He first objects to the inclusion of overtime wages in arriving at his gross income.

The general rule is that overtime pay is included as "gross income" in calculating net monthly income for child support purposes. In re Marriage of Brown, 487 N.W.2d 331, 333 (Iowa 1992). It is excluded only when the overtime is speculative and uncertain, or where the parent is forced to work overtime to meet a burdensome child support obligation. In re Marriage of Geil, 509 N.W.2d 738, 742 (Iowa 1993).

Robert testified he was informed by his employer prior to the trial he would receive no further overtime for the remaining two months of 1993. Furthermore, Robert did not feel he could count on overtime in future years, although he acknowledged there might be some. On the other hand, Robert's employment records revealed he was paid over $2,000 more than he would have been paid for a forty hour work week during the first ten months of 1993. His income in 1992 also exceeded the amount he would have received based on a forty hour work week. Robert also received some commission income in addition to his hourly wage.

We believe Robert's overtime and commission income was properly included in determining his monthly gross income. Under the circumstances, this additional income was not uncertain or speculative. Robert had been receiving it for nearly two years prior to trial, and his evidence to show it would be discontinued was brief and vague. The amount

of the overtime income involved was not substantial. Moreover, there was no evidence that Robert worked the overtime solely to meet his support obligation. The trial court correctly determined Robert's monthly income to be $1,820.

Robert also claims the trial court erred in computing his net monthly income by failing to deduct the monthly costs of providing health insurance coverage for Amanda through Melanie's employer-provided policy, and by not deducting his expected share of the noncovered medical expenses for Amanda. Under the decree, Robert was required to maintain health insurance for Amanda as available through his employment. The parties were also required to pay one-half of the uninsured expenses.

Although Robert's employer provides medical insurance, Robert chooses to cover Amanda under Melanie's employer-provided insurance policy because he believes the coverage is better. The monthly cost of this additional coverage is $48. Furthermore, Robert paid approximately $450 or an average of $38 each month in 1992 as his share of Amanda's uninsured medical expenses. He believes this amount should also be deducted from his gross income to arrive at net monthly income.

The child support guidelines enumerate the deductions which may be used to arrive at "net monthly income." See Child Support Guidelines. They include:

"6) Dependent health insurance coverage either deducted from wages or paid for dependent medical coverage pursuant to court order;

7) Actual medical support paid pursuant to court order or administrative order; . . . "

The decree in this case ordered Robert to provide medical insurance only if available through his employment. The insurance expense Robert seeks to deduct was not "deducted" from his wages or paid "pursuant to court order." Accordingly, it is not deductible in determining net income. Similarly, average monthly uninsured medical expenses are not "actual medical support." The trial court correctly computed the "net monthly income." Furthermore, no grounds were presented to support a deviation from the guidelines. We affirm the modification of child support.

III. Attorney Fees

Teresa seeks appellate attorney fees. We consider the needs of the requesting party, ability of the other party to pay and whether the requesting party was obligated to defend the trial court's decision. In re Marriage of Scheffert, 492 N.W.2d 203, 206 (Iowa App. 1992). After considering these factors, we award Teresa $750 in appellate attorney fees.

AFFIRMED.