

IN THE COURT OF APPEALS OF IOWA

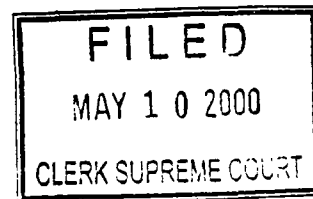
No. 0-190 / 99-1470

Filed May 10, 2000

**IN RE THE MARRIAGE OF PAUL R.
GOSSWEILER AND JANE A.
GOSSWEILER**

**Upon the Petition of
PAUL R. GOSSWEILER,**
Petitioner-Appellee,

**And Concerning
JANE A. VANASDAL, f/k/a
JANE A. GOSSWEILER,**
Respondent-Appellant.



Appeal from the Iowa District Court for Cerro Gordo County, Ralph F. McCartney, Judge.

Jane appeals an order modifying her dissolution decree. **AFFIRMED AS MODIFIED.**

F. David Eastman of the Eastman Law Office, L.L.C., Clear Lake, for appellant.

William T. Morrison of Locher & Morrison, Mason City, for appellee.

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

MAHAR J.

Jane appeals an order modifying her dissolution decree. She contends the court erred in: (1) not giving preference to her in determining custody due to Paul's alleged domestic abuse; (2) finding Paul would be more likely to provide the healthiest home environment; and (3) failing to grant her sufficient visitation and ordering her to pay all transportation costs. Paul seeks an award of appellate attorney fees. We affirm as modified.

Paul and Jane Gossweiler were married on August 21, 1993. They have one child, Zachary, born November 2, 1994. Paul and Jane were granted a dissolution of marriage in June 1998. The court incorporated into that decree the provisions of a stipulation in which the parties agreed to share joint legal custody and joint primary physical care of Zachary. Pursuant to this stipulation, primary physical care was to be shared on an equal basis. They also agreed Zachary would attend school in the district in which Paul resided.

Paul has been a resident of Rockwell, Iowa his entire life and has resided at his current address since 1993. Both Paul and Jane's extended family reside in and around Cerro Gordo County and Zachary has enjoyed a good relationship with family members.

In August 1998, Jane married Brian Vanasdal, a person she met through the internet prior to the dissolution of her marriage to Paul. Brian lives in Ohio. Brian and Jane have a daughter together who was seven weeks old at the time of trial. Modification of the original decree was sought because distance would make continuing the old custody arrangements impossible. Both Paul and Jane

~~seek primary physical care of Zachary along with appropriate child support. Jane continued to reside in Iowa pending the outcome of the custody litigation.~~

A modification decree was entered by the district court on July 16, 1999 giving Paul primary physical care of Zachary. The court awarded Jane visitation rights that were to be as liberal as could be afforded under the circumstances. Jane would have Zachary in Ohio for four weeks in the summer and seven days during the Christmas holidays. In addition, Jane was given monthly weekend visits with Zachary to be held in Iowa. Jane was ordered to pay all transportation expenses connected with the visitations. She was also ordered to pay \$279 per month in child support. Jane appeals.

I. Standard of Review. Our review of child custody modifications is de novo. Iowa R. App. P. 4; *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N.W.2d at 28.

II. Modification. We disagree with Jane's contention the district court erred when it modified custody and placed primary physical care of Zachary with Paul.

To ~~change~~ the custodial provision of a dissolution decree, the party seeking ~~the modification~~ must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the child's welfare supports the requested change. See *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994) (citing *In re Marriage*

of *Milburn*, 298 N.W.2d 670, 671 (Iowa 1980)). The change must be more or less permanent and relate to the welfare of the children but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998).

The parties stipulated Jane's move to Ohio constituted a material and substantial change in circumstances. The district court was then left to determine who would be able to minister superior care to Zachary. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997).

Jane contends she is the one who would be more likely to provide an environment that would bring Zachary to a healthy physical, mental, and social maturity. Jane complains of the quality of the housing provided for Zachary, the condition of Zachary when he returns from visits with Paul, and his lack of concern for Zachary at certain times. Both parties assert the other uses bad language around Zachary and each has displayed a temper toward the other in front of Zachary.

The district court was satisfied both parties could adequately care for Zachary, but it placed primary physical care of Zachary with Paul. The court found Paul provided adequate housing for Zachary and said housing has been his home for most of his life. The court also found Zachary should remain in Iowa. The court noted Zachary has extended family in Iowa. Zachary has enjoyed a good relationship with all of these family members and the court found Paul's assertion he will continue to see Zachary has an ongoing and happy relationship with Jane's family credible. The district court found if Zachary were

to be moved from Iowa, not only would his relationship with his father be reduced but it would severely limit his ability to develop a relationship with the families of his father and mother. The court went on to state Jane did not have a problem with the care Paul was giving Zachary since she agreed to share primary physical care of him equally just six months earlier.

A. Domestic Abuse. Jane further contends the trial court erred when it did not give her preference for primary physical care of Zachary because of domestic abuse. The district court did not specifically discuss the issue of domestic abuse in its modification ruling. Jane, therefore, relies on Iowa Code section 589.41(2)(c) and 598.41(3)(j) in making her arguments. Jane claims according to these code sections, she has the right to have the court consider the evidence in the record when it determines which party should have primary physical care of Zachary. Pursuant to Iowa Code section 598.41 and prior case law, domestic abuse is a factor in determining custody for a child because such abuse is contradictory to a child's best interest. *In re Marriage of Barry*, 588 N.W.2d 711, 713 (Iowa App. 1998). We agree with Jane domestic abuse is certainly an important factor in determining primary physical care. However, these allegations of abuse by Jane appear to have been made for the first time during trial. There were no incidents reported to the police nor did Jane ever seek a protective order against Paul. Jane's actions also contradict her claims she had suffered domestic abuse. She agreed to and signed, with the aid of counsel, a stipulation sharing primary physical care with Paul. This is

~~inconsistent with Jane's claim Paul is physically and verbally abusive. She~~
~~claims such abuse and yet she would still agree to leave Zachary in Paul's care.~~

The district court considers all testimony by witnesses from both sides and makes a finding based in part by the content of the testimony and in part by the credibility of the witnesses. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa App. 1998). We agree with Jane, the district court did not specifically address any claims of domestic abuse. However, this omission was not fatal in this case. Our supreme court has stated:

Although the trial court in *Ford*, as here, failed to specifically discuss these sections, those omissions were not fatal under our de novo review. We said: "The record makes clear that the court gave careful thought to the domestic abuse issue and found that it was not significant enough to be the sole factor in determining custody of the children." This is also true in the case at bar.

In interpreting what is sufficient to constitute a "history of domestic abuse," we find that a "history" is not necessarily established by a single documented incident . . . Nor does more than one minor incident automatically establish a "history of domestic abuse." It is for the court to weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed, not just to be a counter of numbers.

In re Marriage of Forbes, 570 N.W.2d 757, 759-60 (Iowa 1997) (citations omitted).

In the case at bar, the record does not even include a "single documented incident" of domestic abuse. As in the *Forbes* case, the district court carefully reviewed the evidence. It is clear from its decision, the district court concluded domestic abuse did not occur. The district court specifically addressed Jane's lack of credibility. We agree. We conclude the record fails to establish any "single documented incident" of domestic abuse and completely fails to establish

~~any history of domestic abuse. We agree with the district court's decision and~~
~~conclude that in Forbes,~~ the failure to specifically discuss the issue of domestic abuse was not error.

B. Home Environment. We have carefully reviewed the record and conclude the district court was correct in its determination awarding Paul primary physical care of Zachary would be in the child's long-term best interest. We conclude from our de novo review Paul would be more likely to provide an environment that would bring Zachary to a healthy physical, mental, and social maturity.

III. Visitations and Transportation Expenses. Although we are reluctant to change the visitation and transportation arrangements ordered by the district court, in this case we conclude Jane's summer visitations should be increased from four weeks to six weeks. We also conclude the parties should share equally all transportation expenses associated with the six-week summer visitation and the seven-day Christmas holiday visitation.

IV. Attorney Fees. Paul requests appellate attorney fees. A successful party does not have a vested right to appellate attorney fees, rather the court exercises its discretion in determining whether an award is appropriate. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa App. 1999). The court considers the parties' financial conditions, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Spiegel*, 553 N.W.2d 309, 320 (Iowa 1996). We decline Paul's request for attorney fees. Each party shall be responsible for his or her own attorney fees.

For the reasons given, we affirm custody and modify the summer visitation
and the travel expenses.

AFFIRMED AS MODIFIED.