IN THE COURT OF APPEALS OF IOWA

No. 3-034 / 92-663

Upon the Petition of

BELINDA JEANNETTE OVERTON,

Appellee/Cross-Appellant,

And Concerning

ANTHONY SCALISE,

Appellant/Cross-Appellee.

FILED
MAR 30 1993
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

The father appeals the district court's decision in an action to modify a paternity decree. The mother cross-appeals. **AFFIRMED AS MODIFIED.**

Steven L. Udelhofen, Des Moines, for appellant.

Joseph G. Bertogli, Des Moines, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

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HAYDEN, P.J.

The parties involved in this custody dispute, Belinda Overton and Anthony Scalise, are the natural parents of minor child, Tanya.[1] The parties began seeing each other shortly after Overton ran away from home at the age of fifteen. Overton and Scalise cohabited for three years. They were never married. Tanya was born to the parties in early October of 1987. Six months later Overton moved out and took Tanya with her.

On January 20, 1989, Overton filed an application to establish paternity. She alleged Scalise is the natural father of Tanya. On January 19, 1990, the trial court entered a paternity decree which provided visitation rights to Scalise. The court ordered Scalise to pay $45 per week in child support and to provide medical insurance for Tanya. Scalise's visitation privileges were expanded by a stipulated modification order filed on March 10, 1990.

At the time the original decree was filed, Overton was nineteen years old and Scalise was twenty-one years old. At that time, Overton was living with a male companion, who she claims is the father of Kassandra, born on February 15, 1991. This relationship later ended and Overton retained custody of Kassandra. At the time of trial, Overton had no appreciable employment record and was unemployed. She recently received her GED.

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[1]The parties disagree on the spelling of their daughter's name. For the purposes of this opinion, the child will be referred to as Tanya.

Scalise was born on September 9, 1966, and has been gainfully employed since he left high school after eleventh grade. Scalise is employed by the Iowa Methodist Medical Center and is pursuing a career as a radiology assistant. At the time of trial, Scalise resided with his girlfriend, her fourteen-year-old son, and the couple's daughter, Amanda, born in March of 1990.

On September 6, 1990, Scalise filed an application to modify the paternity decree. Scalise sought physical custody of Tanya. Overton filed a counter-application, seeking changes in the visitation schedule and an increase in child support. She sought to eliminate Scalise's weekday visitation on Wednesday from 9:00 a.m. to 7:00 p.m. A hearing was held and the trial court filed its decision on March 30, 1992. On the issue of child custody, the trial court found Scalise had failed to show a substantial and material change of circumstances and failed to show he possessed superior parenting abilities. The court stated both parents were immature and were unable to work together. The court expressed concern over the founded incidents of child abuse naming Overton as perpetrator. The court concluded any benefit the child would derive from a change in physical custody from Overton to Scalise did not outweigh disruption to the child. The court ordered Overton to cooperate with the Iowa Department

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of Human Services (DHS) concerning the incidents of abuse. Based on these findings, the trial court denied Scalise's application to modify custody. The court found Overton failed to establish a change of circumstances which would warrant increasing Scalise's child support obligation. The court modified the visitation schedule to better accommodate Tanya's educational needs. The court ordered, once Tanya is enrolled in pre-school or kindergarten, Scalise or his parents may pick up Tanya from pre-school or kindergarten at the conclusion of school on Wednesday and have Tanya until 7:00 p.m. on Wednesday evening. Finally, the court ordered Scalise to pay $750 toward Overton's attorney fees.

Scalise has appealed and Overton has cross-appealed.

Our standard of review is de novo. Iowa R. App. P. 4. Although we are not bound by the fact findings of the trial court, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). The Iowa Supreme Court has summarized factors this court must consider when determining grounds for modification.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively

> to the children's well being. The heavy burden upon a party seeking to modify custody stems 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 Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

I. **Custody.** On appeal Scalise contends the trial court erred in failing to modify and award custody of his daughter, Tanya, to him. After a thorough review of the record, we find Scalise has failed to show by a preponderance of evidence a substantial and material change of circumstances since entry of the original decree. Scalise has failed to show he possesses a superior ability to minister to Tanya's needs more effectively than Overton. Scalise contends Overton's lack of stability and poor financial status were not contemplated by the trial court. We disagree. Evidence indicating stability of the parties' separate households and financial status of each party was considered by the trial court.

Our primary concern is Tanya's welfare and long-term interests. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984); Iowa R. App. P. 14(f)(15). The two incidents of founded child abuse in which Overton is named as perpetrator are a serious concern. We, like the trial court, urge Overton to cooperate fully with the Iowa DHS concerning the incidents of abuse. We have reviewed the report and testimony of Dr. Kinnaird, a psychologist who

conducted evaluations of the parties and their daughter. Dr. Kinnaird was unable to recommend either parent as primary physical care provider.

Dr. Kinnaird's testimony and report, however, reveal Tanya is more emotionally attached to Overton. The doctor's evidence indicates Overton is better able to meet the emotional needs of the child. Dr. Kinnaird's report raised concern about Scalise's "level of insight and his appreciation of the complexities of parenting." Evidence also indicates Scalise has a history of assaultive behavior and the living environment he could provide Tanya would not be free from the risks of physical and emotional abuse. We find any benefit the child may derive from a change in physical custody does not outweigh the disruption for Tanya.

The presence of a half-sibling, Kassandra, in the custodial home in which Tanya resides also impacts our decision. Our courts are reluctant to separate half-siblings. In re Marriage of Holcomb, 471 N.W.2d 76, 80 (Iowa App. 1991) (citing In re Marriage of Orte, 389 N.W.2d 373, 374-75 (Iowa 1986)). Once custody of a child is fixed, it should be disturbed for only the most cogent reasons. In re Marriage of Hunt, 476 N.W.2d 99, 101 (Iowa App. 1991) (citing Frederici, 338 N.W.2d at 158). Scalise has failed to provide proof to meet his heavy burden of showing cogent reasons to modify custody.

We also consider the relationship between the parents. Tension between parents is a factor in determining if a custody modification is appropriate. In re Marriage of Stanley, 411 N.W.2d 698, 701 (Iowa App. 1987) (citing In re Marriage of Krebsbach, 395 N.W.2d 189, 191 (Iowa App. 1986)). The record shows the parties are immature and unable to cooperate or communicate. We are concerned about the effect the parents' inability to cooperate will have on Tanya. The parties must mature for the sake of their child.

In considering all of the circumstances surrounding this case, we hold change of Tanya's physical custody is not in her best interest. We affirm the trial court on this issue.

II. Attorney Fees for Trial. Scalise contends the trial court also erred in awarding $750 in attorney fees to Overton. Iowa trial courts have considerable discretion in awarding attorney fees. Hunt, 476 N.W.2d at 103 (citing In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983)). To overturn an award of attorney fees, the complaining party must show the trial court abused its discretion. Id. We find no abuse of discretion. We affirm the trial court's award of attorney fees.

III. Visitation. On cross-appeal, Overton seeks to restrict Scalise's visitation privileges. Overton requests Scalise's visitation be modified so as to terminate at 6:00 p.m., rather than 10:00 p.m., on alternate holidays and

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Scalise's birthday if such date falls on a night before school. Overton has failed to preserve this specific modification of visitation for appeal. However, in exercising our de novo review, we determine it is in Tanya's best interest to be returned to Overton at 7:00 p.m. on such days. We modify accordingly. We direct Scalise to return Tanya to Overton at or before 7:00 p.m. on any alternate holiday or his birthday, if such dates fall on a day before Tanya's school days.

IV. Child Support. Overton also seeks an increase in Scalise's child support obligation. The record shows Scalise is enrolled in a radiology assistant program; however, he is earning approximately the same amount of wages he was earning at the time the original decree was filed. Scalise's modest increase in gross income does not represent a substantial and material change of circumstances sufficient to warrant an increase in his support obligation. We affirm the trial court on the issue of support.

V. Attorney Fees on Appeal. Overton seeks attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision

on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We decline to award attorney fees on appeal. Each party shall be responsible for his or her own attorney fees on appeal. Costs of this appeal are assessed one-half to Scalise and one-half to Overton.

AFFIRMED AS MODIFIED.