IN THE COURT OF APPEALS OF IOWA

No. 7-355 / 06-0762
Filed October 12, 2007

IN RE THE MARRIAGE OF ERIC G. SAUER AND REBECCA L. BRIGGS-SAUER

Upon the Petition of
ERIC G. SAUER,
Petitioner-Appellee,

And Concerning,
REBECCA L. BRIGGS-SAUER, n/k/a
REBECCA L. BRIGGS,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Denver D. Dillard, Judge.

Appellant challenges the district court's modification of the visitation provisions of her dissolution decree and a finding by the district court that she was in contempt. **AFFIRMED.**

Carolyn Beyer of White & Johnson, P.C., Cedar Rapids, for appellant.

Crystal Usher, Cedar Rapids, for appellee.

Heard by Zimmer, P.J. and Eisenhauer, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

PER CURIAM

Rebecca L. Briggs appeals the district court's modification of the decree dissolving her marriage to Eric G. Sauer. Rebecca contends the district court (1) erred in determining findings made in an earlier hearing on Eric's petition for a injunction were res judicata, (2) should not have modified Eric's visitation with the parties' twin sons, and (3) should not have found her in contempt of court. She also contends she should be awarded attorney fees in the district court and seeks an award of attorney fees here.

BACKGROUND. The parties' marriage was dissolved on June 21, 2004. They stipulated to the terms of the dissolution and the district court incorporated their stipulation and made it a part of the decree. Rebecca was awarded sole custody of the parties' twin sons, who were born in September of 1998. Eric was granted supervised visits with the twins of not less than an hour a week. Tanager Place was placed in charge of supervising the visits. The decree provided the children's therapists, Trina Reiter of the Abbe Center and Jennifer Palmer of Tanager Place "shall have the mutual discretion to change the frequency, length and extent of supervision of said visitation." Eric was to have counseling for psychiatric care and to address domestic violence issues until his treating therapist found he has received maximum benefits from counseling and successfully completed the recommended treatment. Furthermore, the children were to continue counseling until their counselors believed the children had received maximum benefits from their treatment. It was further provided that Eric would be entitled to modify the terms of the visitation order on the mutual agreement and recommendation of Reiter, Palmer, and Eric's therapist.

Following the dissolution Eric sought additional visits and involvement with the children that Rebecca felt unadvisable and challenged. The parties made various filings. The three most relevant to this appeal are: (1) a November 29, 2004, application to modify visitation filed by Eric, (2) a May 2005 application by Eric for a temporary injunction, and (3) a June 2005 application by Eric for a rule to show cause asking Rebecca be found in contempt of court.

The application for a temporary injunction came on for hearing first. The matter was heard in 2005 and the district court made extensive findings of fact and denied the application for temporary injunction. No appeal was taken from that order.

In March of 2006 a hearing was held on both Eric's application to modify the dissolution decree and rule to show cause asking to have Rebecca found in contempt. Another judge presided. The court took evidence and noted that the July 2005 ruling was res judicata and/or issue preclusion on any issues identical to ones to be litigated in the March 2006 hearing.

The district court subsequently entered a decision finding that existing circumstances establish a significant and substantial change warranting a change in visitation. He then made provision for, among other things, a therapist to work with the parents and children, a supervisor of visitation, and a plan to increase the length of the visits and decrease the supervision. The court also provided that a report be filed when it appeared that the transition visitation process was completed and regular visitation could begin. The court set the regular visitation for Eric from 4:00 p.m. to 8:00 p.m. on Tuesday of each week as well as alternating weekends and specified holidays and vacation periods.

The court also provided for: (1) a neutral drop-off and pickup location, and (2) exchange of written information about the children, including the children's school and teachers and information on their medical and psychological care. The judge provided that the parties shall keep each other current on their respective addresses and telephone numbers, and that if either moves more than fifty miles from their current location they shall give a thirty-day prior notice. The court also modified Eric's child support obligation and made provisions for payment of unreimbursed medical expenses and counseling costs, but awarded no attorney fees.

The court found the evidence showed beyond a reasonable doubt that Rebecca should be found in contempt of court but no punishment be imposed. Rebecca was ordered to pay the court costs.

SCOPE OF REVIEW. We review the record de novo in proceedings to modify the custodial provisions of a dissolution decree. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). We give weight to the findings of the trial court, although they are not binding. *Id.*

Although there is no statutory right to appeal from a contempt order, the proceeding may, in a proper case, be reviewed by certiorari. *Opat v. Ludeking*, 666 N.W.2d 597, 606 (Iowa 2003); *In re Inspection of Titan Tire*, 637 N.W.2d 135, 140 (Iowa 2001). Though this issue is brought here by appeal it is proper for us to address it as a petition for writ of certiorari. Iowa R. App. P. 6.304. In a certiorari action, we may examine only the jurisdiction of the district court and the legality of its actions. *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). Illegality exists when the court's factual findings lack substantial

evidentiary support, or when the court has not properly applied the law. *Id*. Because certiorari is a law action, our review is for the correction of errors at law. *Titan Tire*, 637 N.W.2d at 140. Evidence is viewed in the light most favorable to upholding the district court's ruling. *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996).

RES JUDICATA/ISSUE PRECLUSION. Rebecca contends the district court erred in giving preclusive effect to earlier fact findings and that we should reverse thecourt's rulings and remand for a new trial. We have not considered the earlier fact findings in our review of all issues and consequently find it unnecessary to address this issue. We consider only the evidence that was introduced at this trial.

MODIFICATION OF VISITATION. Rebecca next contends she filed a motion to dismiss[1] Eric's application for modification and that the district court should have acted on her motion when there was not a consensus among experts to give Eric unsupervised visits. She further contends the district court should not have modified Eric's visitation schedule. She argues there was no consensus among the designated professionals that his visits should progress to being unsupervised and that the court should not have imposed a specific schedule without considering experts' opinions about visitation schedules and without accommodating Rebecca's personal schedule and the children's routine. She further argues the court made various directives that contravened the no-contact order between the parties and usurped the function of the Crime Victim Assistance program.

[1] She has failed to reference where in the appendix this motion appears.

In a modification action to justify a change in visitation, the party seeking modification, in this case Eric, must show there has been a change of circumstances since the initial decree. *See In re Marriage of Fortelka*, 425 N.W.2d 671, 672 (Iowa Ct. App. 1988). Generally, a much less extensive change of circumstances need be shown where the party is seeking a modification of visitation and not custody. *See In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa Ct. App. 1998); *In re Marriage of Jerome*, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985). The district court has discretion in determining whether modification is warranted, and we will not disturb that discretion on appeal unless there is a failure to do equity. *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987) (citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)).

A fact finder determines whether to accept or reject expert testimony, and if accepted, what weight to give it. *Trade Prof'ls, Inc. v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003). "Expert opinion testimony, even if uncontroverted, may be accepted or rejected in whole or in part by the trier of fact." *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996).

The district court made extensive findings. He found, among other things, that Eric had complied with all the requirements of the stipulated visitation clause in that: (1) he participated in all counseling sessions required by Paul Eggerman, Ph.D., (2) he took responsibility for his prior abusive acts and recognized they were wrong, (3) he had not violated the domestic abuse protective order, (4) he had paid for domestic abuse counseling for Rebecca, and (5) he had complied

with visitation terms dictated by Rebecca even when those terms were more restrictive than contemplated.

The court further found Rebecca has failed to comply with the terms and the spirit of the visitation clause in the dissolution decree in that she: (1) resisted certain visits, cancelled or shortened others, and resisted or refused makeup visits, (2) blocked Eric from receiving medical and school information on the children, (3) directly or indirectly caused termination of persons named as decision makers in the visitation clause who sought a more normal visitation schedule, (4) moved the children to a school where she was hired and made it clear to Eric he could not come on the school premises because of the domestic abuse protective orders, (5) instructed the children to keep secret the names of their teachers, (6) instructed the school staff to deny information to Eric, and (7) put the children in the middle and instructed them to tell their therapists they did not want to be with Eric. The court found at trial Rebecca was reluctant to reveal the school the children attended. The court also found that Rebecca gave evasive answers that were calculated to mislead the court and to create a false record of the facts of the case. We give deference to these credibility findings from the district court. *See In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

The court specifically found:

> The most profound and compelling evidence in this case came from the testimony and reports of the experts directly involved with the parties and the children. The opinions of Jane Pini, Jennifer Palmer, Trina Reiter, Abby Frazee, and Paul Eggerman were clear and unanimous in their conclusion that: [Eric] has complied with all of his responsibilities; [Rebecca] has blocked progress in visitation and that it is in the best interests of the minor children for visitation between [Eric] and them to be normalized.

> Several of the experts expressed frustration in the slow or nonexistent pace of any transition in the visitation in this case. All recommended that a transition period be defined leading to a normal unsupervised visitation schedule for [Eric] with [the children]. The evidence was overwhelming and unanimous that something needed to be done to move this process.

The district court referenced opinions and testimony and concluded there were changed circumstances in that Eric had shown he was ready for additional visits and the decree should be modified.

Our review of the record on appeal including reports from and testimony of the various experts clearly supports the district court's decision. Rebecca is a concerned and dedicated mother. However, she appears unable to deal with the reality that Eric is the children's biological father, the children like to be with their father, he has made great efforts to apologize and repent for past wrongs, re-establish his relationship with his sons, and do those things to improve that relationship and assure his sons' safety.

While Eric has moved to resolve issues, Rebecca has sought to put roadblocks in his path. Without detailing the record further, we note the testimony of Palmer, who supervised visitation from December 2003 through the spring of 2005. Her testimony, which appears below, is supported by other evidence, including the opinions of other professionals.

> Q. When did you discharge this case? A. The date that I discharged them was May 25, '05.
>
> Q. Why did you discharge the case? A. I discharged the case because I had felt that Becky was unwilling to cooperate with visits. I felt that she was not willing to put the best interest of Caleb and Joshua on continuing their relationship with their father. I felt that the children were being talked to about their father, or coached, because over time continuously things, you know, had came up that Mommy had said this, or Mommy had said that. I felt that since I was not allowed to go any further with the visitations, or the extent

> of the unsupervised visitations, that there was no point in me doing visitations.
>
> Q. Do you believe that it is in the best interest of the children for the visits to be unsupervised at this time? A. Absolutely.
>
> Q. Do you have any concerns for the children's safety in Eric's care? A. No.
>
> Q. Do you have any concerns about the types of discipline that he might use with the children in his care? A. No.
>
> Q. Do you believe that there is any prohibition in the court order against Eric having visits in his home? A. No.
>
> Q. Any prohibitions about having his mother or his father or stepfather present? A. No.

The district court carefully crafted the order to preserve Rebecca's wishes to minimize any contact Rebecca would have with Eric by providing a drop-off point for exchanging the children as well as providing that communications between the parties be in writing. Such protections were put into place even though there is no evidence Eric sought to violate Rebecca's protective order since the dissolution. Rather, the evidence on the issue is Eric has no intent to do so.

The modification as ordered is affirmed.

CONTEMPT. The district court found Rebecca in contempt for deliberately delaying, cutting off, and stalling Eric's visitation rights as contemplated by the parties' stipulation, which was incorporated in their decree of dissolution.

To find Rebecca guilty of contempt, a court must find beyond a reasonable doubt that she willfully violated a court order or decree. Iowa Code § 598.23 (2005); *Gimzo v. Iowa Dist. Ct.*, 561 N.W.2d 833, 835 (Iowa Ct. App. 1997). Eric has the burden to demonstrate Rebecca had a duty to obey a court order and failed to perform the duty. *Skinner v. Ruigh*, 351 N.W.2d 182, 185 (Iowa 1984).

The burden then shifts to Rebecca to produce evidence that suggests she did not willfully violate the order or decree. *Id*. Yet, the burden of persuasion remains on Eric to prove beyond a reasonable doubt that Rebecca willfully acted in violation of the court order. *Id*.

Evidence establishes willful disobedience if it demonstrates conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not. *Ervin v. Iowa Dist. Ct.,* 495 N.W.2d 742, 744 (Iowa 1993). The only defense available to Rebecca other than absence of willfulness in disobeying the order is indefiniteness or uncertainty of the order at issue. *Bevers v. Kilburg*, 326 N.W.2d 902, 904 (Iowa 1982); *Gimzo*, 561 N.W.2d at 835.

Parents can be held in contempt for interfering with visitation rights of a noncustodial parent or failing to return children after visitation. *Sulma v. Iowa Dist. Court,* 574 N.W.2d 320, 322 (Iowa 1998) (finding custodial father in contempt for refusing mother visitation); *Wells v. Wells,* 168 N.W.2d 54, 64 (Iowa 1969) (upholding finding of contempt against mother for failing to return her son after a visit); *Rausch v. Rausch*, 314 N.W.2d 172, 174 (Iowa Ct. App. 1981) (holding custodial mother in contempt for not honoring visitation rights of father).

There is substantial evidence to support a finding Rebecca violated the visitation order. Consequently, there is no basis to reverse the district court's finding. Furthermore, Rebecca is advised that successful parenting requires more than raising children. In being awarded sole custody she still must set aside her understandable resentments and act in her sons' interests. *See*

Petition of Holub, 584 N.W.2d 731, 732 (Iowa Ct. App. 1998); *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996).

She must be reasonable with Eric. *See Holub*, 584 N.W.2d at 732-33. She must also recognize her sons' desire to spend time with their father and be willing to make accommodations to allow them to do so. The courts of this state do not tolerate situations where a parent fails to cooperate and puts the other parent in a less than favorable light. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994).

ATTORNEY FEES. Rebecca contends she should have had attorney fees at the district court and that she should have them here. An award for attorney fees is not a matter of right but rests with the court's discretion and depends on the parties' respective financial circumstances and ability to pay. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa Ct. App. 1995).

We recognize both parties have each incurred in excess of $20,000 in attorney fees litigating the visitation issue, fees they cannot afford as they both have annual incomes of less than $35,000 a year. While Eric's income exceeds Rebecca's, that alone did not support a fee award at the district court level nor does that alone support a fee award here where the cause of much of the litigation and services that generated fees was the result of Rebecca's failure to approach the visitation issue reasonably. Eric denies that Rebecca should have attorney fees, contending that if anyone is awarded appellate fees it should be he, as he has once again had to incur significant legal fees just to have contact with his children. Though mindful of Rebecca's limited resources, we find it

equitable to order her to pay $700 towards Eric's attorney fees. In addition, costs on appeal shall be taxed to Rebecca.

AFFIRMED.