

IN THE COURT OF APPEALS OF IOWA

No. 6-191 / 05-1148

Filed July 26, 2006

TANYA ANN MCCONNELL,
Petitioner-Appellee,

vs.

BRIAN DAVID LEIMBACHER,
Respondent-Appellant.

Appeal from the Iowa District Court for Jasper County, Paul R. Huscher,
Judge.

A father appeals from the district court's denial of his application to modify
the custody of his son. **MODIFIED AND REMANDED.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Lee Walker of Walker & Billingsley, Newton, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

SACKETT, C.J.

Appellant Brian David Leimbacher appeals from the district court's denial of his application to modify the custody of his son Eric, born in February of 2001. Brian contends the order providing that he and the child's mother appellee Tanya McConnell have joint legal and physical custody of Eric should have been modified and he should have been named primary custodian for his son. We modify and remand.

SCOPE OF REVIEW. In this equity action, our review is de novo. Iowa R. App. P. 6.4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Hickey*, 640 N.W.2d 846, 847 (Iowa Ct. App. 2001) (citing *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981)). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g).

Courts are empowered to modify the custodial terms of a custody decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the child. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996).

BACKGROUND. The parties never married. Brian has a nine-year-old child from a prior relationship. The child lives with his mother and she and Brian have a custodial and visitation agreement. Tanya has three other children ages four to ten. Her children all have different fathers. Her two other sons, ages ten

and seven, live with her. Her eight-year-old daughter lives with her daughter's father and his current wife. He had received custody following a contested hearing.

Apparently at the time of Eric's birth Tanya and Brian yet lived together but separated shortly thereafter. By agreement Eric remained in Tanya's primary care. Brian continued to be involved with Eric and, while he may have supplied some of Eric's support, he paid no child support to Tanya. On March 9, 2004, a month past Eric's third birthday, the district court approved the parties' agreement (1) establishing Brian as Eric's father; (2) providing Tanya and Brian have joint legal and physical custody of Eric and that they alternate Eric's physical care every other week and share certain holidays; and (3) not requiring either party to pay child support to the other.

The parties operated under the agreed schedule until June of 2004. At that time Tanya was living with Robert Wince and Robert was the subject of a statutory rape investigation.¹ Brian, allegedly concerned about Eric living in the same household as Robert, retained custody of Eric and did not comply with the parties' agreement. Tanya sought to have Brian found in contempt for violating the custody order.

On June 18, 2004, a calendar entry continued the contempt matter until November 16, 2004. The entry included an agreement signed by Tanya and Brian to abide by the March 2004 order and to continue to share physical custody of Eric. The parties complied with the March 2004 order from June 18, 2004 through October 22 of that year.

¹ Apparently no charges were filed after Robert passed a lie detector test.

Brian testified that while they shared custody during that period he had concerns about Eric because on three occasions upon receiving the child from Tanya's care he noticed scratches and bruises on the child. Brian's mother also testified she noticed these scratches and bruises after the child was with Tanya.

Then on October 22, 2004, Brian picked Eric up from Tanya at a Wal-Mart near her home. Brian testified he immediately noticed that the child had bruises on his forehead and scrapes on his face. Within an hour Brian took Eric to his family doctor, who referred the child to Blank Children's Hospital. There a call was made to the Iowa Department of Human Services, making a report of possible child abuse. The staff at Blank noted scratches, bruises, and swelling on Eric's body namely: three scratches on his left back; an abrasion on his left chest; an abrasion on his right elbow; a bruise on his left cheek with scattered petechiae; an abrasion on the right cheek and eye; a bruise on his right waist; two bruises on his forehead; a bruise to the right of his penis; a swelling of his penis; and a bruising of his scrotum.

Brian testified when he asked Eric what happened the child told him "Robert did it." The only statement that Eric made to the social workers is that "Wobert did it."

A social worker then met with Tanya's two older sons at school. Tanya's son Jacob, who was ten years old, said Robert had been living with them for about a year and that Robert is okay sometimes and sometimes not. Jacob said Robert had a temper and fought with his mother but he had not seen him hit her. Jacob said he was not home when Eric got hurt and that Robert had spanked Zachary, Tanya's seven-year-old, for wetting himself. Zachary told the worker

Robert spanks him really hard on the butt with his hand. Brian testified Eric had a bruise on his behind that appeared to be a hand print.

When asked about the injuries, Tanya did not deny that they happened while Eric was in her custody. She testified Eric got them from playing, wrestling, climbing on bunk beds or shelves, and that he hit his head on the counter. She also said Eric fell on the floor while chasing the cat and got a rug burn on his face and that he must have hit a door or a bunk bed. She said the injuries to Eric's penis and scrotum happened because he pulls on his privates and all boys get bruises from wrestling.

A forensic examination report from Blank Hospital prepared by Forensic Examiner Jennifer Sleiter came to the following conclusions:

Injury to penis appears to be inflicted, possibly from a pinch injury. Bruise on right groin appears to be from blunt trauma, non accidental. Abrasion on the right cheek appears to be non accidental, possibly from a dragging force. Bruise on left side of face appears to be from blunt trauma, non accidental.

The report further stated that colposcopy photos and photos taken by the Department of Human Services had been reviewed by Dr. R. Shah and that the examination findings were reviewed with the Regional Child Protective Center, the child's father, law enforcement and the Department of Human Services.

Eric stayed with his father while the charges were investigated. On November 16, 2004, the district court made the following calendar entry, "Contempt hearing, until further order of court supervised visitation with petitioner (Tanya) due to Department of Human Services investigation and medical reports also until further order of the court."

On about November 20, 2004, the Department of Human Services concluded they could not determine who had rendered the abuse. Two days before, Robert took what was referred to as a "voice stress test" that he apparently passed, so the detectives told the social worker no charges would be filed.

A report from the Department of Human Services, showing it was mailed to Tanya, Eric, Jasper County Juvenile Court, and the Jasper county attorney, said a determination was made Eric had injuries but it was not clear as to the cause, time, place, or person who caused the injuries and there was no credible evidence Robert Wince caused the injuries. The department also found no abuse confirmed. The report noted Tanya had signed a new safety plan and approval was granted for Eric's return to her care. Brian denied he ever received a copy of the report.

Following the Department of Human Services report being prepared, Brian did not return to following the March 2004 agreement. He testified he followed the November 16, 2005 order that provided Tanya's visits were to be supervised until further order of court. He further testified that he set up three supervised visits for Tanya, and they were set up at his insistence. Tanya and her mother testified that Tanya asked for a hundred or fifty more visits.

In April of 2005 Tanya filed an application asking the district court to establish and enforce visitation. A hearing on Brian's application for modification was held on June 10, 2005. The district court filed a ruling the same day, finding no changed circumstances were shown, denying the petition, and ordering compliance with the March 2004 order.

The first question we need to address is whether the record shows there has been a substantial change of circumstances such as is necessary for a modification of the custody provisions of the earlier order.

By the time of trial Tanya and the children in her custody lived with Tanya's mother, her mother's husband, and Tanya's brother in her mother's two-bedroom house. However Tanya testified she spends about sixty percent of her time with Robert who lives in a home owned by his mother. Robert testified he and Tanya intend to move back in with each other after the couple has accumulated sufficient funds to purchase a home.

While Brian is not contending Tanya inflicted the injuries on Eric, it is clear that this little boy sustained injuries under Tanya's watch that were determined to appear to be non-accidental. Whether Robert was the perpetrator or someone else, Tanya bears responsibility for what happened. There was an attempt by Tanya's attorney through cross-examination to suggest Brian inflicted the injuries. Tanya does not specifically deny the injuries happened while Eric was with her, but provides several explanations as to how they occurred.

Brian may or may not have been fair with withholding custody from Tanya when Robert was under investigation for rape. He testified that perhaps law enforcement and Department of Human Services suggested he withhold Eric from Tanya while the statutory rape investigation was in progress. During the abuse investigation, Brian had Eric with Tanya's agreement and a calendar entry was entered providing she should have supervised visits until further court order. While she testified her requests for visitation were not granted, she waited nearly five months before filing a request to establish visitation.

There is little evidence of the respective parties' parenting abilities. Both parties' mothers testified for them. The father of Tanya's daughter testified he received the child's primary care after a two-day custody hearing and he did not believe Tanya to be a good judge of people. The mother of Brian's other child testified in his behalf. She said he was a good father, they had worked out support and visitation, and on only one occasion did they have problems.

Brian has met his burden of showing a substantial change in circumstances. Tanya failed to adequately supervise Eric while he was in her care and as a result he was injured. Brian has shown he will provide superior care. We modify the custody order and grant Brian primary physical care. We remand to the district court to determine visitation only after it is assured Tanya has a safety plan to protect Eric when in her care. The district court shall also determine Tanya's child support obligation.

MODIFIED AND REMANDED.