

**IN THE COURT OF APPEALS OF IOWA**

No. 9-433 / 08-1312  
Filed July 22, 2009

**IN RE THE MARRIAGE OF KIM HIMMELSBACH AND GREG HIMMELSBACH**

**Upon the Petition of**  
**KIM HIMMELSBACH n/k/a**  
**KIM GILBERT,**  
Petitioner-Appellee,

**And Concerning**  
**GREG HIMMELSBACH,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Benton County, David M. Remley,  
Judge.

The respondent appeals from the district court order granting the petitioner's application to modify the legal custody provisions of the parties' dissolution decree. **AFFIRMED.**

Kenneth F. Dolezal, Cedar Rapids, for appellant.

Ryan P. Tang of Law Office of Ryan Tang, P.C., Cedar Rapids, for  
appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

**EISENHAUER, J.**

Greg Himmelsbach appeals from the district court order granting Kim Himmelsbach's application to modify the custody provisions of the parties' dissolution decree. The court modified the decree to place sole legal custody of the parties' two children with Kim. Greg contends the court erred (1) in excluding witness testimony as a discovery sanction, (2) in giving the children's testimony limited consideration, (3) in determining the appropriate weight to give evidence, particularly in determining witness credibility, and (4) in denying his request for new trial. Kim seeks an award of her appellate attorney fees.

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g).

Greg contends the trial court erred in concluding the appropriate sanction for his failure to disclose a witness was the exclusion of the witness's testimony. The decision of the trial court to exclude witness testimony as a discovery sanction is discretionary and will not be reversed unless there has been an abuse of discretion. *Sullivan v. Chicago & N.W. Transp. Co.*, 326 N.W.2d 320, 324 (Iowa 1982). The record here shows repeated, flagrant disregard for the court's orders with regard to discovery matters. Greg failed to disclose the two witnesses in question until after the trial was underway, just prior to calling them.

The court excluded the testimony of one witness in its entirety. It allowed the other witness to testify, but prohibited testimony regarding her expert opinion. We find no abuse of discretion. See *Troendle v. Hanson*, 570 N.W.2d 753, 757 (Iowa 1997) (finding dismissal of the plaintiffs' case was an appropriate discovery sanction where the response to discovery requests was not received until two days prior to trial in spite of three court orders on the matter that spanned a one-year period).

In regard to Greg's next two assignments of error, which address the weight of the evidence and credibility of the witnesses, we again note our review is de novo. We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968).

On the basis of the forgoing, Greg also contends the court erred in denying his motion for new trial. Because we have already found the court's exclusion of witness testimony was not an abuse of discretion and because this court makes its own fact findings as it deems fit, we conclude new trial is not warranted. We conclude Kim has proved a substantial change of circumstances exists warranting modification. The parties' sons were fourteen and eleven at time of trial. Since 2004, they have been under the jurisdiction of the juvenile court. The oldest is now in a residential facility and the younger boy was placed with his mother by the juvenile court. After the juvenile court ordered supervised visitation between Greg and the boys, Greg chose to not visit them from April

2006 and May 2007. The district court made the following fact-findings and conclusions:

Kim and Greg have had very little communication with each other regarding the children's needs for the past three years. Greg has not been able to support Kim's relationship with the children and has attempted to undermine that relationship with his negative comments to the children regarding Kim. Kim has had difficulties supporting Greg's relationship with the children in that she has been resistant to the efforts of DHS to increase Greg's visitation with Alex. There is mutual distrust on the part of the parents and a high level of conflict. Kim is now opposed to joint custody, and Greg requests joint custody. Greg would not be a suitable custodian for the children for several reasons. Greg has knowingly exposed Alex to pornography. Greg has physically struck Alex which resulted in a 2003 founded child abuse report. Greg also has a founded report of denial of critical care in 2004 for his failure to give Alex his prescribed medication. Greg has lost his temper and engaged in loud arguments with service providers in the presence of the children. Greg has two convictions for OWI. Kim would be a suitable custodian for the children. However, Kim does have a finding in 2004 by DHS that she denied critical care to the children by failure to provide proper supervision. DHS records show this as "confirmed, not placed." Kim needs to spend more time with the children when they are in her home and needs to ensure that Calvin does not call Alex any names. The geographical proximity of the parents is not a factor.

Placing custody of the children with Kim is not in accord with the wishes of either child. Alex strongly prefers to have his primary physical care placed with Greg. Austin's wishes do not appear to be as strong as Alex's. However, it is evident that Greg has played upon Alex's emotions by calling Alex, who is under treatment for mental health problems, and telling Alex that he, Greg, is at a restaurant crying because he knows what is going on. I conclude that Alex is responding in part to what he perceives to be Greg's needs and believes that Greg needs him more than Kim. In addition, this is a modification proceedings so that the children's preference is entitled to less weight than in an original custody proceeding.

Greg has been convicted of domestic abuse assault as a result of an incident which occurred March 24, 2005, and involved his second wife, Diane, as the victim. Greg literally pulled large clumps of Diane's hair out of her scalp. Greg also agreed to a deferred prosecution as a result of a 1997 incident in which Kim was the victim. There is some risk to the safety of the children if

Greg has joint custody with unrestricted visitation for the reasons which are set forth above. However, it is difficult to evaluate the probability of this risk. There is some risk that the psychological and emotional needs and development of the children may suffer due to lack of active contact with and attention from both parents. The best example of this is the period of time between approximately April 2006 and May 2007 when Greg refused to participate in supervised visitation because he did not think there was a need for supervision. As a result, Greg had no in-person contact or contact by telephone or mail with either of the children during this period of time, and this was harmful to the children. However, placing sole custody of the children with Kim would not have to result in a lack of active contact with and attention from Greg because Greg would be entitled to reasonable visitation. Kim has actively cared for both children since the December 1999 Dissolution. Greg has not had the children in his home since Easter 2006.

Since the filing of the Decree of Dissolution of Marriage, Kim has demonstrated more stability than Greg and has shown more continuity in her dealings with the children. Kim has been supportive of Alex's mental health treatment and his medications. She has also cooperated with DHS and other service providers. On the other hand, Greg voluntarily had no contact with either of the children for approximately one year and has not been supportive of Alex's treatment program until just recently. Even though Karla Graves views Greg as being supportive with the exception of the time Alex first entered Four Oaks in December 2007, Greg has become angry and has yelled at Rosemary Sanford in the presence of Austin as recently as March 12, 2008, and became angry and yelled at Brian Jeffrey in the presence of Austin as recently as January 2008. In addition, Austin has lived with Kim since the Decree of Dissolution of Marriage, and with the exception of the time that Alex has spent in the hospital or in the shelter or in a PMIC facility, he has lived with Kim. Greg has shown potential recently. He has had several successful visits with Austin which were interactive and involved more than simply a shopping trip. He has also encouraged Alex at Four Oaks. However, it has been a little over eight years since the dissolution of marriage. Although Greg has made some positive steps in recent months, even then, his progress has been inconsistent as demonstrated by the arguments with Brian Jeffrey and Rosemary Sanford in the presence of Austin.

Both Kim and Greg have controlling personalities. However, there is a greater risk to the children's future if custody of the children is placed with Greg than if custody is placed with Kim. Although the parties have had joint legal custody since the Decree,

Kim has assumed sole custody on a de facto basis. After considering all of the factors set forth in section 598.41(3), The Code, I conclude that Kim has proven by clear and convincing evidence that joint custody is unreasonable and not in the best interests of the children to the extent that the legal custodial relationship between these children and Greg should be severed. I conclude that sole legal custody of the children should be placed with Kim.

Upon our de novo review of the record, we adopt these findings as our own and conclude the best interests of the children requires Kim be granted sole legal custody. Accordingly, we affirm.

Kim requests an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). 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 district court's decision on appeal. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We award Kim \$3000 in appellate attorney fees. Costs of the appeal are taxed to Greg.

**AFFIRMED.**