

FILED
DALLAS COUNTY, IA

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IN THE IOWA DISTRICT COURT FOR DALLAS COUNTY

IN RE THE MARRIAGE OF RENEE LYNNE MAKOHONIUK AND RICHARD DAVID MAKOHONIUK

Upon the Petition of

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NO. CDCD0005950 -

RENEE LYNNE MAKOHONIUK,
N/K/A/ RENEE MAK,
Petitioner,

]

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

And Concerning

RICHARD DAVID MAKOHONIUK ,

]

Respondent.

This matter came before the Court for trial on July 30, 31 and August 1, 2007. Petitioner appeared in person and with her attorney, Kent Balduchi, and respondent appeared in person and with his attorney, Jean Pendleton. After hearing the evidence and examining the exhibits, the Court now makes the following:

FINDINGS OF FACT

On June 7, 2005 a Dissolution of Marriage decree, approved by both parties and their attorneys, was filed in Dallas County District Court. The decree granted the parties joint custody of the three minor children; Monet, born June 15, 1992, Taylor, born February 15, 1994 and Matisse, born January 10, 1007. Physical care was placed with Petitioner, Renee Makohoniuk (Renee), subject to visitation rights of respondent, Richard Makohoniuk (Rick). The decree also ordered Rick to pay child support to Renee in the amount of \$1050 per month.

ENTERED
08/27/07

On or about July 19, 2005, the children informed Rick that Renee might be moving to Florida and taking the children with her. Renee did move to Florida on August 1, 2005 driving the children to the airport without explanation.

On July 26, 2005, Rick filed an application for modification of decree regarding custody, visitation, support and attorney fees, alleging that Renee has unilaterally and without legitimate purpose chosen to move to Florida and in so doing is attempting to take the children away from him, their home, schooling, friends and family.

On August 30, 2005, attorney Vicky Meade was appointed as guardian ad litem for the children.

With the children in Florida, Rick tried to maintain close contact with them through e-mails, telephone calls, flying to Florida almost every two weeks and flying the children to Iowa. He even purchased a home in the neighborhood where the children lived in Florida and left a car there. The reaction from Renee was mixed. He would get his visitation sometimes, sometimes not. He showed up at the children's schools and Renee called the police. Despite Rick's attempts to communicate with the children through telephone calls and e-mail, Renee restricted access between Rick and the children in a number of different ways including calling the police, telling the school that Rick was not to be there and simply not being present for visitation. When Rick was unable to see the children for an extended period of time because of their new residence in Florida, Renee still held him to the minimum amount of visitation as set out in the decree.

Rick's father died on July 9, 2006. Renee would not agree to the children returning to Iowa and Rick had to get a court order allowing the children to return to Iowa to attend the funeral.

While the children were in Florida, Renee filed a domestic abuse petition in late January 2006, just before a modification trial that was scheduled to commence in Dallas County District Court in early February 2006. A temporary protective order was entered resulting in no contact between Rick and the children for nearly two months. The modification trial was continued and the Florida Court dismissed Renee's petition for relief from domestic abuse on March 24, 2006, stating "The evidence is insufficient under Florida law to allow the Court to issue an injunction for protection against domestic violence." Respondent's Exhibit D. It was not until the Florida Court's dismissal that Rick regained his visitation rights with the children. By Renee's own admission, the children were not happy in Florida.

On July 25, 2006, Dr. Keri Kinnaird was appointed to conduct a child custody investigation. Renee thereafter moved back to Iowa with the children. However, in the fall of 2006, Renee's pattern of trying to limit Rick's contact with the children continued.

Dr. Sheila Pottebaum, a licensed psychologist with Child Psychiatry Associates, P.C., started working with the family in the summer of 2004, having started with Renee initially. She became re-involved with the family after Renee moved back to the Des Moines area. Initially, Dr. Pottebaum provided counseling services to the children. In late 2006, her services transitioned to the parents. She worked with Kim Stamatelos, a West Des Moines attorney specializing in mediation, to prepare a shared custody recommendation.

Dr Pottebaum reported that Monet was clear in wanting to be primarily with her father and having a good relationship with her mother. Taylor consistently voiced his desire to live with his father. Matisse wanted to spend time at both homes. Taylor and Monet believed there were too many problems in their relationship with their mother; there were always crises. Monet and Taylor seemed to have more trust with their father. Matisse seemed more neutral.

On February 5, 2007, with the assistance of Dr. Pottebaum and Kim Stamatelos, the parties entered into a stipulated temporary modification order that provided for joint legal and physical custody of the children. The order provided for therapy for the children with Dr. Pottebaum and provided that Dr. Pottebaum would supervise the co-parenting relationship and provided that in the event the parties were not able to agree upon any decision affecting the children's legal status, medical care, education, religious training, extracurricular activities or welfare, the parties would discuss their differences with Dr. Pottebaum. If the parties then could still not agree, Kim Stamatelos would mediate the disputes before resorting to litigation. They recommended that the police were to be called only when there was a danger to physical safety.

On April 3, 2007, Renee was arrested for physically assaulting Monet. She gave permission for Rick to have Monet that night. The next day, Renee filed a petition for relief from domestic abuse against Rick in Polk County District Court. A transcript of the proceedings before Polk County District Judge Stovall was admitted as evidence. The transcript revealed that Renee testified to no allegations of domestic abuse against Rick, only that there was an ongoing domestic dispute. She erroneously testified that Rick had visitation with the children, when in fact, the parties had joint legal and physical custody of the children pursuant to the order entered

in Dallas County District Court on February 5, 2007. Judge Stovall nonetheless issued a temporary protective order. On April 18, 2007, after hearing evidence from both parties and from Monet, Polk County District Court Judge Gamble dismissed the petition and quashed the temporary protective order. The Court stated, "Plaintiff failed to prove domestic abuse by a preponderance of the evidence."

After the domestic abuse petition was dismissed and the temporary protective order was quashed, Renee re-engaged in her repetitive behavior of calling the police in an attempt to discredit Rick. On May 18, 2007, Renee alleged that Rick caused a "huge harassment scene. Witnesses to the incident stated that the things Renee reported were "not truthful or only partly truthful." As a result, Renee was arrested for making a false report. These charges are still pending in Dallas County District Court.

Dr. Keri Kinnard is a psychologist supervisor at Orchard Place. She conducted a court-ordered custody evaluation. Her written report has been admitted into evidence, Respondent's Exhibit S.

Dr. Kinnard testified that it is her opinion that the children should be placed in the custody of Rick. This evaluation took about twice as long because the parties had twice as much to say. The impact on the children from the move to Florida was a major example of what the children describe as unpredictable behavior by Renee. It confirmed the children's notion that she was trying to distance them from their father. Taylor described a situation where Renee took the children to a motel and they thought they were going to a friend's. Monet stated that she was afraid that her mother was going to move again. In general the children were exposed to

negative statements by both parents about the other. While back in Iowa, the children have been able to disarm the alarm system in Renee's house so they could go see their father. Monet thought that Renee called the police one time reporting Taylor as a runaway, and knowing where Taylor was. Calling the police so frequently made it difficult for the children to trust Renee. Taylor and Monet expressed a desire to live with their father and wanted to spend more time with him. They felt it was emotionally and physically safer with him. Taylor shared that his mother kicked him out of anger and the girls reported that Taylor was the brunt of Renee's anger. For the most part the physical contact with Renee involved trying to control the children. Dr. Pottebaum found the children to be credible. She stated that she had four times the normal number of collateral contacts in this case. The consensus from these contacts was that the children were in a terrible bind. She made her recommendations for the reasons that the children felt physically and emotionally safer in their father's home, that there would be less chance of physical contact, and as long as the children would have to battle their mom to be able to see their father, it would impair their relationship with her.

Dr. Kinnard stated that her decision was not cut and dried and easily reached. Renee had sought mental health treatment and it was discouraged by Rick. His behavior is typical of someone who is controlling and is abusive. Renee is not able to sort out what is worth fighting about. She should choose her battles with the children more wisely. Renee expressed that the move to Florida was a mistake. In retrospect she could see that it was problematic for the children. When she returned to Iowa it was hoped that their behavior would settle down.

Almost all the conflicts related to something involving their dad. Renee felt that Rick was undermining her role as mother.

Dr. Kinnard feels that Renee reported as she saw her life to be. There is no evidence that she is out of touch with reality. She has many impulsive behaviors, not well thought out. She portrays herself as a victim, but Dr. Kinnard does not really see Renee as a victim.

The guardian ad litem for the children, Victoria L. Meade, has also filed a report with the Court. She recommends that the physical custody of the children be placed with their father. She states that Monet and Taylor were very clear with her that they want a relationship with their mother. Matisse wants her mother to be able to go to the Girl Scout Mother/Daughter events. The children were also adamant that they do not want any hitting, grabbing or physical discipline during Renee's visits. Ms. Meade is concerned that Renee cannot control her children without resorting to outside assistance such as the police or violence. She recommends that Dr. Pottebaum continue to be a resource for these parents if she agrees to do so and they seek out her help.

The parties have stipulated that their incomes at the time of the dissolution of marriage should be used in the computing of child support.

CONCLUSIONS OF LAW

In order to change the custodial provision of a Dissolution of Marriage Decree, the applicant must establish by a preponderance of the 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. In re Marriage of Frederici, 338 N.W.2d 156 (Iowa

1983). Furthermore, the party seeking to take custody from the other must prove an ability to minister more effectively to the children's needs. See In re Marriage of Whalen, 569 N.W.2d 626 (Iowa App. 1997). The burden placed upon the applicant stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. See In re Marriage of Bergman, 466 N.W.2d 274 (Iowa App. 1990). Also, when a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling, may be considered by the Court. However, a child's preference is entitled to less weight in a modification action than would be given in an original custody proceeding. See In re Marriage of Thielges, 623 N.W.2d 232 (Iowa App. 2000).

Renee has engaged in a pattern of conduct designed to limit Rick's contact with the children and to alienate them from him. This is evidenced by her ill advised move to Florida without letting Rick or the children know of the impending move, thereby seriously restricting Rick's contact with the children and making the visitation the parties had agreed upon in the dissolution of marriage decree impossible. Rick went through considerable expense and inconvenience in an effort to see his children. When he came to Florida, Renee would sometimes deny him his visitation. She called law enforcement authorities numerous times and filed a domestic abuse petition against him in Florida restricting him from contact with the children for almost two months. This petition turned out to be groundless as the petition was ultimately dismissed after a hearing before a Florida judge. After Renee moved back to Iowa, she resorted to calling law enforcement authorities numerous times attempting to have Rick arrested. Law enforcement eventually tired of her constant calls and Renee was arrested and

charged with making a false report. She filed another petition for relief from domestic abuse in Polk County District Court and was untruthful with the judge in her testimony to obtain a temporary protective order. This petition also was dismissed, but not until after Rick had to attend a hearing and defend himself against Renee's baseless accusations. She has made it difficult for the children to see their father on numerous occasions and the children have had to resort to disarming the security system in Renee's house in an effort to see their father.

The Court has observed the demeanor of the parties and concludes that Rick's testimony should be given more credibility than the testimony of Renee.

For all of the foregoing reasons, the Court finds that Rick has proven by a preponderance of the 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.

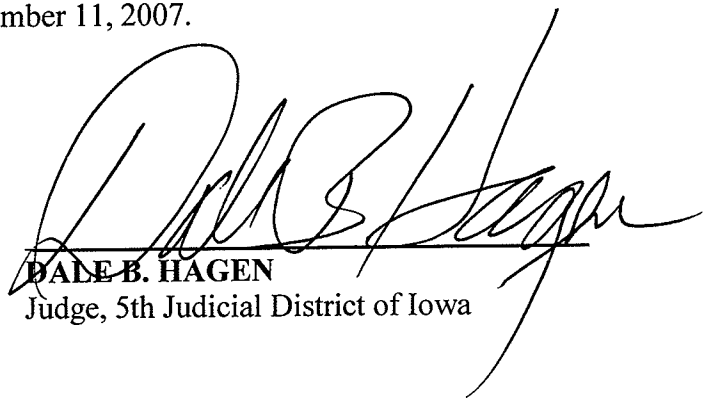
The Court has considered the recommendations of the guardian ad litem, Dr. Kinnard and Dr. Pottebaum and finds that their recommendations concerning custody are in the children's best interest. Dr. Kinnard has done a thorough investigation and the Court respects her opinions and recommendations as well as the opinions and recommendations of Ms. Meade and Dr. Pottebaum. The Court has not heard testimony from the children, but the desires of Monet and Taylor to live with their father have been made known through the testimony of other witnesses. The Court does not make the custody determination based solely upon the children's desires, but their preferences are given consideration along with the other evidence in this case. The Court agrees that it would be in the best interests of the children that their physical custody be placed with Rick.

The Court finds that Rick's requested relief in Exhibit Y is reasonable and will be adopted by the Court. The Court finds, however, that neither party shall be awarded attorney fees.

ORDER

Rick's attorney is directed to prepare a decree in accordance with these findings and conclusions, and submit same to Renee's attorney for approval "as to form" and to submit the same to the Court for signature and filing by September 11, 2007.

Dated August 21, 2007.



DALE B. HAGEN
Judge, 5th Judicial District of Iowa

- AB* Copies to:
- ✓ Jean Pendleton, attorney for respondent
 - ✓ Kent Balduchi, attorney for petitioner
 - ✓ Victoria Meade, guardian ad litem for the children