



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KAREN J. ALBERTS AND DAVID J. ALBERTS

Upon the Petition of	)	1
KAREN J. ALBERTS,	)	
Petitioner-Appellant,	)	Filed November 30, 1987
And Concerning	)	
DAVID J. ALBERTS,	)	7-301
Respondent-Appellee.	)	86-1767

Appeal from the Iowa District Court for Wapello County (No. CD 2039-1279), Harlan W Bainter, Judge.

The petitioner appeals from the trial court order changing the custody of the parties' minor children from the petitioner to the respondent. **AFFIRMED.**

Dennis W Emanuel of Webber, Gaumer & Emanuel, Ottumwa, for petitioner-appellant

Allan C Orsborn of Keith & Orsborn, Ottumwa, for respondent-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

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Petitioner wife appeals from the trial court order changing custody of the parties' minor children from the petitioner wife to the respondent husband. We affirm.

The petitioner Karen J. Alberts and respondent David J. Alberts were married in 1976. Karen has a son from a previous marriage, Michael Herman. Karen and David have two children: David, born in 1976, and Summer, born in 1977. A decree of dissolution of marriage was filed in 1980 and provided that Karen would have custody of the minor children. David moved to Massachusetts in 1979 when the parties separated. He had trouble getting telephone communication with his children, and in 1982 the decree was modified to permit scheduled times of visitation.

Since the dissolution of marriage, Karen married Greg Capell. Greg testified that Karen took amphetamines, once tried to commit suicide, threatened to kill her mother, Nancy Newton, and made it difficult for David to have telephone visitation with the children. Karen's marriage to Greg has been dissolved. Karen then moved to Arizona with Mike Peden and her children. Mike Peden has a criminal record, including a conviction of assault with intent to commit serious injury. David has remarried. David brought this application to modify the decree to change the custody of David and Summer to him. Before the trial, Karen, Mike Peden, and the children moved back to Iowa. The trial court changed the custody of the Alberts children to David. Karen appeals from the order modifying the decree.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the factfindings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and we must base our decision primarily

on the particular circumstances of the parties in this case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). Our paramount consideration in determining custody is the best interests of the children. Id.; Iowa R. App. P 14(f)(15).

To succeed in modifying the custodial provisions of a dissolution decree, the moving party carries a heavy burden. The Iowa Supreme Court has set forth the criteria to review in order to modify the custodial provisions of a dissolution decree in In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983), as follows:

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 more or less be 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 Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

The district court is granted reasonable discretion in determining whether modification is warranted, and that discretion will not be disturbed on appeal unless there is a failure to do equity. E.g., In re Marriage of Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983) (application to modify child support provisions); Norenberg v. Norenberg, 168 N.W.2d 794, 797 (Iowa 1969) (application to modify visitation).

I. Karen's first argument is that the trial court erred in holding that David had met his burden of proof to mandate modification of the custody of the children because (1) there had been no change in circumstances to justify a modification; (2) any alleged change in circumstances was in the contemplation of the

trial court at the time of the original decree; and (3) David has not proved a superior parenting ability.

We find there are substantial and material changes which have occurred which were not in the contemplation of the trial court at the time the decree was entered. We further find these changes adversely affect the children's welfare.

With regard to Karen, the facts which we find important to consider include: (1) Karen's usage of "speed" when she was able to obtain it; (2) Karen's efforts in thwarting David's telephone visitation with the children; (3) Karen's failure to consistently supervise the children; (4) an attempted suicide by Karen during a depressed stage in her life and talk of another suicide attempt; (5) Karen's inappropriate discipline of the children and calling her children vulgar names; (6) Karen's involvement with a man, Mike Peden (who has a criminal record which includes incarceration for two years on a conviction of assault with intent to inflict serious injury and probation in Iowa on burglary and OWI convictions out of Texas), with whom she and the children moved to Arizona, with Karen giving no notice to David of her whereabouts in order for him to continue his telephone visitation; and (7) Karen's changing her residence frequently since the parties' dissolution.

Those factors we look to with regard to David include: (1) David's remarriage to Gail Alberts (a licensed day-care operator), whose testimony revealed her commitment to caring for the children and her favorable reception to a change in custody of the children to them and (2) David's additional post-high school education at a technical school which has resulted in an increased earning ability. The record discloses that David has consistently attempted to maintain contact with his children, often with considerable difficulty in exercising his visitation rights. It is apparent that David and Gail have given great thought

to acquiring custody of the children; they have spoken with a counselor about potential problems that could arise.

Finding there have been material and substantial changes since the decree which have related to the children's welfare, we affirm the trial court's modification of the dissolution decree transferring custody of the children to David. David has proved his ability to minister more effectively to the children's long-term needs.

II. Karen contends the trial court erred in failing to hold that persuasive reasons do not exist to justify the disruption of the longstanding custody of the children with Karen since the dissolution decree was entered. She feels since she was the sole caretaker for seven years, the children should stay with her.

Our cases dictate that when circumstances have changed to the point that it is in the best interests of the children that custody be changed, then the court should change custody. In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979). We have previously addressed our reasons under Division I as to why modification is warranted. Karen cannot now take credit for being the sole caretaker when she has been able to limit the contact between the children and their father. Further, this type of activity will not be condoned by our courts and reflects unfavorably on a party seeking to retain custody. Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972). We are impressed by the fact that David has investigated the schools, recreational facilities, and religious training for the children. David's home has been shown to be the more stable environment in which the children's needs will be met.

III. Karen contends there are no compelling reasons to justify the separation of the children from their half-brother, Michael Herman. The trial court's ruling disclosed that this was the most distressing issue in the case and gave substantial

consideration to the fact that the two Alberts children and their half-brother are very close to each other.

In order to depart from the general rule that children of broken homes should be kept together, it must appear that separation may better promote long-range interests of the children. In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986). In Orte, the Iowa Supreme Court held that the parties' son should not be separated from his half-brother. However, of significant importance in that case is the fact that both parties "were at a virtual standoff in terms of their performance as parents" in terms of their life-styles and lack of financial stability so that the controlling factor in deciding the custody issue was the relationship between the two half-brothers. Id. at 374. In the case at hand we do not find that the parties' capabilities in respect to being effective parents is in equipoise; section I of this opinion sets out our discussion on the differences between Karen and David's abilities to minister more effectively to the children's needs. Thus, we distinguish those facts set out in Orte in deciding the custody issue from the facts in the case at hand.

We agree with the trial court that the change in custody is in the best interests of the Alberts children. David is not the father of Michael Herman and has no legal claim to his custody; David's efforts to obtain custody of his own children should not be thwarted because of this situation. The trial court's decision in this regard is equitable and we decline to disturb its ruling.

IV. Karen states that the trial court erred in giving significant weight to the testimony of (1) Greg Capell, the man to whom she was married for a period of time after her dissolution from David, and (2) Nancy Newton, Karen's mother. Karen feels both parties are biased against her.

Iowa Rule of Appellate Procedure 14(f)(7) recites that the court may give weight to the fact findings of the trial court, especially when considering the

credibility of witnesses. The rationale for this rule is set out in In re Marriage of Urban, 359 N.W.2d 420, 423-24 (Iowa 1984), as follows:

There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974). In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented. See Lehmkuhl v. Lehmkuhl, 259 Iowa 686, 692, 145 N.W.2d 456, 460 (1966).

In this case, the testimony of the witnesses . . . was irreconcilably in conflict on several key issues. In deciding those issues, particularly the question of child custody, we have relied heavily on the trial court's findings of fact. Those findings were clearly expressed, supported by substantial evidence, and led to a sound and equitable determination of the sensitive issues of child custody, visitation, and child support.

The trial court in the case at bar set forth a very detailed opinion in reaching its decision; it was well-reasoned and considered the testimony of all the witnesses, not just Greg Capell and Nancy Newton. The trial court viewed the witnesses and formed impressions as to their demeanor and credibility. We find the trial court reached an appropriate decision in this case and acted within its discretion in assessing the witnesses' credibility.

V. Karen's last contention is that the trial court did not give weight to the preferences of the children to remain in her custody. We find two problems with this argument: (1) we have no testimony from the children to the effect they desired to remain in their mother's custody, and (2) the trial court did give consideration to the children's testimony and stated the following:

The Court has carefully reviewed the notes taken at trial, and the findings set out at page 8 of the Court's Statement of Issues, Findings of Fact, Conclusions and Decree of Modification. The Court has also reviewed In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974), and In re Marriage of Grandinetti, 342 N.W.2d 876 (Iowa App. 1983). This Court believes it is significant that both cases hold the Court "may give some weight to the preference of the child, if the child is of sufficient age and maturity." This court did consider testimony

of both David and Summer, as well as Michael, in making its decision. It was obvious from the demeanor, responses, and appearances of the three children that they had been coached in their answers. It was very obvious, as the Court pointed out in its Ruling, that Michael appeared to be the spokesman, and his statements were, in some instances, voluntary and not in response to a question directed to him. Nonetheless, the Court considered all of the responses of the three children in deciding the question of custody in this case.

We find Karen's fifth argument to be without merit.

Accordingly, we affirm the trial court and transfer custody of the two minor children to their father, David.

AFFIRMED.