

IN THE COURT OF APPEALS OF IOWA

No. 2-314 / 91-1985

FILED

SEP 29 1992

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JAMES N. GEORGE AND TANYA R. GEORGE

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Upon the Petition of
JAMES N. GEORGE,

Appellee,

And Concerning
TANYA R. GEORGE,

Appellant.

Appeal from the Iowa District Court for Polk County,
Ross A. Walters, Judge.

Tanya George appeals a district court order modifying
the parties' dissolution decree and awarding physical
custody of the parties' child to James George. **AFFIRMED.**

Richard O. McConville of Scalise, Scism, Sandre,
McConville, Miller, Holliday, Schwarz, Carr & Renzo,
Des Moines, for appellant.

Tom Hyland and Teri Beyer of Hyland, Laden & Pearson,
P.C., Des Moines, for appellee.

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

HABHAB, J.

FACTS

James and Tanya George were married in August 1979 and divorced in December 1985. One child was born of the marriage: Alexa (Ali), born on October 10, 1981.

The custodial provisions of the decree were set forth in a separation agreement which was approved by the court and incorporated in the dissolution decree. It granted the parties joint physical and legal custody of Ali. Specifically, the decree provided for divided physical care to be alternated between each parent at three to six-month intervals for the two-year period following entry of the decree. The primary physical caretaker was to be decided when Ali enrolled in school, and the determination was to be based upon available school systems, Ali's preference, and each parent's situation.

Until August 1986, the parties exercised divided physical care of Ali as contemplated in the decree. At that time, Tanya was living in Memphis, Tennessee, and began to experience personal difficulties. She asked James to care for Ali for she was unable to do so. James agreed and Ali went to live with him in Orem, Utah. In the fall of 1986, the parties agreed Ali should be enrolled in kindergarten. Ali attended school in Utah until 1987, at which time James accepted employment in Iowa and moved with Ali to this state.

A regular routine began between the parties whereby James had physical care of Ali during the school year and Tanya had physical care for the substantial part of the summer and at Christmas. The parties did not make a deliberate determination as to which would have primary physical custody.

In April 1989, Tanya first raised the topic of changing Ali's custody. She maintained that during counseling prior to their dissolution the parties agreed one parent would have physical custody of Ali from kindergarten to sixth grade, whereupon the other parent would receive physical custody from seventh through twelfth grade. James was stunned by the suggestion and asked for more time with Ali. He admitted the alleged arrangement was discussed along with other possible arrangements during the parties' pre-dissolution counseling, but denied they reached any agreement on such an arrangement. Tanya again raised the issue of changing custody on a number of other occasions and pressed James for a commitment.

On November 20, 1990, James filed a petition to modify the dissolution decree. Tanya filed an answer and counterclaim seeking physical custody of Ali.

The district court held there had been a material and substantial change in circumstances warranting modification of the dissolution decree due to the fact the parties were unable to agree on a primary caretaker as contemplated in the decree. It rejected Tanya's argument that the parties

had agreed one parent would have physical custody of Ali from kindergarten to sixth grade and the other parent would have physical custody from seventh through twelfth grade. It determined that had the parties agreed on the alleged arrangement it would most likely have been set forth in the separation agreement for there was no reason to omit such a key provision from the dissolution decree. In addition, it found the alleged arrangement was inconsistent with the intent of the decree to keep open the determination as to who would have primary physical care.

The district court placed the burden upon Tanya to demonstrate that changing custody of Ali was in the child's best interest. It found both parents equally qualified to parent Ali. It further determined Ali thrived under the current custodial arrangement and there was no compelling reason to change it. Based upon these findings, the district court modified the decree and placed physical custody of the child with James subject to visitation with Tanya.

Tanya appeals and asks the court to award her appellate attorney fees. We affirm.

SCOPE OF REVIEW

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have

little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

ANALYSIS

I. Custody.

In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1991), in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

To change the custodial provision of a dissolution decree, the applying party 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, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id. See also In re Marriage of Gravatt, 371 N.W.2d 836 (Iowa App. 1985).

This burden stems from the principle that once custody of a child 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).

We adopt the following findings of the district court as our own:

[A]li is a happy and well-adjusted child. Her teachers describe her as excellent both academically and behaviorally. She is perceived as happy and affectionate. Though she started early for her age, her academic performance has earned her a place in the Gifted and Talented program. Counsel stated the point well: "During the last five years, Ali has developed into a bright, vivacious, intelligent, friendly, caring and stable child through the nurturing and relationships with both of her parents."

* * * *

[A]li has thrived under the existing custodial arrangement, and there is no good reason to change it.

(Emphasis added).

Tanya wants to take physical custody away from James where Ali has been receiving proper care and nurturing for over six years. Ali has thrived in her present environment. Tanya even admitted during her testimony she did not feel she could do a superior job of ministering to

Ali's needs. She simply claims that because of the alleged agreement she is entitled to have physical care of Ali once she reaches seventh grade.

The district court determined Ali thrived under the current custodial arrangement and there was no compelling reason to change it. It ultimately held it was in Ali's best interest to be placed in the parties' joint custody and in James's physical care. In making its decision, the district court considered the factors set forth in Winter, 223 N.W.2d at 166-67. We agree with the findings of the district court and hold it is in the best interest of the child for the parties to have joint custody and for James to have primary physical care of Ali, subject to visitation with Tanya. We affirm the district court on this issue.

The appellant argues on appeal that the trial court misplaced the burden of proof. She contends the burden to prove the elements of modification should rest with James since he brought the action. The trial court evidently concluded that since James had Ali's custody for such an extended period of time, it was for Tanya to prove that a change in custody was in the child's best interest. Although we are inclined to agree with the trial court, we need not resolve that question for even if the burden of proof is placed with James, we hold he met it.

II. Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties'

financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Tanya argues she is entitled to appellate attorney fees. We disagree. We find the parties shall each pay his or his own attorney fees on appeal.

CONCLUSION

After considering all issues presented, we affirm the district court.

Costs of this appeal are taxed to the appellant.

AFFIRMED.