FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ELVA J. McBRIDE AND WILFORD D. McBRIDE

Upon the Petition of)
ELVA J. McBRIDE,)
Petitioner-Appellant,) Filed August 30, 1983
And Concerning)
WILFORD D. McBRIDE,) 3-190
3-69216
Respondent-Appellee.)

Appeal from Polk District Court - Rodney Ryan, Judge.

Petitioner wife appeals from the judgment of the trial court modifying the custody provisions of the parties' dissolution decree. AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.

Diane L. Dornburg and Robert C. Oberbillig, Des Moines, for petitioner-appellant.

Gerald W. Crawford of Neiman, Neiman, Stone & Spellman, Des Moines, for respondent-appellee.

Susan L. Ekstrom, Des Moines, for the parties' children.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel and Hayden, JJ.

DONIELSON, J.

Petitioner wife appeals from the judgment of the trial court modifying the custody provisions of the parties' dissolution decree. She claims that the children's best interests require that their custody be given to her with limited and supervised visitation allowed to respondent husband. She also asserts that: 1) the court erred in failing to award her specific visitation rights if the custody decision is upheld; 2) she was denied a fair trial by the trial court's hostile attitude toward her and her attorney; 3) the court erred in making its ruling without specific findings of fact and conclusions of law; and 4) the court did not comply with our prior order remanding this case for child-in-need-of-assistance proceedings. Our review is de novo. Iowa R. App. P. 4. We affirm in part, modify in part, and remand.

The decree dissolving the marriage of Elva and Wilford McBride was entered on July 23, 1979. By agreement of the parties, custody of their two children (Porchia, born in 1973, and Jeffrey, born in 1977) was awarded to Elva.

In 1980, the parties began having problems with visitation. Elva believed that Wilford had sexually abused the children, and she would no longer allow him to visit them. She filed an application for modification of the decree requesting that Wilford's visitation be restricted. Wilford in turn filed his own application for modification of the decree requesting that custody of the children be transferred to him. At the hearing on these applications and on various allegations of contempt, there was testimony regarding, among other things, the allegations that Elva beat Brenda, her daughter from a previous marriage, and that Wilford sexually abused the parties' children. During a break in the trial, Elva was arrested on a charge of second-degree burglary.

Following the trial, the court made an oral ruling that custody of the two children should be immediately transferred to Wilford "based on the actions of the

petitioner shown in the record in regard to Jeffrey and Porchia outside of the basic caring for the children," which it found Wilford was equally capable of providing. The trial court found that Elva's allegation that Wilford sexually abused the children had not proven to the extent that Wilford's visitation should be limited or supervised. The court offered to enter a written order immediately if either party felt it was necessary. Neither party requested an immediate order, and custody was transferred without one. Elva filed a notice of appeal that same day. Almost a month later, the trial court filed its written findings of fact, conclusions of law and decree.

Wilford moved to dismiss Elva's appeal on the ground that the notice of appeal had been filed before final judgment was entered. The supreme court granted permission for an interlocutory appeal pursuant to Iowa R. App. P. 1(c) and 2 and denied the motion to dismiss.

After submission to this court, we filed an opinion indicating our belief that serious questions were raised as to each party's fitness to have custody. We therefore vacated the trial court ruling appealed from and remanded the case to the trial court with directions to refer the matter to the county juvenile probation office for proceedings pursuant to Iowa Code § 232.87 (children in need of assistance). In re Marriage of McBride, No. 3-66233 (Iowa Ct. App. Oct. 8, 1981). We also stated, however, that the parties could present evidence to the trial court of matters occurring since the ruling appealed from which would render "moot or unadvisable" the referral of the case to the juvenile probation office.

A hearing to present such evidence was held. A minister, a day school teacher, and two neighbors of Wilford's, one of whom was also a social worker, testified that in Wilford's care the children appeared to be neat, clean, well-fed, and well-behaved and that they were not afraid of him. Elva presented evidence showing that she had been acquitted on the burglary charge, that her ex-husband

had been awarded custody of Brenda, that Wilford had restricted her visitation with their children to times when she was accompanied by another person, and that on the day of the trial court's oral modification, the children had cried and screamed when they were told they had to go with Wilford. The children have been with Wilford since the day of the oral modification.

After the hearing, the trial court found that the evidence showed that the "past failings of respondent husband have been sufficiently and adequately resolved," that "the two minor children are well cared for by respondent," and that "their best interests dictated that they remain in the custody of respondent." Based on these findings, the trial court concluded that referral of the matter to the juvenile probation office was "moot and unadvisable." It ordered that custody remain with Wilford with Elva to have reasonable rights of visitation. Elva brought this appeal.

I.

The primary issue in this emotionally-charged case is the determination of who should have custody of the children; specifically, did Wilford sustain his burden of proving that the custody provisions in the original decree should be modified in his favor? As in all custody cases, our primary consideration is the long-range best interest of the children. Iowa R. App. P. 14(f)(15). The principles guiding our determination of the propriety of a custody modification were summarized in In re Marriage of Morton, 244 N.W.2d 819, 821 (Iowa 1976):

> In such cases, the party seeking a change in custody has a burden of showing the circumstances extant at the time the original decree was entered have changed so materially and substantially as to warrant transfer of the children to his or her custody. The parent seeking to take custody from the other must show some superior claim based on his or her ability to minister, not equally, but more effectively to the childrens' well-being. . . . In deciding the question, we seek neither to punish one parent nor to reward the other. (citations omitted)

After carefully considering the entire record, we find no reason to disturb

the trial court's conclusion that circumstances since the decree have changed such that Wilford should have custody of the children. We first note that both Wilford and Elva love their children very much and have the ability to take care of their basic needs. Since the children have been in Wilford's custody, they have been well taken care of and are living on his farm in Madison County. Their current environment is more stable than that with Elva who had four different residences between the entry of the original decree and the modification hearing.

The most significant changes in circumstances, however, involve two factors. First, it is undisputed that Elva has on occasion physically abused Brenda, her child by a previous marriage. Admittedly, Elva has not treated Porchia and Jeffrey, the children involved here, in that way and it is also true that Brenda was causing some special problems for Elva. Like the trial court, however, we cannot ignore these incidents of child abuse. If Porchia and Jeffrey for any reason would become hard to handle under Elva's care, we cannot be sure that she would not react to them as she did to Brenda. We are also very concerned about Elva's cavalier attitude toward Wilford's visitation rights. The supreme court has held that a custodial mother's denial of visitation rights to the noncustodial father "is a most serious reflection on her capacity to retain custody." Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972). Even though the court ordered supervised visitation to allay her fears for the children's safety with Wilford, she refused to comply because, among other reasons, it was "inconvenien[t]" to do so. We do not consider Elva's burglary arrest since she was later acquitted by a jury.

Elva's primary argument that Wilford should not have custody and that his visitation rights should be limited involve allegations of sexual abuse on his part against the children sometime around Thanksgiving in 1979. It is not necessary to specify the allegations; suffice it to say that, if proven, they would cast serious doubt on Wilford's parenting abilities. Elva maintains that, based on the children's

statements, Wilford sexually abused them; Wilford, on the other hand, steadfastly denies it. In the light of this and other relevant and contradictory testimony, we give special weight to the trial court's findings on the credibility of the various witnesses. Iowa R. App. P. 14(f)(7). The trial court, who viewed the witnesses and was able to observe their demeanor, is in a much better position to evaluate witness credibility than are we who have only a transcript to read. The trial court here made the following findings regarding the credibility of the sexual abuse charges:

> The background of the allegations against the Respondent, in that the children did not verbalize their allegations until some two months following the incident but miraculously were able to be very explicit six months after the incident . . . leads the Court to find that the chances of fabrication by Petitioner were far greater than by Respondent.

We note that Susan Ekstrom, an attorney appointed to represent the children, also indicated her belief that Wilford's testimony was more believable than was that of Elva. We are not in a position to say that the trial court erred in finding Wilford more credible than Elva.

Given the undisputed testimony in the record, we agree with the trial court that Wilford sustained his burden of proving the elements required to modify the custody provisions of the decree. The order granting custody to him is affirmed.

We agree with Elva, however, that she is entitled to specific visitation rights. The trial court allowed her "regularly scheduled mutually agreed rights of visitation . . . supervised by a mutually agreed third party" (emphasis added). If the record in this case demonstrates anything, it is that the parties have been unable or unwilling to agree on anything relating to the welfare of the children. We therefore remand to the trial court for the limited purpose of specifying Elva's visitation rights and naming the third party who will be responsible for supervising her visitation. We admonish the parties to adhere to the visitation terms to be set down by the court on remand.

II.

Elva's remaining issues need not long detain us. The trial court complied with Iowa R. Civ. P. 179(a) when it issued its written findings of fact, conclusions of law and judgment on February 24, 1981. Elva's claim that the court had no jurisdiction to enter its written judgment after her January 30, 1981, notice of appeal from the court's oral order granting custody to Wilford is without merit. The court specifically indicated in its oral ruling that a formal written order would be entered. The oral ruling was therefore not an appealable final judgment and the court still had jurisdiction to enter its written judgment of February 24. In re Marriage of McCreary, 276 N.W.2d 399, 400 (Iowa 1979).

Nor do we find any merit in Elva's claim that she was deprived of a fair trial by the actions of Wilford's attorney and the trial court. The attorneys for both Wilford and Elva were forceful and effective advocates for their clients. Any complaints directed at Wilford's attorney could just as easily be directed to Elva's attorneys. Her allegations regarding the actions of the trial court are concerned mainly with its rulings on evidence and motions for continuance. We believe those rulings were correct.

Finally, Elva contends that the trial court erred in failing to comply with our order of October 8, 1981. Although admittedly not clearly stated in that order, our obvious intent was to provide for some sort of independent investigation into the various allegations of misconduct on the part of both Wilford and Elva. The trial court would have been well-advised to have this independent investigation available to it. The evidence produced by able counsel for both sides was totally incompatible with each other. One side or the other had to be untruthful. The hearing held on October 20, 1981, was of marginal use to that purpose. However, the evidence presented at that hearing did indicate that the children were being well cared for in Wilford's custody and that they loved him and enjoyed living with

him. The court could therefore have concluded that, given the current situation, referral to the county juvenile probation office would be "moot or unadvisable." The court substantially complied with our order. In addition, any remand for a completely new and independent investigation would unduly lengthen this already protracted litigation. Both the parties and the children deserve to have this long and extremely unpleasant battle come to an end so as to bring some semblance of order into their lives.

The order modifying the decree so as to award custody to Wilford is affirmed. The cause is remanded with directions to specify Elva's visitation rights and the third party who shall supervise her visitation. Each party shall pay his or her own attorney fees incurred in this appeal. Costs are divided equally.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED WITH DIRECTIONS.

All judges concur, except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting).

I would grant custody to the petitioner-appellant.