IN THE COURT OF APPEALS OF IOWA

No. 9-074 / 97-2217
Filed March 31, 1999

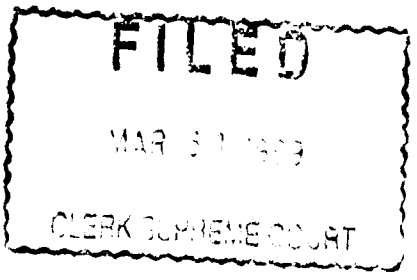
WILLIAM ALLEN BROWN, JR.,

Petitioner-Appellant,

vs.

SHARI R. FARBER,

Respondent-Appellee.



Appeal from the Iowa District Court for Pottawattamie County, Gordon Abel, Judge.

William Brown appeals from the district court's ruling denying his petition for modification of a custody order. **AFFIRMED.**

Michael J. Winter, Council Bluffs, for appellant.

Shari R. Farber, Fremont, Nebraska, pro se, appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

William Allen Brown ("Bill") appeals from the district court's ruling denying his petition for modification of a custody order. We affirm.

Bill and Shari have two children together: Aspen Nicole, born March 18, 1993, and Kaylie Rene, born February 6, 1994. These children were born of a five-year relationship which ended in June 1996; Bill and Shari never married.

The hearing on Bill's petition to establish paternity, custody, visitation, and child support was held on April 7, 1994. Bill's paternity of the two girls was established and the parties were granted joint custody. Primary physical care of the girls was awarded to Shari, subject to Bill's rights to reasonable visitation. Bill was ordered to pay child support in the amount of $250 per month. Bill has always exercised visitation and has paid the court-ordered child support.

Shari was born in March 1970. She is a high school graduate and has had at least six employers since 1994. She has also experienced periods of unemployment during which she received unemployment benefits and food stamps. She was unemployed at the time of trial but testified she was supposed to start a new job with a salary of $24,000 per year.

Shari has lived in at least eleven places in three states between September 1993 and the time of the trial. She had been evicted at least three times. At one point, she spent two nights sleeping in her car with the girls and she has also spent an approximate total of six or seven weeks in shelters. The testimony shows Shari had difficulty paying rent on time, if at all.

Shari has apparently also had difficulty paying babysitters and has changed babysitters a number of times. One day care provider testified Shari was late paying her, still owed her money, and Shari always had an excuse for not paying on time. She also testified Shari would pick the children up late or tell her another individual would be picking them up, but when the individuals would not show up or when called, said they did not know they were supposed to pick up the children.

Bill was born in March 1971. He is also a high school graduate and co-owns a Kwik Shop franchise with his mother. With help from a government program and his parents, Bill was able to purchase a two-bedroom home thirteen months before the trial. Bill's mother apparently had been making his car payments and allowing him to pay her a small payment on the house each month.

Bill admits to an OWI conviction six years prior to trial. He attended outpatient treatment and AA classes after his OWI arrest. He also has attended anger control classes following a conviction on a domestic abuse incident involving Shari in May 1994.

Shari was arrested on December 17, 1996, on charges arising from Shari's forging a check on her grandmother's account. On December 18, 1996, Bill filed this application to modify the custody order. Bill was granted temporary custody of the girls; they were returned to Shari on February 17, 1997.

The hearing on Bill's application for modification was on August 7, 1997. At the hearing, Bill offered the testimony of a private investigator he had hired to investigate Shari's residences and child care providers.

At the time of trial, Shari had lived at her then-current residence since April and her boyfriend had been sharing expenses. Shari testified she intended that this residence would not be a temporary one.

The testimony established the girls were well taken care of by Shari; no one was of the opinion Shari was a bad mother, just that there had been instability in her life. The psychologist reported, in part:

> [Shari] likely has hidden feelings of insecurity and dependency, however, there is no suggestion that her psychological makeup will impair her ability to care for her children. Their daughters appear to be adequately adjusted and happy children who have met all their developmental milestones. They appear attached to both their parents, and they respond to them appropriately. In summary, both Mr. Brown and Miss Farber appear to be adequate adults. They both appear to have the necessary skills to adequately care for their daughters, and they both appear concerned about them. Although Miss Farber's living arrangements have been very unstable over the last year, her psychological profile suggests that she is emotionally and cognitively able to provide a stable home life for her children. *However, if she continues to move around frequently and does not provide a stable home environment for her daughters, the children will be at risk for adjustment problems, and custody should be given to the father.* (Emphasis added.)

The district court concluded Bill failed to meet his burden of proof and denied the petition to modify custody.

I. STANDARD OF REVIEW. Our review of child custody modifications is de novo. Iowa R. App. P. 4; *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N.W.2d at 28.

II. SUBSTANTIAL CHANGE. Custody, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). To change a custodial provision of a paternity order, the party seeking modification must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)). The change must be more or less permanent and relate to the welfare of the children but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998).

The burden to modify custody provisions of a paternity order is a heavy burden. *See In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998). The question is not which home is better, but whether the parent seeking modification can offer the children superior care. *Id.*; *Whalen*, 569 N.W.2d at 628. Bill must show an ability to minister more effectively to the children's well-being. *See Whalen*, 569 N.W.2d at 628. If both parents are found to be equally competent to minister to the children, custody should not be changed. *Id.*

Bill contends he should have been awarded primary physical care of the children because of the stability of his employment and residence. We disagree.

First, Bill makes no claim nor does the testimony show he has superior parenting skills or that Shari is not a good mother. Second, there was no showing the

children had been adversely affected at the time of trial by the instability in Shari's life. To the contrary, by all accounts the children are well cared for and happy. Third, we note although Bill expresses concern about the instability of Shari's residences, the record indicates he did nothing to help Shari provide stability for the children during the time periods in question, even though he had the ability to do so.

Finally, and most importantly, we discuss the issue of Shari's instability. At first glance, the past instability in Shari's life appears to support the granting of Bill's petition for modification. However, the district court found Shari to be a good mother in all respects except for her instability. The psychologist agreed. The district court concluded Shari had taken steps to end her period of instability and that she had the ability to do so. The psychologist once again agreed and stated, "[S]he is emotionally and cognitively able to provide a stable home life for her children." The psychologist only supported a transfer of custody to Bill if her instability continued in the future.

We conclude, as did the district court, Bill has not met his heavy burden of proof of showing conditions since the order was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change.

For these reasons, we affirm the district court's ruling denying Bill's petition for modification of the custody order.

AFFIRMED.