IN THE COURT OF APPEALS OF IOWA

No. 9-169 / 98-0488
Filed April 30, 1999

IN RE THE MARRIAGE OF RENEE JEAN KLEINSMITH AND MICHAEL DENNIS KLEINSMITH

Upon the Petition of
RENEE JEAN KLEINSMITH,

Petitioner-Appellee,

And Concerning
MICHAEL DENNIS KLEINSMITH,

Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Respondent appeals from a court order denying his application to modify the child custody provisions of the parties' dissolution decree. **REVERSED.**

Harold J. Delange, II, Davenport, for appellant.

Catherine P. Alexander, Davenport, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

MAHAN, J.

Michael Kleinsmith appeals the decision of the district court which denied his application for modification of the custody provision of the parties' dissolution decree. We reverse the decision of the district court.

Renee and Michael Kleinsmith were previously married. They have one child, Lindsay, who was born on October 3, 1987. Under the terms of the parties' dissolution decree, which was entered on September 24, 1992, Lindsay was placed in the primary physical care of Renee.

At the time of the dissolution, Renee was attending college and working part-time in food service at DeWitt Community Hospital. She later worked as a general laborer for American Honda. During this time, Renee and Lindsay were living in Davenport, first in an apartment, then in a duplex.

Renee obtained her college degree in August 1993. She and Lindsay moved to Des Moines, where Renee was employed in public relations for Food Bank of Iowa and earned $17,000 per year. After three months, Renee decided she was unhappy with this job, and she and Lindsay moved in with her parents in DeWitt. She sold radio advertising for about one month, then went back to work at American Honda where she earned about $13,500 annually.

In June or July 1994, Renee began working with Marriott Food Service ear about $15,600. In August 1994, Renee and Lindsay moved in with Steven Cc Renee and Steven were married in September 1995 and they moved with Li

a new home. The same month, Renee began working as a general laborer at Bawden Printing, where she has annual income of about $17,800.

Renee and Steven had many arguments, which sometimes became physical altercations. Steven sustained fingernail scratches on his face, neck, and arm from one of these arguments. The physical violence spread to Lindsay. The Department of Human Services issued a founded report of physical abuse against Renee because she hit Lindsay in the mouth. Lindsay sustained a chipped tooth due to this incident.

Renee and Steven separated in approximately January 1997, and Renee moved with Lindsay to an apartment. In May 1997, they moved to a townhouse. Renee's current boyfriend, Scott Cristner, also lives in this home. Renee was divorced from Steven in August 1997. At one time, Renee and Scott were planning to move to Florida with Lindsay, but they have since changed their plans.

At the time of the dissolution, Michael was living in Davenport and working at Valley Beverage as a truck driver. In the spring of 1994 he moved to a home in Bettendorf owned by Tammy Holzerland. Michael and Tammy plan to be married. Michael still works at Valley Beverage, but is now a salesman earning an annual income of about $24,400. He is also a volunteer firefighter.

For a period of time, from about February to August 1997, when Renee and Steven were separated, Lindsay spent most evenings at Michael's house. During this period, her grades at school improved. Her grades declined again slightly when she began again to spend most evenings with Renee. Michael is involved in Lindsay's

school activities and has gone to parent-teacher conferences. He lives in a home near an elementary school and Bettendorf High School. He has brought a fire truck to her school for show and tell.

On August 30, 1997, Michael filed an application to modify the custody provision of the parties' dissolution decree. The district court denied the request for modification, finding Michael had failed to show a substantial change in circumstances.[1] Michael has appealed.

Modification proceedings are reviewed de novo. Iowa R. App. P. 4. In child custody cases, the governing consideration is the best interests of the children. Iowa R. App. P. 14(f)(15).

To change the custody set by a dissolution decree, the party seeking the modification must establish by a preponderance of the evidence conditions have so materially and substantially changed since the decree the child's best interests make

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[1] In the decree of dissolution filed September 24, 1992, the district court stated in part:

> As stated, and in balance, the Court cannot make a decision based upon the kind of people these parties are. The guardian ad litem for the child recommends that the mother have custody. The Court agrees. The Court's decision is based upon the fact that while either party at this point would be a very good parent with the child, the Court finds in the long run that the petitioner, being a female, is better situated to raise the child through puberty and her teenage years without having to have recourse to outside parties than is the respondent. The respondent admits that he would have to get help to see the child through her maturing as she reaches her teen years. Although the father is also very important to a girl going through the teenage years, her physical and emotional problems will be better handled by the petitioner in this case than the respondent. The mother will not have to rely entirely on what the girl tells her. She will better be able to understand what is going on emotionally and physically well in advance of oral communication or "acting out" behavior.

the requested change expedient. *In re Marriage of Moore,* 526 N.W.2d 335, 337 (Iowa App. 1994). The parent seeking to take custody from the other must prove an ability to minister more effectively to the child's well-being. *In re Marriage of Whalen,* 569 N.W.2d 626, 628 (Iowa App. 1997). This heavy burden comes from the principle that once custody has been fixed it should be disturbed only for the most cogent reasons. *In re Marriage of Downing,* 432 N.W.2d 692, 693 (Iowa App. 1988).

Michael contends there has been a substantial change in circumstances since the time of the dissolution decree in that Lindsay has been exposed to domestic violence and has been the victim of physical abuse. Michael is also concerned about the instability of Renee's lifestyle. Renee's former husband, Steven, testified Renee had scratched him with her fingernails. He presented photographs to show these injuries. Additionally, Renee admitted she had struck Lindsay in the mouth. The force of the blow chipped Lindsay's tooth.

Under Iowa Code section 598.41(3)(j), domestic abuse is a factor in determining the custodial parent. *In re Marriage of Wilson,* 532 N.W.2d 493, 495 (Iowa App. 1995). This stems from the ravaging and long-term consequences of domestic abuse on children. *In re Marriage of Daniels,* 568 N.W.2d 51, 55 (Iowa App. 1997). The violent tendencies of a parent adversely impact on the fitness of that parent to be the primary caretaker of a child. *In re Marriage of Brainard,* 523 N.W.2d 611, 615 (Iowa App. 1994).

In addition to the evidence of domestic violence and physical abuse in this case, there is also the evidence of Renee's peripatetic lifestyle. Renee has changed jobs and residences with some frequency. Renee admitted the only stability in Lindsay's life was Renee herself. Renee testified that as long as she was happy, she was a better mother for Lindsay. We find this is Renee's attempt to justify acting in her own interests instead of acting in Lindsay's best interests.

We do note in the original dissolution decree the district court found the child's best interests could equally be served by either parent. While Renee has been Lindsay's primary caretaker, she has exposed Lindsay to domestic abuse, physical abuse, and instability. Based on these factors, we determine Michael has shown a substantial change in circumstances since the dissolution decree was entered.

There is no evidence of negative characteristics possessed by Michael which would affect his parenting. Michael lives in an adequate home which is close to area schools. Lindsay has a good relationship with Michael and his fiancé, Tammy. Michael is involved with Lindsay's schooling and her grades improved when she spent more time in his care. Michael has demonstrated more stability in his job, residence, and relationships. There is no evidence to show Lindsay has a greater bond with either parent. For these reasons, we determine Michael can minister more effectively to Lindsay's best interests.

We modify the parties' dissolution decree to place Lindsay in the primary physical care of Michael. We also modify the decree to eliminate Michael's child

support obligation and to require Renee to pay child support. The district court found Michael had net monthly income of $1237 and Renee had net monthly income of $720. Applying the child support guidelines, we find Renee is required to pay child support of $150 per month.

We determine Michael's child support obligation should end as of the filing date of this opinion and Renee's obligation to pay support should commence on the same date.

Renee seeks appellate attorney fees. Since we have modified the decree to place Lindsay in the primary physical care of Michael, we determine Renee is not entitled to appellate attorney fees.

We reverse the decision of the district court and modify the parties' dissolution decree to place Lindsay in Michael's primary physical care. The decree should also be modified to eliminate Michael's child support obligation and to require Renee to pay child support of $150 per month, both provisions commencing on the filing date of this opinion.

REVERSED.

No. 98-0488. [9-169] IN RE MARRIAGE OF KLEINSMITH

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge. **REVERSED.** Considered by Huitink, P.J., and Vogel and Mahan, JJ. Opinion by Mahan, J. (7 pages $2.80)

Michael Kleinsmith appeals from the district court's ruling denying his petition for modification of the custody provision in the parties' dissolution decree. Renee and Michael Kleinsmith had one child and the child was placed in the primary care of Renee following the parties' dissolution of marriage. Since 1992, Renee has had at least five different jobs and lived in at least eight different houses. During the same period of time Renee has been married and divorced and was living with another man **No. 98-0488.** as of the time of the trial. There is also a founded report of physical abuse against Renee for striking the child. Michael is working for the same company he did at the time of the dissolution and has moved to the home of his fiancé. During the time the child spent with Michael, her grades improved and Michael was involved with her school activities. **OPINION HOLDS:** Michael contends there has been a substantial change in the circumstances since the dissolution, and he should be awarded primary physical care of the child. We agree. The child has been exposed to domestic abuse and has been a victim of physical abuse since the dissolution. Domestic abuse is a factor in determining the custodial parent and violent tendencies of a parent will adversely impact the fitness of that parent as the primary care giver. Additionally, Renee's unstable lifestyle has had an impact on the child's life, as Renee testified as long as she was happy she was a better mother. With the domestic abuse, physical abuse, and the instability, we believe it would be in the best interest of the child to be in the primary physical care of her father. He has shown more stability in his job, residence, and relationships, and when the child has been with him her school performance has improved. We believe Michael has met the heavy burden of showing he has the ability to minister more effectively to the child's well-being. We also determine Michael's child support obligation should end as of the filing date of this opinion and Renee's obligation to pay support in the amount of $150 per month should commence on the same date.