IN THE COURT OF APPEALS OF IOWA

FILED
DEC 26 1984
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JOHN DEAN STARR AND SARA JACQUELINE STARR

UPON THE PETITION OF)
JOHN DEAN STARR,

Petitioner-Appellee,)

AND CONCERNING)
SARA JACQUELINE STARR,

Respondent-Appellant.)

Filed December 26, 1984

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Appeal from the Iowa District Court for Wapello County-Phillip R. Collett, Judge.

Respondent wife appeals from the denial of her application for modification of the visitation provisions of the decree dissolving the parties' marriage. AFFIRMED.

Patricia N. Fetzer and Constance Peschang-Stannard, Student Legal Intern, Cedar Rapids, for respondent-appellant.

Patrick F. Curran, of Vinyard & Curran, Ottumwa, for petitioner-appellee.

Considered by Snell, P.J., and Schlegel and Hayden.

HAYDEN, J.

Respondent appeals from the denial of her application for modification of the visitation provisions of the decree dissolving the parties' marriage. She asserts that: (1) the trial court erred in ruling that there had not been a change in conditions subsequent to the dissolution decree so as to warrant a modification, and (2) the trial court erred in denying respondent's motion for a continuance and her request to keep the record open for the receipt of additional evidence. We affirm the ruling of the trial court.

Our review of this proceeding in equity is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight to them, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

I. Visitation

The party seeking to modify a dissolution decree on the issue of visitation must show there has been a change in circumstances since the decree. In Re Marriage of Glass, 213 N.W.2d 668, 670 (Iowa 1973); Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973). A much less extensive change is sufficient to modify visitation rights as compared to child custody modifications. Glass, 213 N.W.2d at 670; Donovan, 212 N.W.2d at 453. However, the best interests of the child ordinarily requires a continuing association with the noncustodial parent unless the contrary is clearly shown. Donovan, 212 N.W.2d at 453.

The marriage of petitioner, John Starr, and respondent, Sara Starr, was dissolved in January, 1982. Sara was awarded custody of the parties' son, John Jacob (J.J.), and John was allowed reasonable visitation rights. At the time of the dissolution John had been diagnosed as suffering from a bipolar disorder, also known as a manic depressive illness, and had been hospitalized several times during the marriage. John was not taking medication at the time of the dissolution and his illness was considered to be in a state of remission.

In May, 1983, Sara applied for a modification of the visitation provisions of the decree. She requested that the amount of visitation be decreased and certain

guidelines be imposed. Sara maintained that John's mental condition had deteriorated since the dissolution. She asserted the following facts to support her contention: (1) John had unsuccessfully applied for government benefits prior to the dissolution, but after the dissolution he began receiving Supplemental Security Income and Social Security benefits based on his mental disability; (2) John began taking medication after the dissolution; (3) shortly after the dissolution John was arrested for shoplifting and was hospitalized four or five days. In March of 1983, John again shoplifted but was not caught. He testified he knew the theft was wrong and so he returned the cassette tapes and voluntarily admitted himself into the hospital for a weekend, and (4) John received three speeding tickets after the dissolution.

We conclude that the trial court did not err in finding there was an insufficient change in circumstances to justify a modification of the decree on the question of visitation rights. We agree with the trial court that John's receipt of government benefits alone does not give rise to an inference that his mental condition significantly deteriorated subsequent to the dissolution. Furthermore, John testified that contrary to Sara's beliefs he was not taking any medication at the time of the modification hearing and had not been required to take any for the past six or seven months. John also testified that his psychiatrist no longer required regular visits. John's two hospitalizations are likewise an insufficient change. The record shows that John was hospitalized numerous times throughout the marriage. There is also evidence in the record that John had accumulated a number of speeding tickets prior to the dissolution.

Sara testified she did not object to John's visitation with J.J., but with his practice of having his brothers drive J.J. from Iowa City to Ottumwa, and with his allowing J.J. to stay with John's parents one night of the weekend. There was evidence that Sara had raised the same concerns at the dissolution hearing. The

trial court noted that the parties were raising substantially the same issues regarding visitation as they had at the dissolution.

We agree with the trial court that Sara did not meet her burden of showing a change of circumstances.

II. Denial of Continuance and Request to Keep Record Open.

The application for modification was filed on May 17, 1983. At the pretrial conference on October 24, 1983, an order was entered requiring discovery to be completed by March 1, 1984, and setting the matter for hearing as soon as was convenient after that date. On January 27, 1984, Sara's attorney filed an application to withdraw pursuant to DR 2-110(c)(1)(a) of the Code of Professional Responsibility on the ground that she believed her client was insisting on presenting a meritless claim. Sara's present attorney filed a notice of appearance on her behalf on February 10, 1984. The hearing was scheduled for March 13. Counsel's motion for continuance to conduct discovery and prepare for the hearing was denied. At the hearing the motion was renewed and once again denied. Counsel also requested that the record be kept open for receipt of medical records and police records relating to John's present condition. The trial court postponed ruling on this request on the ground that it was premature. The request was not renewed until after the court had ruled on the application for modification.

The granting or denial of a motion for continuance rests largely within the discretion of the trial court, and such discretion is very broad. We will only interfere with the action of the trial court if there has been a clear abuse of its discretion and injustice has been done to the party seeking a continuance. In Re Estate of Lovell, 344 N.W.2d 576, 578 (Iowa Ct. App. 1983).

Respondent relies upon the case of Orcutt v. State, 173 N.W.2d 66 (Iowa 1969). In Orcutt the supreme court held it was error for a trial court to deny a

request for continuance where the attorney was appointed by the court on Friday and did not have an opportunity to meet with his client until Monday, the day of the hearing. Id. at 67-71. The supreme court held that the client was denied her statutory right to effective assistance of counsel in an action to terminate parental rights. Id. at 70.

In a modification of visitation rights there is no statutory or constitutional right to counsel as there was in Orcutt. A more important distinction between the two cases, however, is the amount of time counsel had in which to prepare. In this case Sara's present counsel became involved in the case over a month before the date of the hearing. Furthermore, as the trial court pointed out, counsel made no effort to subpoena the documents which allegedly could not be procured through discovery.

We hold that the trial court did not abuse its discretion in denying the motion for a continuance. We further conclude there was no abuse of discretion in denying the motion to keep the record open for receipt of additional evidence. There was no attempt to obtain hospital and police records through use of a subpoena. Moreover, counsel failed to secure a ruling on his motion prior to the court's ruling on the merits of the case.

AFFIRMED.