IN THE COURT OF APPEALS OF IOWA

No. 2-556 / 92-461

FILED
DEC 29 1992
CLERK SUPREME COURT

ALAN W. SCHLARMANN,

Petitioner-Appellee/Cross-Appellant,

vs.

SANDRA S. HAAS,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dubuque County, Alan Pearson, Judge.

Sandra Haas appeals a district court decision denying her petition to modify the parties' prior child custody agreement. **AFFIRMED.**

Mary M. Schumacher of Roth & Schumacher, Dubuque, for appellant.

Alan W. Schlarmann, Dubuque, pro se.

Heard by Oxberger, C.J., and Hayden, J., and Perkins, S.J.* but decided by Oxberger, C.J., and Donielson, Schlegel, Hayden, Sackett, and Habhab, JJ.

*Senior Judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Heather Haas was born on January 12, 1985. Her mother, Sandra Haas, and Alan Schlarmann were living together at that time, but were not married. In late 1987 Sandra moved out, leaving Heather with Alan. Alan filed an action to establish paternity.

A decree was entered on June 9, 1989, pursuant to a stipulation of the parties. The decree granted joint custody of Heather to Alan and Sandra, awarded primary physical care to Alan, and made no provision for the payment of child support.

Until August 1991 Heather lived with Alan, and Sandra had liberal rights of visitation. Both parties were living in the same mobile home court in Dubuque, Iowa. Sandra had married. She had made a remarkable improvement in her behavior since the time the decree was entered.

Sandra brought this action to modify the custody provisions of the decree. She accused Alan of sexually abusing Heather and alleged the child was not properly fed, clothed, or bathed by Alan. Heather was removed from Alan's care. A physical examination revealed she had not been abused.

After the trial court heard the testimony of the witnesses and considered the entire record, the modification was denied. The court found that a material and substantial change of circumstances had taken place,

but that Alan provided adequate physical care and supervision of Heather, and there was no proof that modification was in Heather's best interest.

Sandra was unemployed at the time of the original decree. She now works part-time as a maid at a motel. Her earnings are insufficient to support herself. Alan's request for an award of child support was apparently denied by the district court because the court did not order Sandra to pay child support.

Sandra appealed and Alan cross-appealed the district court's decision.

Our review of this equitable action is de novo. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992). We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. Id.

To change a 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 child's best interests make it expedient to make the requested change. In re Marriage of Howe, 471 N.W.2d 902, 903 (Iowa App. 1991). The change in circumstances must relate to the welfare of the child. In

re Marriage of Smith, 471 N.W.2d 70, 72 (Iowa App. 1991).

We find that Sandra has greatly improved her behavior, particularly concerning her use of alcohol, since the initial custodial order was entered in 1989. We agree with the district court that this is a substantial change in circumstances. However, a parent seeking to take custody from the other must prove an ability to minister more effectively to the child's well-being. Howe, 471 N.W.2d at 903. After examining the facts in this case, we conclude Sandra has not met her burden to show she could minister more effectively to Heather's well-being. We note that once custody of a child 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).

In his cross-appeal, Alan asks that Sandra be ordered to pay child support and to contribute to his trial attorney fees. The district court did not rule on these issues. We have previously held that where a decree does not address an issue and the parties did not seek an enlargement of findings, the failure to present the trial court with the claimed error precludes the parties from first raising the issue on appeal. In re Marriage of Davis, 462 N.W.2d 703, 704 (Iowa App. 1990). We conclude Alan failed to preserve these issues for appeal.

Because he appeared pro se, Alan had no attorney fees for this appeal. Sandra is ordered to pay her own attorney fees and the costs of this appeal.

AFFIRMED.

All judges concur except Sackett, J., who concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority decision to affirm the trial court decision not to modify the custody award. I disagree with the majority that the issue of child support to be paid by the noncustodial mother cannot be addressed on the custodial father's cross-appeal. I address the issue. I find there has been a change in circumstances in so much as the noncustodial mother, who was not employed at the time of the initial determination of custody, is now employed. I would fix her child support obligation at $60 a month.

The child involved, Heather, was born to Sandra Haas and Alan Schlarmann. Sandra and Alan have never been married. In 1989, Sandra and Alan entered a stipulation where they both agreed Alan was the father of Heather and should be her physical custodian. The trial court then decreed that Alan was the father, and should be the physical custodian. Sandra was not ordered to pay child support.

In August 1991, Sandra filed an application to modify the decree to make her the physical custodian and to require Alan to pay her child support. Alan answered and denied that the custodial arrangement should be modified. In February 1992, Alan filed to amend his answer contending that since the decree establishing paternity and custody had been entered in 1989, Sandra had remarried and become

employed and was capable of contributing to her daughter's support, and he asked the decree be amended to require her to do so. Both parties filed financial statements setting forth a statement of their assets and income and expenses. The matter went to trial. The trial court did not modify the custodial arrangement and made no finding as to child support and did not order child support paid. Sandra appealed and Alan cross-appealed.

The majority has refused to address Alan's claim for child support on appeal. In doing so they have stated:

> We have previously held that where a decree does not address an issue and the parties did not seek an enlargement of findings, the failure to present the trial court with the claimed error precludes the parties from first raising the issue on appeal.

The majority cites our case of In re Marriage of Davis, 462 N.W.2d 703, 704 (Iowa App. 1990), as the case where we made this statement.

First, I disagree with the majority conclusion that Davis so holds, but if Davis does make this holding, the holding in Davis is in conflict with Brunner v. United Fire & Casualty Co., 338 N.W.2d 151, 152 (Iowa 1983). If our holding in Davis is in conflict with the supreme court's holding in Brunner, then we should overrule Davis.

In Davis, 462 N.W.2d at 704, this court was asked to address a wife's claim that the trial court failed to award her an interest in her husband's IPERS pension. This court said that the failure to present the trial court with this

claimed error precluded the wife from first raising the issue on appeal. Id. This court cited In re Marriage of Tucker, 213 N.W.2d 498, 500 (Iowa 1973), as support for this decision. In arriving at its conclusion not to address this issue on appeal, this court said:

> Jo Anne claims the trial court erred in failing to award her any interest in Jerry's IPERS pension plan. The dissolution decree did not address the pension plan and Jo Anne did not seek an enlargement of findings. Furthermore, the record is completely silent as to the value of any pension benefits.

Davis, 462 N.W.2d at 704. (Emphasis supplied).

This language clearly indicates to me that we considered both the failure to enlarge the findings and the fact that there was a silent record in determining not to address the issue. This is consistent with the holding in In re Marriage of Tucker, 213 N.W.2d 498, 500 (Iowa 1973), relied on by this in Davis. In Tucker, the supreme court in a dissolution case found the issue being raised was raised for the first time on appeal. It found a search of the record failed to reveal the issue was raised during the course of the trial.

Furthermore, in Brunner, McCormick writing for the court looked at the issue not addressed in the trial court's findings in a law action and said:

> We must also assume, however, that the court rejected each defense on its merits, even though only the waiver defense was addressed in the court's ruling. Brunner [the appellant] did not seek an enlargement of the ruling pursuant to Iowa R. Civ. P. 179(b), and in these circumstances we presume the court decided in defendant's

> [appellee's] favor the facts necessary to support its decision. See State v. Boelman, 330 N.W.2d 794, 795 (Iowa 1983). With the appeal in this posture, Brunner is entitled to prevail only if his evidence was so strong the trial court was compelled to rule for him as a matter of law. Id.

It, therefore, is clear that the failure to ask for a motion to reconsider does not preclude the issue being raised on appeal. We must assume the trial court denied Alan's request for child support. See id. Because this is an equity rather than a law action, we must review the evidence de novo to see if child support should be awarded. Unlike Davis, 422 N.W.2d at 704, the record is not silent on the child support issue. The record contains the necessary evidence to make a child support determination.

Sandra was not working when the current custody arrangement was decided. She is now working, although only part-time. She has a net income of $316 monthly. She is married, lives in a house owned by her husband and has few bills to pay. Alan is in need of additional help with the support of their daughter. Alan works thirty hours a week and is paid $6.50 an hour. He pays $100 a month in support for two children from a dissolved marriage. I approach the issue from a gender neutral position. I find Alan has shown the necessary change of circumstances and Sandra has the ability to contribute support to her daughter. I would fix support at $60 a month.