

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**IN RE THE MARRIAGE OF JUDITH ANN FLORY AND ROGER GENE FLORY****UPON THE PETITIONER OF
JUDITH ANN FLORY,**) Filed April 8, 1983
)

Petitioner-Appellant,

)

**AND CONCERNING
ROGER GENE FLORY,**

)

2-519
3-68255

)

Respondent-Appellee.

)

Appeal from Polk District Court, Dick Strickler, Judge.

Petitioner-mother appeals trial court's modification of the child custody provisions of the parties' dissolution decree, transferring permanent custody of the parties' minor child from petitioner in Alaska to respondent-father in Iowa.

AFFIRMED.

C. A. Pasley of Pasley, Singer, Holm, Timmons & Mathison, Ames, for petitioner-appellant.

Leslie Babich of Babich, Bennett & Nickerson, Des Moines, for respondent-appellee.

Heard en banc.

SNELL, J.

Petitioner-mother appeals trial court's modification of the child custody provisions of the parties' dissolution decree, transferring permanent custody of the parties' minor child from petitioner in Alaska to respondent-father in Iowa. We affirm.

Petitioner Judy Flory and respondent Roger Flory were married in Iowa in August 1971. This custody dispute concerns the parties' only child, Tami, who was born on February 28, 1973. The parties' marriage was dissolved by decree filed in Story County on August 1, 1977. Judy was awarded custody of Tami subject to reasonable visitation rights in Roger. Immediately after entry of the dissolution decree, Judy, Tami, and Judy's son by a previous marriage, Mark, moved to Fairbanks, Alaska, where Judy has resided since. Upon moving to Fairbanks, Judy and the children lived with a divorced man, Don Lokken, and his two sons.

Tami was returned to Iowa in April 1978. She lived with Roger in Ankeny until August of 1978, when she was returned to Fairbanks. She lived with Judy through the 1978-79 school year, completing kindergarten. In June of 1979, Judy returned Tami to Iowa because of health and personal problems Judy was suffering at the time. Tami lived with Roger and his new wife through the 1979-80 school year, completing first grade in Ankeny. Tami returned to Alaska in June of 1980. Judy was still living with Don Lokken at that time, but their relationship broke down and Don moved out in November 1980. Judy then began to see Richard Morris, and Richard and his two sons by a prior marriage moved in with Judy in the spring of 1981. They were still living together at the time of trial. Tami lived with Judy through the 1980-81 school year, completing second grade in Fairbanks.

Judy sent Tami back to Iowa in May 1981 for summer visitation, but only after Roger signed an affidavit that he would return her in August. However, in

August 1981 Tami became emotionally upset at the prospect of returning to Alaska, and Judy agreed to allow her to remain in Iowa for the 1981-82 school year. Tami returned to Alaska on December 25, 1981, for a one-week vacation. Judy then refused to allow her to return to Iowa, prompting Roger to file an application for modification of the custody provisions of the parties' dissolution decree. This application was filed on January 6, 1982.

The trial court rejected Judy's claims of lack of subject matter jurisdiction, concluding that Iowa was Tami's home state as defined in Iowa Code section 598A.2(5); that Roger and Tami have a significant connection with Iowa; that there is available in Iowa substantial evidence concerning Tami's present and future care; and that it was therefore in Tami's best interests for the Iowa court to assume jurisdiction.

At the modification hearing there was testimony about Tami herself, and the circumstances of and Tami's reaction to the various past changes in physical custody. There was considerable testimony from a child custody investigator and a child psychologist who had treated Tami in the past. There was also considerable testimony about each party's residence, employment, life-style, and relationship with the child. The trial court found that "the evidence elicited a sufficient change of circumstances [to] warrant the permanent change of custody," and ordered custody of Tami transferred to Roger. In a supplemental order the trial court granted Judy visitation with Tami for two months each summer, two weeks during each school year, and other times agreed upon by the parties. The court also ordered Judy to pay child support in the amount of \$150 per month.

Judy then instituted this appeal, in which she asserts that: (1) the Iowa court lacked subject matter jurisdiction under pertinent provisions of the Uniform Child

Custody Jurisdiction Act, Iowa Code sections 598A.3(1)(a)(home state of the child), 598A.3(1)(b)(significant connection with and substantial evidence in this state), and 598A.3(1)(d)(no other state would have jurisdiction under the act); (2) alternatively, the Iowa court should have declined to exercise jurisdiction of grounds of inconvenient forum under Iowa Code section 598A.7; and (3) there was insufficient evidence of a substantial change in circumstances, of respondent father's superior ability to minister to the needs of the child, and that the modification of custody was in the child's best interests.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. The Iowa Supreme Court has held that de novo review applies to questions of subject matter jurisdiction arising under the Uniform Child Custody Jurisdiction Act. St. Clair v. Faulkner, 305 N.W.2d 441, 445 (Iowa 1981). Accordingly, we review the facts as well as the law and determine anew those rights properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). We give weight to the findings of the trial court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

I. Subject Matter Jurisdiction. The Uniform Child Custody Jurisdiction Act was adopted in Iowa in 1977 as chapter 598A of the Iowa Code. Section 598A.3(1) provides that an Iowa court which is competent to decide child custody matters has jurisdiction to make a child custody determination if:

a. This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

b. It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; . . .

"Home state" is defined as "the state in which the child, immediately preceding the time involved, lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months. . . ." Iowa Code § 598A.2(5).

It is clear from an application of these sections to the factual situation in this case that Iowa constitutes Tami's "home state." Iowa was "the state in which [Tami], immediately preceding the time involved, lived with [her father] for at least six consecutive months" within six months before commencement of the proceeding. Judy had sent Tami back to Iowa to live in May 1981, where Tami remained until December 25, 1981. This period exceeded six months, and ended within six months of January 6, 1982, the date on which the proceeding was commenced by Roger's filing of the application for modification. The two remaining requisites of section 598A.3(1)(a) have also been met: Tami was absent from Iowa from December 25, 1981, on because of "removal or retention by a person claiming custody"; and Roger, "a parent or person acting as parent," continues to live in Iowa.

In her brief, Judy concedes that Tami had been living in Iowa with her father for the requisite six months, but asserts that Alaska was "the state of Tami's permanent residence, and she was physically present in the State of Alaska at the time of the institution" of Roger's application for modification. Section 598A.3(2) specifies, however, that physical presence of the child "is not alone sufficient to confer jurisdiction on a court of this state" under the provisions discussed herein. Nor can we accept Judy's argument that the May-to-December period which Tami spent with her father constitutes a "period of temporary absence" from Tami's "home state" of Alaska; that period cannot be considered a temporary absence when it is sufficient to meet the "six consecutive months" requirement of section 598A.2(5).

Because we conclude that Iowa is Tami's "home state" within the meaning of Iowa Code § 598A.3(1)(a), it is unnecessary for us to reach the issue whether the "significant connection" test of section 598A.3(1)(b) has been met. We also conclude that it would be inappropriate for us to decline jurisdiction in this case under section 598A.7 (inconvenient forum), and therefore hold that the trial court properly exercised jurisdiction over the matter.

II. Custody Modification. The burden in a modification proceeding is upon the party seeking modification to prove, by a preponderance of evidence, that circumstances have so materially and substantially changed since the original dissolution decree was entered that the child's best interests make it expedient that custody be awarded to him. In re Marriage of Mickelson, 299 N.W.2d 670, 671 (Iowa 1980). These changed circumstances "must not have been contemplated by the trial court when the decree was entered. They must be more or less permanent or continuous, not temporary, and must relate to the welfare of the children." Id.

We believe that the most significant change of circumstances cited by Roger in support of modification is the fact that Tami's residence has failed to stabilize during the five years since the decree was entered. She has been subjected to seven shifts of residence during that time. Several of these shifts transpired at Judy's request and appear to be due to her own instability. This unfortunate change of circumstance was not contemplated by the court when the original decree was entered; it has been continuous throughout the past five-year period and there is no evidence to suggest it will stabilize; and it relates directly to Tami's welfare in that Tami's counselor indicated that her unstable living situation had caused her depression and emotional distress. We conclude that this instability of residence, particularly when coupled with the fact that Tami has

grown increasingly attached and accustomed to her home in Iowa, constitutes a material and substantial change of circumstances sufficient to warrant modification. See Stooky v. Stooky, 229 N.W.2d 256, 257 (Iowa 1975); Stouwie v. Stouwie, 222 N.W.2d 435, 438 (Iowa 1974).

This fact also leads us to the conclusion that Tami's interests would best be served by affirming the trial court's order placing her in Roger's custody. It is this principle, the best interests of the child, which governs our determination in child custody disputes. Iowa R. App. P. 14(f)(15); Hobson v. Hobson, 288 N.W.2d 137, 139 (Iowa 1976). It is also important that custody be quickly fixed and thereafter little disturbed. In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974).

Although both Roger and Tami are suitable parents, we believe that Roger has demonstrated his ability to more effectively minister to his child's well-being. In re Marriage of Day, 314 N.W.2d 416, 417 (Iowa 1982). The testimony presented at trial indicates that Roger has a close emotional relationship with Tami, is sensitive to her needs, and understands that stability is important in a young child's life. Judy, on the other hand, is more impulsive, has difficulty talking to Tami, and testified herself that "to protect and show love for my daughter I have to keep her away from me." Tami herself has expressed a preference to live with her father. While this preference is not controlling in the case of a minor child, it is a relevant factor. See In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979). Finally, a child psychologist recommended to both parties that Tami remain in Iowa. These factors lead us to the conclusion that Tami's interests would best be suited by affirming the award of custody to her father. See Iowa Code § 598.41(3); In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

AFFIRMED.