FILED
JUN 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

119

CYNTHIA JO PORTER,

Petitioner-Appellant,

Acting as Next Friend of DAWN MARIE PORTER and BRANDY JO PORTER, Minor Children,

Plaintiffs,

vs.

LARRY ROBERT PORTER, MARY E. PORTER, and MERRILL ROBERT PORTER,

Defendants-Appellees.

Filed June 29, 1982

2-200
3-67519

Appeal from Polk District Court - M. C. Herrick, Judge.

Petitioner Cindy Porter appeals from the trial court's order that dismissed her petition for habeas corpus and granted temporary custody of the parties' two minor children to respondent Larry Porter. AFFIRMED AND REMANDED WITH INSTRUCTIONS.

Joyce J. Green and Diane L. Dornburg of the Legal Aid Society of Polk County, Des Moines, for petitioner-appellant.

Donald G. Beattie, Altoona, for defendants-appellees.

Heard en banc.

DONIELSON, J.

Petitioner Cindy Porter appeals from the trial court's order that dismissed her petition for habeas corpus and granted temporary custody of the parties' two minor children to respondent Larry Porter. We affirm the trial court's grant of temporary custody to respondent and remand for a full hearing on respondent's application for modification of custody.

Habeas corpus proceedings involving child custody are equitable in nature and our review is de novo. Doan Thi Hoang Ank v. Nelson, 245 N.W.2d 511 (Iowa 1976).

I.

The parties' marriage was dissolved by decree on August 26, 1980, and custody of their two minor children was awarded to Petitioner Cindy Porter. Following the dissolution, respondent Larry Porter resided with his parents. Cindy allowed the children to stay with Larry in his parents' home on two occasions when she was suffering from emotional stress. After the second of these stays in the Porter family home, Larry and his parents refused to return the children to Cindy's custody on the ground they were concerned she was not emotionally able to cope with raising the children.

Cindy then filed this habeas corpus proceeding requesting the return of the children. Larry answered and counterclaimed requesting that he be granted custody. The trial court granted temporary custody to Larry and ordered psychiatric treatment for Cindy without holding an evidentiary hearing. Cindy then filed a writ of mandamus and the supreme court ordered that if the parties and the court could not proceed forthwith to a trial on the merits, a hearing should be held to determine what temporary order should be entered.

Prior to this hearing, the parties entered the following stipulation into the record:

> The parties have agreed and stipulate by their attorneys, Joyce Green and Don Beattie, that this hearing be limited, as follows: To determine whether sufficient cause exists to justify transferring custody of the Plaintiff Minor Children to the Defendants, or any of them, pending hearing on the application of Larry Porter for a modification of a custody provision of the dissolution decree.
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> We further agree and stipulate that the determination of the modification of custody be continued to a later date. This is what the parties have agreed to.

The parties and the trial court agreed on the record to limit the scope of the hearing to the issue of temporary custody. The trial court's order dated September 21, 1981, made the following finding:

> That there has been a material change of circumstances since the entry of the decree of dissolution of marriage of these parties, not contemplated at the time of the original decree; that the petition for writ of habeas corpus should be denied and temporary custody should be placed with Larry Robert Porter, subject to reasonable rights of visistation in Cynthia Jo Porter, pending the final hearing on modification of dissolution action.

II.

Cindy asserts the trial court erred in dismissing her petition for habeas corpus and abused its discretion by exceeding the limited scope of the hearing on temporary custody. We disagree. The sole purpose of the hearing, as stipulated by the parties, was to determine the issue of temporary custody. Dismissal of Cindy's action, which was in effect a denial or annulment of the writ, was appropriate once the trial court had heard the evidence and made its decision to award temporary custody to Larry.

III.

Cindy also asserts that the evidence does not support the trial court's finding of sufficient changed circumstances to warrant either a temporary or permanent change of custody and that the best interests of the children would be best served

if she retained custody. We find the evidence does support the trial court's decision to award temporary custody to Larry. However, we do not decide whether there are sufficiently changed circumstances to require that this court modify the terms of the parties' dissolution decree and award permanent custody to Larry. Both parties stipulated prior to the hearing that the sole issue would be temporary custody with the issue of modification of custody reserved for a later hearing. The trial court's order was limited to an award of temporary custody to the respondent. Since we cannot determine the status of the respondent's pending modification action, we order that a hearing on respondent's petition for modification be held forthwith.

In this hearing, Larry, as the party seeking modification, must show material and substantial changes that warrant such a transfer in the children's best interest. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). He must also show an ability to administer to the needs of the children not equally but more effectively than Cindy. In re Marriage of Gutermuth, 246 N.W.2d 272, 274 (Iowa 1976).

AFFIRMED AND REMANDED FOR A MODIFICATION HEARING WITH INSTRUCTIONS.