

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 25 1984

CLERK SUPREME COURT

IN RE THE MARRIAGE OF GILDA G. JONTZ and JOHN C. JONTZ

Upon the Petition of )  
GILDA G. JONTZ,

Filed September 25, 1984

Petitioner-Appellee, )

And Concerning )  
JOHN C. JONTZ,

4-189

83-727

Respondent-Appellant. )

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Appeal from the Iowa District Court for Polk County—Luther T. Glanton,  
Judge.

Appellant/Husband seeks modification of a dissolution decree in order to  
award custody of child to him. The trial court refused his request. AFFIRMED.

Steven L. Udelhofen, of Jones, Hoffman & Davison, Des Moines, for  
respondent-appellant.

Joseph G. Bertogli, Des Moines, for petitioner-appellee.

J. Michael Mayer, Des Moines, guardian ad litem.

Heard by Snell, P.J., and Hayden, and Sackett, JJ.

John and Gilda were divorced in 1974. Custody of Andrea, the only child of the marriage who was born in 1970, was placed with Gilda. John was given certain visitation rights which were later expanded by two separate modifications. This action is a third modification wherein John is seeking custody of Andrea. The modification was tried and the district court refused to modify the decree except to specify certain visitation matters which are not the subject of this appeal.

John argues that the trial court erred in not admitting certain tapes, transcripts and depositions and in admitting certain opinion testimony. In this equity matter the trial judge ruled on objections and excluded certain evidence. In an equitable proceeding the rules are such that the trial judge while noting objections, may not ordinarily exclude offered testimony. The purpose is to preserve a complete record of the evidence for the trial and appellate courts, leaving to them the rejection of inadmissible evidence in deciding the issues. Local Board of Health, Boone County v. Wood, 243 N.W.2d 862, 868 (Iowa 1976). In the review de novo the appellate court, if it finds the trial court has erred, may then decide the case on the record made without a remand. O'Dell v. O'Dell, 238 Iowa 434, 465-466 (1947). See also Scarlett, 231 N.W.2d 8, 10 (Iowa 1975).

John does not ask that the cause be sent back nor did he object at trial to the procedure followed by the trial judge in ruling on objections and excluding evidence. Gilda also did not object to the procedure followed by the trial judge.

The tapes, transcripts and depositions were introduced by an offer of proof and we have considered them as a record of evidence.<sup>1</sup> O'Dell v. O'Dell, 238 Iowa 434, 466 (1947), 26 N.W.2d 401, 416-17 (1947).

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<sup>1</sup>We have, however, in our de novo review, examined all evidence and depositions and have listened to a battery of tape recordings which the trial court did not accept into evidence. The recordings are disorganized, confusing, repetitive, difficult to understand and required the use of several types of recorders to listen to them. A more concise presentation of this evidence should have been made. Litigants and their attorneys have an obligation to present evidence in an organized and concise manner.

John alleges that the trial court should not have admitted the opinion testimony of Ronnie Laden, a probation officer with Polk County Juvenile Court, because she lacked the credentials to testify. Laden held a BA in English and an MS in secondary education. She received a four-week training program with Polk County prior to taking her position. This case was her second assignment.

As the trier de novo, we should not consider the evidence where the record shows as a matter of law that the witness is unqualified or the facts upon which the opinion is based are not sufficiently stated by the witness. However, normally the evidence is admitted as an opinion which the trier of fact is at liberty to reject. Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977). The weight and credibility of testimony are matters for the trier of fact. See Becker v. DE Distributing Co., 247 N.W.2d 727, 730; Doe v. Ray, 251 N.W.2d 496, 503 (Iowa 1977).

We believe in this case the opinion of Laden can be considered as evidence. An MA in education requires certain courses in child development. In addition thereto she received four weeks training for her new position. Considerable latitude is allowed in qualifying a witness as an expert. Shenrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 289 (Iowa 1979).

John contends that the decree should be modified to award him custody, or to award physical custody and make him the custodial parent, or to award physical custody and expand his visitation rights.

Gilda and her present husband Allen have two children who are younger than Andrea. The family lives in an adequate home near Indianola. Gilda's present husband Allen has little time for John. At one visitation period he threw rocks at John's car. John pressed charges as a result of the altercation and Allen was convicted.

Gilda has been totally inflexible with visitation. On one occasion Gilda became unhappy because John refused to bring Andrea home in a January blizzard. When John returned Andrea to her home the next morning to pick up her books and

take her to school, Gilda refused to let Andrea ride to school with her father despite the fact Gilda did not have transportation. Andrea missed the day of school.

Gilda and Allen have placed a gate at the entry of their yard. The gate is left open at all times except when John comes to pick up or return Andrea. At those times the gate is closed. Andrea is forced to crawl under the gate in the dirt or mud or climb over the gate to reach her father's car. Andrea is sent on visitation in old clothes.

Gilda professes to maintain good communications with her daughter. She does not know, however, what subjects she is taking in school nor the names of Andrea's friends. She does not attend parent-teacher conferences. Andrea is not involved in any outside school, church or social activities. The trial court characterized Gilda as a mean woman. Gilda maintains an unlisted phone number which was not even available to Andrea for some time.

Gilda, Allen and their two children have gone on several vacation trips, including a trip to Disney Land, leaving Andrea at home.

The child custody investigator recommended custody remain with Gilda. Dr. John Garfield, a clinical psychologist who interviewed the parties and the child, felt the custody arrangement should remain as it was. His opinion was influenced in part by Andrea's desire to have the current arrangement continue.

John admittedly had a serious drinking problem prior to the parties' dissolution. He sought help for his problem, regularly attends AA and has done no drinking for a long period of time. John has exercised his visitation with Andrea. During these visitation periods he has made an effort to expose Andrea to cultural and educational interests. He sent her to horseback riding camp. John attends parent-teacher conferences when he is advised of them. John now works as a private investigator. He has taken numerous college courses.

John and Marsha live in an adequate home in Des Moines. Marsha has two years of college. She has established an excellent relationship with Andrea and has had a positive influence on Andrea's life.

John failed to remove his investigator's hat in preparing for the modification proceeding. He interrogated Andrea at length about life with her mother. When the child investigator came to his home he became concerned about the answers Andrea was giving to certain questions, and he took Andrea outside and spanked her. Later claims indicated Andrea received bruises as a result of the spankings. Andrea was taken to the family physician who observed the bruises but was unable to make a medical determination of child abuse and indicated the bruises could have come from other things.

John is delinquent in past due child support in the approximate amount of \$2,000. He has been current with his monthly support for some time.

The record supports the fact that Andrea's physical needs are being adequately provided for in her current home.

Both parties have adequate physical facilities to care of the child. We are critical of John for allowing child support to become delinquent.

Gilda provides little intellectual stimulation for Andrea. While the child investigator indicates mother and daughter communicate well, Gilda's testimony at trial does not support this conclusion. Andrea is overweight, as is Gilda. Gilda has done little to help her daughter with weight loss. Gilda resists counseling for the visitation problems.

Our review is de novo. R. of App. P. 4(1983). The modification of a dissolution decree requires a showing of a change in circumstances since the date of the decree which substantially relates to the welfare of the children and was not within the contemplation of the parties and the court at the time the decree was entered. In Re Marriage of Wagner, 272 N.W.2d 418, 421 (Iowa 1978). We must determine whether John has established that there has been a change of circumstances since the original decree so as to make the change expedient. In Re Marriage of Snyder, 276 N.W.2d 402 (Iowa 1979). John must prove an ability to

administer, not equally but more effectively to the child's well being. In Re Marriage of Ivins, 308 N.W.2d 75 (Iowa 1981); In Re Marriage of Melton, 256 N.W.2d 200 (Iowa 1977).

Much emphasis has been placed in recent years on the need for children to maintain an open relationship with both parents after the parents' marriage has been dissolved. The Iowa legislature has emphasized this need in their strong support for the concept of joint custody. Parents should put their personal feelings aside to assist their children in maintaining relationships with both parents.

The ability of parents to assist their children in maintaining a relationship with the other parent is an important factor in custody determinations. The fact that a mother demonstrated ability to put personal feelings aside to permit her son to continue a relationship with father and paternal grandparents was considered in awarding her physical care. In Re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983); custody awarded to father because of likelihood under his care children would have contact with both parents. In Petition of Ferguson, 244 N.W.2d 817, 819 (Iowa 1976); court expressed disapproval of mother's conduct in denying father his visitation rights. In Re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976); court found mother's conduct in depriving children of the right to see and know their father was a serious reflection on her capacity to act as a custodial parent. Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972).

Gilda's actions with reference to Andrea's father are a serious reflection on her ability to function effectively as a parent. While not actually preventing the visitation, this mother, who understandably is a major factor in this little girl's life, has made a supreme effort to make visitation an unpleasant experience for Andrea. Conduct such as this woman has exhibited should not and will not be tolerated.

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The fact that custodial father's second wife displayed hostility toward reasonable visitations between natural mother and child and its adverse effect on the child were considered sufficient to make expedient a change of custody. in Norenberg v. Norenberg, 168 N.W.2d 794, 797 (Iowa 1969).

Gilda's uncooperative and totally unreasonable attitude toward visitation is sufficient for us to consider a change of custody. Furthermore, since the time of trial Iowa Code §498.41 has been amended, making the original enactment of that section a substantial change in circumstances which will justify modification of a child custody order.

We must first determine whether the child will be better served in her father's home. A parent seeking to obtain custody of minor children from the other parent must show some superior claim based on his or her ability to minister, not equally, but more effectively, to the well being of the children. In Re Marriage of Towers, 226 N.W.2d 810, 812 (Iowa 1975).

We look at the wishes of the minor child. The trial court did not talk to the minor child despite the fact that she was available. Her wishes to stay with her mother were put in evidence through the testimony of Dr. Garfield and Ronnie Landen. Children's expressed preferences are entitled to consideration but are not controlling. In Re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). Andrea was a 14 year old child at the time of trial. She has spent time in both homes. Her wishes should be given strong consideration. Neither Dr. Garfield nor Ms. Laden support an award of custody to John. Nor does John's behavior show that he will provide Andrea with a better home. John has not met the burden of proving his care will be superior to Gilda's.

We need next to determine whether there is clear and convincing evidence to support a denial of joint custody. There is clear and convincing evidence in this record that supports the denial of joint custody.

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We do not condone Gilda's attitude toward visitation. We find her conduct to be totally unacceptable. She must make an honest effort to approach visitation in a reasonable manner. Her failure to do so may well result in the loss of custody of her daughter.

Our primary concern is for Andrea's welfare. The record reflects she has been subjected to mental abuse from both parents. A copy of our opinion is being forwarded to the Polk County Department of Human Services.

AFFIRMED.