IN THE COURT OF APPEALS OF IOWA

No. 1-234 / 90-1664

FILED
AUG 27 1991
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JEFFREY LYNN LINKENHOKER AND ROXANNE LINKENHOKER

Upon the Petition of

JEFFREY LYNN LINKENHOKER,

Appellant,

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And Concerning

ROXANNE LINKENHOKER, n/k/a ROXANNE MILLER,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Paul H. Sulhoff, Judge.

Husband has appealed the modification order to the parties, 1987 dissolution decree. **AFFIRMED AS MODIFIED.**

Michael J. Winter, Council Bluffs, for appellant.

Raymond R. Aranza and Michael W. Manske of Marks & Clare, Omaha, Nebraska, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

Jeffrey and Roxanne Linkenhoker were married in January 1981. They had two children, boys born in September 1981 and March 1983.

The marriage was dissolved in 1987. The 1987 dissolution decree placed the two boys in Roxanne's primary physical care and directed Jeff to pay child support of $100 per month per child.

In the spring of 1989 Roxanne and her then husband moved to the state of Nevada. Jeff has continued to live in Iowa at all relevant times.

In August 1989, a few months after Roxanne's move to Nevada, the dissolution decree was modified to give Jeff visitation during the months of June, July, and August. The August 1989 modification order also provided that the costs of transporting the boys between Nevada and Iowa for visitation would be divided equally between Jeff and Roxanne.

In the summer of 1990 both parties filed petitions asking that the dissolution decree once again be modified. Jeff asked that the children be transferred to his custody and that Roxanne be required to pay him child support. Roxanne requested modifications in the existing visitation schedule, an increase in Jeff's child support obligation, and a contempt order against Jeff for failure to pay past child support.

On October 4, 1990, the district court entered a ruling on both modification petitions. The district court left the boys in Roxanne's primary physical care, left Jeff's child support obligation at the same level, made a minor modification in the visitation schedule, and directed Jeff to assume all the costs of transporting the boys between Nevada and Iowa for visitation. Jeff has appealed the modification order.

Jeff contends the district court should have transferred the children from Roxanne's primary care to his primary care. He asserts he can provide a better and more stable home for the children than Roxanne can. He accuses Roxanne of drug usage, multiple relationships with undesirable men, and frequent changes of residence.

Jeff also challenges the requirement that he assume all the costs of transporting the boys between Nevada and Iowa for visitation. He asserts he should not be penalized for Roxanne's voluntary move to another state.

Finally, Jeff contends the district court erred by allowing Roxanne to introduce into evidence a letter from a psychologist. Roxanne introduced the letter to support her claim that the children should be left in her care. Jeff argues the letter should have been excluded because it was hearsay, because its author was unavailable for cross-examination, and because there was no foundational showing of its authenticity.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

We first address Jeffrey's objection to the admission of the psychologist letter, exhibit number two. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and, where the ruling is one admitting evidence, a timely objection or motion to strike appears of record stating the specific ground of objection, if the specific ground was not apparent from the context. Iowa R. Evid. 103 (a)(1).

An objection, to be timely, must ordinarily be made at the earliest opportunity after the ground of the objection becomes apparent. Ver Steegh v. Flaugh, 103 N.W.2d 718, 722 (Iowa 1960). The purpose underlying the requirement for timely objections to the admission of evidences is the need to give the court adequate time to correct any problem the evidence may present.

At trial, respondent's attorney, prior to offering exhibit two, requested the witness to review the letter. The attorney then proceeded to quote sections of the letter verbatim and asked the witness if that portion of the letter was consistent with the witness's findings. No objection was made at this time.

The respondent's attorney continued to reveal the contents of the letter referring to lies the children had made in counseling sessions. Objection was not made. Counsel did not object until the actual letter was offered into evidence at the close of the cross-examination of the witness and after virtually all of the contents of the letter had been either read or referred to during the witness testimony. Such delay prevented the court from correcting any problem the letter presented.

The general rule is that parties are not permitted to delay objections until it is too late for the problem to be corrected. Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 555 (Iowa 1980). This court finds the objection untimely.

CUSTODY

To change a custodial provision of a dissolution decree the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed

that the children's best interests make it expedient to make the requested change. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. Id. They must relate to the welfare of the children. Id. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

Petitioner asserts that the trial court erred by leaving the physical custody of the two minor boys with Roxanne. We disagree.

Petitioner argues that Roxanne's move to Nevada justifies a change of custody. This court has noted, however, that courts have been reluctant to limit a custodial parent to a geographic area when there is evidence that the custodial parent has a valid economic reason for moving and when there is evidence that the move was not motivated by an attempt to limit visitation of the noncustodial parent. In re Marriage of Jerome, 378 N.W.2d 302, 305 (Iowa App. 1985).

In this case Roxanne moved to Nevada to seek employment with her then husband, Mitch, after being unable to find work in the area they were currently living. Geographical proximity is not an indispensable component of joint custody, and, at least when the decree is silent on the issue, the parent having physical care of the children must, as between the parties have the final say concerning where their home will be. In re Marriage of Frederici, 338 N.W.2d 156, 159 (Iowa 1983).

Further, Roxanne, while in Nevada, had acted to assist the father's visitation by not only complying with summer visitation requirements, but cooperating in special circumstances.

The parent seeking to take custody from the other must show some superior claim based on his or her ability to minister, not equally, but more effectively to the child's well being. Crary v. Curtis, 199 N.W.2d 319 (Iowa 1972). This court finds nothing in the record to establish Jeffrey's superiority over Roxanne in the care of the children.

We affirm the trial court's decision to dismiss Jeffrey's application to modify custody.

VISITATION RIGHTS

Jeffrey next asserts that the trial court should not have modified the August 1989 order by requiring that he

pay the entire costs of transporting the two children to and from Nevada for the purpose of exercising visitation. We agree.

A trial court has reasonable discretion in determining the advisability or necessity for modification of the custodial or visitation rights of a divorce decree and will not disturb its decision unless the record fairly shows it fails to do equity. Pucci v. Pucci, 143 N.W.2d 353, 357 (Iowa 1966).

It is not clear from the court's reasoning why the prior mutual responsibility of the parents for the transportation was modified. Petitioner's income had not changed significantly, and he does not appear to be in a financially superior position to Roxanne. Roxanne urges that, because Jeffrey has been delinquent in past child support payments, she has no resources to pay for transportation.

The trial court, however, addressed Jeffrey's failure to keep payments current by requiring him to endorse quarterly bonus checks from his employment until the arrearage is paid in full. The unacceptable failure of Jeffrey to maintain his child support responsibilities has necessarily reduced the financial resources available to Roxanne for transportation of the children. By requiring Jeffrey to pay the child support arrearage however, this court envisions a time in the future when both parents will

again be on even footing financially. This court sees no reason to require Jeffrey, upon the payment of the arrearage, in full, to shoulder the entire cost of the children's transportation to and from Nevada.

We therefore modify the visitation provision so that upon the payment of all arrearage in full by Jeffrey, both Jeffrey and Roxanne shall equally bear the responsibility for costs incurred in the transportation of the children from one parent to the other. This arrangement is to remain in effect providing Jeffrey remains current with his child support payments. Except as modified, the trial court's decree is affirmed.

Each party will pay his or her own attorney's fees. Costs are taxed to the appellant.

AFFIRMED AS MODIFIED.