

FILED

JUL 26 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CAROL L. STARR AND RICHARD L. STARR

Upon the Petition of)

616

CAROL L. STARR,)

Petitioner-Appellee,)

And Concerning)

RICHARD L. STARR,)

8-706
88-676

Respondent-Appellant.)

Appeal from the Iowa District Court for Jackson County
(No. D-5-1336), C. H. Pelton, Judge.

Respondent appeals the decision of the district court
overruling his application for change of custody of his two
daughters. **AFFIRMED.**

C. J. Munson and Robert E. Weinberg of Munson, Woods &
Weinberg, Bettendorf, for respondent-appellant.

Thomas F. Peckosh of Peckosh & Lawson, Maquoketa, for
petitioner-appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.
Donielson, J., takes no part.

HABHAB, J.

Richard Starr, father of Kerri and Tonya, appeals the decision of the district court overruling his application for change of custody of his two daughters. He argues the trial court erred 1) in denying his application for a home study; 2) in failing to give sufficient weight to the preference of the children; and 3) in finding that he had failed to meet his burden of proof.

The parties' marriage was dissolved on December 11, 1986, after thirteen years of marriage. The dissolution decree placed the parties' two children in joint legal custody and in Carol's physical care. At the time of the application for modification, Kerri was eleven and Tonya was thirteen. Subsequent to the dissolution, the two girls moved with their mother to a suburb of Milwaukee, Wisconsin. The petitioner, Carol Starr, had received a promotion in the retail business which required that the family relocate from Iowa to Wisconsin. Richard filed bankruptcy; Carol assumed their joint debt as a result. He did not contribute to the support of his children until shortly before the hearing concerning his petition for modification. Carol's position required she work extended hours in the evenings and on weekends.

During June of 1988, the children's father came to the home of their mother and took the children, in accordance with visitation rights, to Georgia, where he currently lives. They expressed a preference to continue living with

him. Instead of returning the children to their mother that August as agreed, he enrolled the children in school nearby and informed Carol of his decision when she called to inquire as to the whereabouts of the children.¹

The children continue to reside with their father.

Initially Richard argues the district court erred in denying his request for a home study pursuant to Iowa Code section 598.12. In his application he alleged "the parties' home conditions, parenting capabilities, and other matters pertaining to the best interests of the children . . . [are][in] issue." He did not elucidate further. This language parrots that of Iowa Code section 598.12(2) under which the court has discretion whether or not to order a home study. The district court reasoned that the request was made solely for Richard's convenience.

After his application was denied, Richard enlisted the services of Mr. Michael Tendall of Family Mediators, Davenport, Iowa, to perform a private investigation. Carol declined to be interviewed. Richard argues if the court

1. The dissolution decree, according to the testimony of Carol, gave Richard visitation rights until August 14. At the remand hearing, Carol testified that Richard agreed to return the children by that date. In anticipation of the children's return, Carol rented a large apartment and incurred expenses moving her furniture. When Richard told her the children would not be returning, she again incurred expenses moving the furniture to a smaller apartment.

had granted his application for a home study, a more complete investigation could have been procured.

We find no error in the court's ruling in this regard. It is the movant's burden to inform the court as to the nature of his request. Failing to do so, he cannot now complain that the court erred.

Richard next contends the trial court erred in failing to give "sufficient" weight to the preference of the children. At this juncture, we note our review is de novo. Iowa R. App. P. 4. We give weight to the findings of fact of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

The court interviewed the children regarding with which parent they would prefer to live. Both of the girls stated that they wished to live with their father² because their mother was unable to be at home with them due to the lengthy hours she worked. In its opinion, the district court stated:

Both of the children testified in chambers. The Court's impression is that they did not really want to testify. The Court Finds that the girls

2. We note that on March 24, 1989, a hearing was held in compliance with our remand order of February 1, 1989. At that hearing Tonya testified that she wrote her mother on March 6, 1989, expressing a desire to live with her. Tonya at the same hearing testified further that at the time she wrote the letter, she "was mad" and thought she wanted to remain with her father. Both children love their mother.

are thrilled with their father's present attention to them and his improved behavior but they have not seriously considered his employment, living arrangements and the routine duties of a custodial parent.

The wishes of a child, though not controlling, are entitled to some weight in a custody proceeding; however, they are entitled to less weight in a proceeding to modify the original decree. In re Marriage of Junkins, 240 N.W.2d 667, 668-69 (Iowa 1976). When we couple our de novo review with the fact that the district court had the opportunity to view the children as they testified and to observe their demeanor, we agree with the findings of the trial court.

Finally, Richard argues that he did not fail to meet his burden of proof which would merit modification of the custody decree. We disagree. A party requesting a change of custody must establish by a preponderance of the evidence that conditions have materially and substantially changed; that the children's best interests make it imperative to make a modification. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). The parent seeking a change of custody has the burden to show a superior claim based on the ability to minister more effectively, not equally, to the children's well being. Once custody of a child has been determined, it should be disturbed only for the most cogent reasons. In re Marriage of Weidner, 338 N.W.2d 351, 360 (Iowa 1983).

After the children expressed their dissatisfaction with the long hours Carol worked, she took a different position

which paid less money.³ Nowhere in the record could we find where Carol's actions rose to the level of neglect.

We remind Richard of Iowa Code section 598.41, in which it is stated:

The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.

Richard's actions in failing to return the children to their mother while under court order are not condoned.

For these reasons, we affirm the decision of the district court.

AFFIRMED.

3. We also note Carol's testimony at the remand hearing that Richard has not paid child support since the dissolution decree. This is so despite the fact the court ordered him to pay \$25.00 per week per child. Richard's failure to pay child support forced Carol to hold down two jobs to support the two children. It is understandable why she was unable to spend as much time with the children as all parties concerned would like.