IN THE COURT OF APPEALS OF IOWA

No. 1-450 / 91-128

FILED
DEC 31 1991
CLERK SUPREME COURT

691

IN RE THE MARRIAGE OF SUSAN KAY WIEDMANN AND STEPHEN JOHN WIEDMANN

Upon the Petition of

SUSAN KAY WIEDMANN,

Appellant/Cross-Appellee,

And Concerning

STEPHEN JOHN WIEDMANN,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Susan Wiedmann appeals, and Stephen Wiedmann cross-appeals, the district court decision in a modification action. **AFFIRMED.**

Joseph G. Bertogli, Des Moines, for appellant.

G. Stephen Walters of Jordan, Oliver & Walters, Winterset, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Susan Kay Wiedmann and Stephen John Wiedmann were married in April 1979. They have two children: Sean, born in October 1979; and Stephen, born in January 1982. Susan also has a child (Jeffrey) from a previous relationship, who lived with them.

The parties' marriage was dissolved in October 1985. In the dissolution decree, the district court set up a joint custody arrangement for the parties' two children, with Stephen having their physical custody pursuant to an agreement by them. The district court did not direct Susan to pay any child support, because of the debts she was assuming and because of the expenses she would incur in establishing herself in a separate household.

In May 1989 Susan remarried. In October 1989 Stephen filed a petition for modification of the dissolution decree asking for child support. Susan answered the petition and also filed her own petition for modification asking that physical care of the children be transferred to her.

Trial was held. Evidence was introduced about, among other things, the financial situations of the parties and of Susan's new husband, the visitation problems the parties had after the dissolution decree was entered, Stephen's alcohol abuse, the inappropriate disciplining of the children by Stephen and his father, and Stephen's attempts to prevent Susan from obtaining the children's school

records. A clinical psychologist who conducted a child custody investigation testified that he concluded Susan should have custody of the parties' children.

In November 1990 the district court ruled on the petitions for modification of the dissolution decree. It denied Susan's request that physical care of the children be transferred to her. The district court found that if this had been an original custody proceeding rather than a modification, there would have been "little doubt that custody should be with Susan."

The court stated, however, that its decision to leave the children with Stephen had been influenced by Susan's actions in voluntarily giving up custody of the children originally and in failing to request a custody change until Stephen asked her for child support. The court also noted that the parties' children, in Stephen's care, were doing well academically but that Jeffrey, who is in Susan's care, was not.

The district court granted Stephen's request for a child support award: it directed Susan to pay child support of $175 for the month of December 1990 and $190 per month beginning January 1, 1991. The district court based this ruling on findings (1) that Stephen had a net monthly income of $1,000, (2) that Susan had a net monthly income of $839, (3) that in applying the child support guidelines, the child support amounts for one child rather than two

children should be used because Susan was also supporting Jeffrey, her child from a previous relationship. Susan has appealed, and Stephen has cross-appealed.

Our review of this modification proceeding is de novo. Iowa R. App. 4.

I. Change in 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. 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. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. 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 Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

We have reviewed the facts of this case and the trial court's opinion. We agree with the trial court Susan has not carried her burden necessary to modify custody. As noted above, the burden of proof on a person seeking to modify custody is greater than at the original dissolution proceeding. Additionally, maintaining the children's present situation, to which they are accustomed, is in the children's best interest. Finally, we too are concerned Susan only sought custody after Stephen filed for child support. We affirm the trial court on the custody issue.

II. Child Support.

The trial court set Susan's child support payments in accordance with the child support guidelines. However, because Susan is already supporting a child by a previous relationship, the trial court applied the guideline for one child rather than two. Although we do not approve of this practice as a general rule, we believe in this case such an application is appropriate.

Stephen asks that the support order be made retroactive to the date of filing the modification petition. In this respect the trial court has authority to order such payment, See In re Marriage of Chesterman, 462 N.W.2d 696, 697-98 (Iowa App. 1990), but it is not mandatory. We determine the trial court did not abuse its discretion in ordering payments to commence December 1990. We agree with the trial court there is a substantial change of circumstances sufficient to warrant a modification of the previous child support order. We affirm on the child support issue.

III. Attorney Fees.

Stephen requests attorney fees at the trial level. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250

N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We affirm the trial court's decision on attorney fees.

We affirm the trial court on all issues. Both parties shall pay their own attorney fees on appeal. Costs of this appeal are taxed to Susan.

AFFIRMED.