

FILED**OCT 25 1983**

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**IN RE THE MARRIAGE OF LINDA J. WOLFE AND WALTER J. WOLFE**

Upon the Petition of)

LINDA J. WOLFE,)

Petitioner-Appellee,)

Filed October 25, 1983

And Concerning)

WALTER J. WOLFE,)3-23083-24

Respondent-Appellant.)

Appeal from Dubuque District Court - Robert J. Curnan, Judge.

Respondent husband appeals from the district court judgment modifying the joint custody provisions of the parties' dissolution decree and granting sole custody to petitioner wife. REVERSED AND REMANDED.

Wayne A. Norman, Jr., Dubuque, for respondent-appellant.

Peter J. Klauer, Dubuque, for petitioner-appellee.

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

DONIELSON, J.

Respondent husband appeals from the district court judgment modifying the joint custody provisions of the parties' dissolution decree and granting sole custody to petitioner wife. He contends he is better able to minister to the child's best interests. Our review is de novo. Iowa R. App. P. 4. We reverse and remand.

The 1981 decree dissolving the marriage of Linda and Walter Wolfe incorporated the parties' stipulation for joint custody of their son, Jared, born in 1979. Physical care was to alternate between the parties every six months. In 1982, Walter filed an application for modification of the decree; he requested that custody be awarded to him alone because Linda intended to move out of state. Linda answered Walter's application and also applied for a modification of the decree; she requested that custody be awarded to her alone because of the move out of state and because of her remarriage.

The trial court awarded sole custody of Jared to Linda on the basis of her ability to be a full-time parent, the better economic position that Linda and her new husband have in Houston, Texas, and the fact that she had the greater role in caring for Jared in the marital home. Walter brought this appeal.

We agree that Linda's move to Houston presents a substantial change in circumstances making it desirable to modify the physical care provisions of the decree for this small child. It would be impractical to have Jared move more than one thousand miles away every six months and change school systems under the terms of the original decree. It is also apparent that the dissolution court did not contemplate that Linda would move away any great distance since the alternative six-month arrangement clearly would not work in such a case. We do not believe, however, that the joint custody arrangement itself should be terminated. Our statutes now presume a preference for joint custody. Iowa Code § 598.41; In re Marriage of Weidner, ____ N.W.2d ____, ____ (Iowa 1983). The fact that the

parties now live much farther apart is a factor to be considered but does not necessarily preclude a joint custody situation. In re Marriage of Frederici, ____ N.W.2d ____, ____ (Iowa 1983). The question remains, however, as to which parent should have physical care. This case presents the relatively favorable situation of both parents being good custodians—both Walter and Linda have proven themselves very capable of caring for Jared and meeting his needs, both material¹ and emotional. Both parents love Jared very much and devote much time, energy, and attention to him.

The question, therefore, is a close one. Contrary to the trial court, however, we believe that Jared's long-term best interests would be better served by awarding physical care to Walter with reasonable visitation to Linda. See Iowa R. App. P. 14(f)(15). In the seventeen months between the dissolution decree and the modification order, Walter had cared for Jared eleven months. There is no question that, during that time, Walter had been taking very good care of Jared, making sure that he was clean and well-fed and clothed. While Walter was at work, Jared attended preschool and was reported by workers there to be a remarkably well-adjusted child. Finally, we do not believe it would be in Jared's best interests to uproot him from the Dubuque area where he has been doing well with his father, has the chance to be with his maternal grandparents, and has already made a circle of friends at preschool. Given the relatively equal parental abilities of Walter and Linda, we believe the need for some sort of stability and familiarity of surroundings tips the scales in favor of Walter. "[W]hen it appears children are happy, well adjusted, adequately disciplined, and receiving proper care in a suitable home they should not be removed therefrom other than for the

¹ Although the financial resources of Linda and her new husband are greater than Walter's, there is no question that Walter is fully capable of meeting Jared's material needs. In addition, despite Linda's attempt to emphasize the differences between Walter's modest apartment and her "lavish" Houston home, we believe the apartment to be an adequate residence for Walter and Jared.

most persuasive causes." Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975).

Although both Linda and the modification court placed much weight on Linda's superior financial position, that factor alone does not determine the outcome, especially here where Walter has sufficient resources to care for Jared's material needs. In addition, the modification court's reference to Jared's age as a determining factor leads us to wonder if the court was adhering to any degree to the outmoded presumption that children of tender years should be with their mother. Such a presumption, of course, is no longer the law in Iowa. In re Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974).

We also believe that Linda should pay child support. She has a job that pays well and would enable her to contribute to Jared's support. Considering the relevant criteria of Iowa Code section 598.21(4), we believe Linda should pay \$75 per week for Jared's support until he reaches eighteen; if he pursues post-secondary education, support shall continue under the terms of Iowa Code section 598.1(2).

The trial court's order is reversed and the cause is remanded with directions to award physical care to Walter, specify Linda's visitation rights, and award child support in conformity with this opinion. Costs are split equally between the parties.

REVERSED AND REMANDED.

All judges concur, except Schlegel, J., who dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

I agree that there has been a sufficient showing of change in circumstances to modify the award of physical custody. In re Marriage of Lower, 269 N.W.2d 822, 827 (Iowa 1978). I believe, however, that the award of physical custody should be made to Linda. She has shown by a preponderance of the evidence that Jared's best interests will be served if she is awarded primary physical custody of Jared. See In re Marriage of Bolin, 336 N.W.2d at 447.

I agree with the majority that both parties are equally able to financially provide for the needs of Jared. I find petitioner's argument that she should be granted physical custody solely because of her ability to provide Jared with luxuries, whereas respondent is less able to provide "extras," to be particularly pernicious. Despite the errors in petitioner's argument, I still believe Linda is better able to minister to the child's best interests.

Linda was the primary caretaker of Jared during the marriage. She has adjusted well after the dissolution and seeks to further her own abilities while providing for the parties' child. Walter, however, has experienced difficulties adjusting after the dissolution and this may adversely affect Jared's future best interests. See In re Marriage of Winter, 223 N.W.2d 165, 166 (Iowa 1974).

I would reverse the trial court's grant of sole legal custody to Linda, grant joint custody to both parties, and grant physical custody to Linda. I would affirm the other provisions of the trial court decree.