IN THE COURT OF APPEALS OF IOWA

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No. 7-716 / 97-1116
Filed March 27, 1998

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF EUGENE MARK WAUGH AND JULIE ANN WAUGH

Upon the Petition of
EUGENE MARK WAUGH,
Appellant,

And Concerning
JULIE ANN WAUGH, n/k/a JULIE ANN SCHRODT,
Appellee.

Appeal from the Iowa District Court for Ringgold County, William H. Joy, Judge.

On appeal from a modification of the parties' dissolution decree, petitioner asserts the district court erred by transferring physical custody of his daughter to respondent. **AFFIRMED.**

James C. Steffes of Steffes, Kenyon & Nielsen, Creston, for appellant.

Sherman W. Phipps of Phipps Law Office, Lamoni, for appellee.

Considered by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

A father appeals the district court's modification of the custody provision of a dissolution decree changing the primary physical custody of his daughter from him to his ex-wife. The deteriorating relationship between Dana and her father is a substantial change since the time the decree was entered. The change justifies a modification of custody. We affirm the trial court on all issues.

I. Background Facts & Proceedings.

Gene and Julie Waugh were divorced on February 5, 1990, after a six-year marriage. Their daughter, Dana, was six years old at the time of the divorce. The dissolution court approved a stipulation by the parties for joint custody of Dana with Gene as the primary physical caretaker. Julie filed an application for modification of the dissolution decree on August 2, 1996, seeking primary physical care of Dana.

After a hearing on May 12, 1997, the district court found substantial changes in circumstances supported the modification of the decree to give primary physical care of Dana to Julie. Gene appeals the modification.

II. Standard of Review.

Review of a modification to a child custody decree is an equitable action and reviewed de novo. Iowa R. App. P. 14(f)(7). This court has a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). Weight is given to the fact findings of the trial court, especially when considering the credibility of

witnesses, but the court is not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value with respect to custodial issues, and the court must make its decision on the particular circumstances unique to each case. *In re Marriage of Anderson*, 522 N.W.2d 99, 101 (Iowa App.1994).

Courts can modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree not contemplated by the court when the decree was entered. *Dale v. Peterson*, 555 N.W.2d 243, 245 (1996). The change must be more or less permanent and relate to the welfare of the children. *Id.* The party seeking to take custody from the other must also prove an ability to minister more effectively to the children's well being. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). As in any custody determination the best interests of the children is the first and governing consideration in determining the primary caregiver of the children. *See In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa App.1991). The parent who can administer most effectively to the long-term best interests of the children and place them in an environment that will foster healthy physical and emotional lives is chosen as primary physical caregiver. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

III. Modification of Custody Decree Based on Child's Preference.

Dana has expressed a clear desire to live with her mother rather than her father. She contends she hates her father and hates living with him. She has threatened to do something drastic such as run away or kill herself if forced to remain with her father.

In determining child custody, a child's stated preference is a factor to be considered, but is not controlling. *In re Marriage of Clifford*, 515 N.W.2d 559, 562 (Iowa App. 1994). A child's preference is entitled to less weight in a modification action than an original custody proceeding.[1] *In re Marriage of Behn*, 416 N.W.2d 100, 102 (Iowa App. 1987). In assessing the weight which should be given to Dana's preference, we look at her age and educational level, the strength of her preference, her relationship with family members, and the reasons she gives for her decision. *In re Marriage of Jahnel*, 506 N.W.2d 473 (Iowa App. 1993).

Dana is thirteen years old. There is no evidence she has been in any serious trouble. She is a good student and communicator. She has made her preference known in no uncertain terms that she wants to live with her mother. She contends living with her father makes her depressed and that she cannot talk to him. There is no evidence Dana's mother is pressuring her to have these feelings. Dana also wishes to spend more time with her sister, Tracey, who her father forbids her to see.

Dana's preference alone does not constitute a sufficiently substantial change of circumstances to justify modifying the decree. *See In re Marriage of Levsen*, 510 N.W.2d 892, 894 (Iowa App. 1993); *In re Marriage of Bugg*, 492 N.W.2d 452, 454 (Iowa App. 1992). This is especially so in these circumstances where Dana has displayed immaturity by threatening suicide or to run away if custody was not

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[1] This burden stems from the principle that once custody of a child 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).

changed. The trial court judge was better able to judge Dana as a witness. Although immature, her threats displayed the strengh of her desire to live with her mother.

Dana's preference, in combination with other substantial changes which have occurred since the time the decree was entered, constitute a substantial change that justifies modification of the custody decree.

Since the divorce Gene has had considerable trouble resolving issues arising from the divorce. As Dana has entered adolescence, Gene's inability to come to terms with the divorce has affected his parenting skills. Dana does not trust or confide in her father, partly because he gives her no independence or privacy. Although it is normal for teenagers to feel their parents are controlling, Dana's perception of her father is based on Gene's behavior. For example, Gene recorded, without Dana's knowledge, telephone conversations Dana had with her mother. Gene would not allow Dana to be in a room alone and she could not use the telephone without telling Gene who she was going to call and why she was calling them. This type of conduct on Gene's part has caused his and Dana's relationship to deteriorate.

Gene's conduct has also interfered with Julie's parental role over Dana. This is particularly destructive to Dana as she enters adolescence and needs the benefit of a relationship with both parents. After reviewing all the evidence, we agree with the district court there was a substantial and material change in circumstances to support a modification of the custody provision.

It is in the best interests of Dana to have Julie as her primary caretaker. Julie is emotionally stable and better able to support Gene's role with Dana than Gene can Julie's role with Dana. Gene should have liberal visitation as outlined by the trial court. The trial court's order requiring Gene to pay child support in the amount of $169.93 is affirmed.

AFFIRMED.