IN THE COURT OF APPEALS OF IOWA

No. 0-581 / 90-204

IN RE THE MARRIAGE OF VICTORIA R. EKSTRAND AND JAMES H. EKSTRAND

FILED
DEC 27 1990
CLERK SUPREME COURT

Upon the Petition of

VICTORIA R. EKSTRAND,

Appellee/Cross-Appellant,

And Concerning

JAMES H. EKSTRAND,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Respondent appeals the district court's denial of his application for modification of the child custody provisions in a decree of dissolution and Petitioner cross-appeals denial of attorney fees. **AFFIRMED IN PART; REVERSED IN PART.**

Jack A. Faith of Green, Faith & Hendrickson, Sioux City, for appellant.

William G. Deck of Deck & Deck, Sioux City, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

OXBERGER, C.J.

Victoria Ekstrand and James Ekstrand were married in December 1963. They had five children, two of which have attained their majority. A decree of dissolution entered in November 1985 ended the parties' marriage and granted Victoria physical custody of the three minor children. A September 1986 modification action, filed by James, granted him physical custody of one of the children, Terry born in October 1972, but declined to transfer to him the custody of the twins, Michael and Patrick, born in August 1976.

James filed the present application for modification in August 1989. Victoria married Roy McFarland in February 1986. Victoria, Roy, and the twins live together in Sioux City. James claims a material and substantial change in circumstances exists because Roy physically abuses the twins. The twins claim a desire to live with James in Rapid City, South Dakota because of personal conflicts with Roy. Additionally, Patrick is currently obtaining treatment for an alcohol abuse problem. Patrick apparently is at least the third generation of his family to abuse alcohol or other chemical substances.

The district court denied James' application finding the best interests of Michael and Patrick dictate Victoria retain their physical custody. The court felt Victoria could best provide the continuing care needed by the twins as well as the professional counseling they need. The court then refused to grant Victoria attorney fees claiming

a lack of authority to do so in modification actions. James appeals and Victoria cross-appeals.

James claims he should be awarded physical care of Michael and Patrick because Roy has used inappropriate physical disciplinary techniques resulting in physical abuse of the twins. James also points to Patrick developing a chemical abuse problem in his present environment as supporting a custody change. Lastly, James contends both boys have demonstrated that they are unhappy living with Victoria by running away.

In her cross-appeal, Victoria claims the court erred in not allowing her attorney fees. She asks for attorney fees of $1,500 for the modification proceedings in district court.

Both parties seek attorney fees for this appeal.

We review this equity action de novo. Iowa R. App. P. 4. We 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). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence 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 party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. Id. See also In re Marriage of Gravatt, 371 N.W.2d 836 (Iowa App. 1985). This burden stems from the principle that once fixed, custody of a child should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

After evaluating the whole record we agree with the trial court James failed to meet the heavy burden imposed on him. We find no proof James can minister more effectively to the twins needs. We are concerned that Victoria and Roy must resort to physical discipline to control the twins, but we are also concerned that James may be influencing the twins to rebel against Victoria and Roy in hopes of obtaining a custody transfer. Lastly, we are most concerned about the substance abuse problems plaguing this family for many years and we hope these children receive whatever care they need to stop the vicious cycle this family is in.

We next turn to the issue of attorney fees both at the trial and appellate levels. Iowa Code section 598.36 provides "[i]n a proceeding for the modification of an order or decree under this chapter the court may award attorney fees to the prevailing party in an amount deemed to be reasonable by the court." We find the trial court

incorrectly denied itself the authority to award attorney fees in this case and therefore we will evaluate the appropriateness of both trial and appellate attorney fee awards anew.

An award of attorney fees rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Accordingly, we order James to pay Victoria's trial attorney fees of $1,500.00 and $500.00 towards Victoria's appellate attorney fees. The costs of this appeal are taxed to James.

In summation, we affirm the trial court's denial of James' application for modification of the custody provisions of the parties' dissolution decree, reverse the court's refusal to award Victoria attorney fees, and award Victoria appellate attorney fees.

AFFIRMED IN PART, REVERSED IN PART.