

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 31 1987

IN RE THE MARRIAGE OF DALE E. PETERSON AND CAREN K. PETERSON

CLERK SUPREME COURT

270

Upon the Petition of)

DALE E. PETERSON,)

Petitioner-Appellant,)

Filed March 31, 1987

And Concerning)

6-503

86-642

CAREN K. PETERSON,)

Respondent-Appellee.)

Appeal from the Iowa District Court for Marion County (No. DM5-353)

- Thomas S. Bown, Judge.

Petitioner husband appeals from a modification of the decree dissolving the parties' marriage. **AFFIRMED BY OPERATION OF LAW.**

Fred J. Kreykes, Pella, for appellant.

Bert A. Bandstra, Knoxville, for appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ., but decided en banc.

Petitioner husband appeals from the trial court's order modifying the parties' dissolution decree on custody of the parties' child and the petitioner's visitation rights. Judges Donielson, Snell and Hayden would affirm the trial court. Chief Judge Oxberger and Judges Schlegel and Sackett would affirm the trial court in all respects except they would reverse the trial court's decision modifying petitioner's visitation rights.

Judges Donielson, Snell, and Hayden, would affirm the trial court as follows:

Respondent sustained her burden of showing change sufficient to justify a modification of visitation. A change of circumstances needed to allow a modification of visitation, is a much less extensive change than is required to change custody. In re Marriage of Jerome, 378 N.W.2d 302, 305 (Iowa Ct. App. 1985).

Petitioner was terminated from his job in November 1984 because he would not work overtime. Obviously the parties and the trial court at the time of the dissolution contemplated petitioner would be employed, and the times of visitation were to accommodate petitioner's work schedule. The original decree and stipulation provided for the petitioner to visit with Jeremy every other weekend and any other time he was not employed. (Emphasis added.) Petitioner was employed full time at 3-M Company at the time of the dissolution. He worked a varying shift, two days on and two days off. Petitioner is not seeking employment outside of his girlfriend's home and, under the terms of the original decree, he could exercise visitation every day. This court has recognized excessive shifting of a child between parents, through midweek visitation, could impair the child's sense of stability. In re Marriage of Fish, 350 N.W.2d 226, 230-31 (Iowa Ct. App. 1984). This indefinite visitation provision combined with the parties' inability to cooperate is not in the best interest of the child.

In reversing on the issue of visitation, Judge Sackett, with Chief Judge Oxberger joining, would state as follows:

The trial court said:

Now, since I have made that finding that there has not been a substantial change in circumstances which would warrant a change of custody, this is probably unnecessary, but I still want to comment on it. I have no criticism in the abstract of the relationship between Dale and Diane and the fact that Diane is the breadwinner and Dale is the househusband, nothing — I'm not critical of that in the abstract. But I am critical of it as it might affect Jeremy, were I to give custody to Dale, primary physical custody to Dale, because regardless of what . . . Mr. Peterson might think about that reversal of roles, that isn't working to prepare Jeremy very well for the world that he is going to grow up in.

It wouldn't be a good role model for him, because in our society it is still accepted that the husband and father is the breadwinner and works and that is the role model that Jeremy should have unless he is going to be socially crippled when he is an adult. (emphasis added).

We are concerned that the trial court may have let its decision be permeated by outdated social stereotypes.

The court must be willing to disregard stereotypes and recognize the freedom of both men and women to make their own decisions about family care and employment outside the home. The court must be sensitive to the rights of both men and women to consider family responsibilities in making job decisions. We cannot establish one set of guidelines for mothers and another set of guidelines for fathers. See Orr v. Orr, 400 U.S. 268, 281, 99 S.Ct. 1102, 59 L.Ed.2d 306, 321 (1979). We cannot classify on the basis of sex.¹

Furthermore, the responsibility of caring for a child is in fact work, whether that responsibility is assumed by a man or a woman. The rights of fathers to participate in homemaking and childrearing must be judicially recognized.

¹ See Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) (The court held unconstitutional a Utah statute mandating different ages of majority for men and women); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) (The court invalidated an Idaho law favoring men over women as administrators of estates).

Until both sexes are free to pursue work and childcare and work or childcare there can be no emancipation for either sex. See Note, Fathers and Families: Expanding the Familial Rights of Men, 36 Syracuse L. Rev. 1265, 1266 (1986); Bear, Berger & Wright, Even Cowboys Sing the Blues: Difficulties Experienced By Men Trying To Adopt Nontraditional Sex Roles and How Clinicians Can Be Helpful To Them, 5 Sex Roles 191 (1979).

Denying men the right to take an active part in childrearing not only is unfair to them, but it also impacts adversely upon women contemplating careers outside the home. See B. Friedan, The Second Stage 120-121 (1981); 36 Syracuse L. Rev. at 1299. We must make custody and visitation decisions based on the best welfare of the child and not outdated stereotypes and inferences. There is no basis to determine a father who leaves the family home each day to enter the workplace provides a better role model for his son than does the father who has abandoned the traditional father's role to assume homemaking and childcare responsibilities. See Mead, Some Theoretical Considerations on the Problem of Mother Child Separation, 24 Am. Medical J. Orthopsychiatry 471-483 (1954) (Culture not biology dictates childrearing practices).

In discussing sexual stereotyping and the judiciary, The Honorable William Eich of the Wisconsin Court of Appeals stated:

Prior to 1980, there had been few, if any, efforts to educate judges about the nature and effect of sexual stereotyping and its impact on the conduct and outcome of trials and on the administration of justice in general. Clearly, much has been accomplished since that time. The work of the New Jersey Task Force on Women in the Courts and similar bodies in other states, and the growing interest in sensitizing judges to these problems, have helped many judges to realize that they, in common with everyone else, have been socialized to think and react toward women—men—in terms of stereotypes and, further, that such thinking can be inimical to the goal of equal justice for all. Judges must also inform themselves about the social and economic realities of women's

and men's lives today—particularly as they relate to the consequences of divorce. Many are making substantial efforts along these lines, and they certainly should be commended; but there is still considerable distance to travel.

[I]n exchange for the special position of power and influence judges and attorneys hold in government, in the legal/judicial system, and in society itself, they, and the institutions they represent, must assume a special burden of responsibility for fairness and objectivity. n. 37. Becoming aware of, and striving to eliminate gender-based myths, biases and stereotypes from the courtroom, from the decisionmaking process, and from the entire apparatus of justice, should be a priority for us all.

Gender bias in the courtroom: Some participants are more equal than others,

59 Wis. B. Bull. 339, 343 (1986) (Special issue: Women in Wisconsin Law).

Those of us in the judicial branch of this state have an obligation to sensitize ourselves on gender bias issues and strive to eliminate gender-based biases from the decision-making process.

Judge Schlegel would simply reverse the modification of visitation.

AFFIRMED BY OPERATION OF LAW.