IN THE COURT OF APPEALS OF IOWA

No. 5-213 / 94-0635

FILED
MAY 30 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF PENNY JO DANIELSON AND DAVID W. DANIELSON

Upon the Petition of
PENNY JO DANIELSON,

Petitioner-Appellee,

And Concerning
DAVID W. DANIELSON,

Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Respondent appeals the district court's denial of his application to modify child custody. **REVERSED AND MODIFIED.**

Dennis D. Jasper of Stafne, Lewis, Jasper, Alexander & Preacher, Bettendorf, for appellant.

Penny Jo Danielson, Pine Ridge, South Dakota, pro se.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

David and Penny Jo Danielson were divorced on April 12, 1990. Pursuant to the decree, they were awarded joint custody of their minor children, Christian, born December 4, 1985, and Casey, born August 4, 1988. Penny Jo was awarded physical care of the two children with David being awarded liberal visitation. David was ordered to pay child support of $38.25 per week per child until each child reached the age of majority. David was also ordered to pay for health insurance for the two children, and to purchase a life insurance policy in the amount of $40,000 naming the children as beneficiaries.

On August 25, 1993, David filed an application for modification of the decree. David alleged that Penny Jo had removed herself from Iowa with their minor children. David stated he ultimately contacted Penny Jo, and she agreed to have the children stay with David. He argued it was in the children's best interest that he be awarded their physical care. Following a hearing on February 2-4, 1994, the district court entered its order on March 15, 1994, denying David's application for modification. The court concluded David had not shown there had been a substantial change in circumstances justifying a change in custody. David appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have 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). 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).

David contends the district court erred in failing to modify the primary physical care provision of the parties' dissolution decree.

> 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 find David has met this heavy burden.

David argues he should be granted physical care of the minor children. In so arguing, David raises a number of incidents to support his claim. He notes Penny Jo was evicted from her home in Davenport because of unsanitary conditions. He also maintains the children developed intestinal parasites after drinking substandard water in their next new home in Hillsdale, Illinois. He further points to allegations by the children of sexual abuse by Penny Jo's live-in boyfriend Bob. David additionally notes Penny Jo has a drinking problem. David further notes the children have burned themselves while using a stove for heat and have had head lice on several occasions. David contends he is better able to provide a stable home environment than Penny Jo.

The criteria for determining child custody are applied in modification proceedings. *In re Marriage of Hubbard*, 315 N.W.2d 75, 80 (Iowa 1982). In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1993), in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and in *In re Marriage of Winter*, 223

N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App. 1985). In determining which parent serves the child's best interests, the objective is to place the child in an environment most likely to bring the child to healthy physical, mental, and social maturity. *In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa App. 1993).

Penny Jo has moved eight times in the four years since the dissolution decree was entered. At times, the children have been forced to live in unsanitary and unsafe accommodations. During the four years there have been instances of sewage problems, unsafe drinking water, lack of heat, electrical outlets with exposed wires, crumbling ceilings, and light fixtures hung from wires in holes in the ceiling.

Both Penny Jo and Bob have a history of drinking problems. Penny Jo has been arrested for OWI twice, convicted for OWI at least once, and has a charge of transporting alcohol. Penny Jo is undergoing treatment and counseling for alcohol. Bob has at least three OWI convictions and at the time of the trial had outstanding warrants in Iowa and Illinois. Testimony was provided regarding the fact that alcoholism is a serious problem on the reservation where Penny Jo now lives. In addition, although admittedly not controlling, the children have expressed a preference that they prefer living with their father.

We believe it is clear the children's best interests will be met by modifying the primary physical provision of the dissolution decree in favor of David. In the time Penny Jo has had primary physical care, she has been unable to provide a stable, safe environment for the children. We find David amply met his burden

of showing a material and substantial change. We conclude David is able to minister more effectively to the children's well being. We reverse the trial court and modify the dissolution decree by awarding David the physical care of the children.

As a result of our reversal, the dissolution decree must be further modified. Penny Jo is granted the equivalent visitation rights as were held by David prior to this modification. We further modify the decree to terminate David's obligation to pay child support thirty days after procedendo issues. Penny Jo and David shall remain joint custodians of the children. Costs on appeal are assessed to Penny Jo.

REVERSED AND MODIFIED.