

IN THE COURT OF APPEALS OF IOWA

No. 2-347 / 91-1600

IN RE THE MARRIAGE OF LYLE McGLADE, JR., AND
DEBORAH A. McGLADE

FILED

AUG 27 1992

CLERK SUPREME COURT

Upon the Petition of

LYLE McGLADE, JR.,

Petitioner-Appellant,

And Concerning

DEBORAH A. McGLADE,

Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie
County, Charles L. Smith, III, Judge.

Husband appeals a district court decision dismissing
his application to modify the parties' dissolution decree.

MODIFIED.

Eric Borseth of Borseth & Holmes, Pleasant Hill, for
appellant.

Deborah A. McGlade, pro se, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab,
JJ.

SACKETT, J.

The primary issue in this appeal is whether the physical care provisions of a dissolution decree should have been modified and physical care of children born in 1980 and 1982 should have been transferred to petitioner-appellant Lyle McGlade, Jr. We modify.

The marriage of Lyle and respondent-appellee Deborah McGlade was dissolved in August 1990. Physical care of the parties' two children, Scott born in 1980, and Patricia born in 1982, was awarded to Deborah.

Deborah and the children left Iowa shortly after the dissolution to live in the State of Pennsylvania where Deborah had moved following the parties' separation.

In December 1990, the children returned to Iowa for visitation, and Lyle filed an application for modification of the dissolution decree contending he should be made physical custodian. In August 1990 the trial court dismissed Lyle's petition for modification and ordered Lyle to pay \$1,000 toward Deborah's attorney fees. A motion for a new trial was overruled, and this appeal followed.

Lyle contends on appeal that he should be the physical custodian. We review de novo. Iowa R. App. P. 4.

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983); Mears v.

Mears, 213 N.W.2d 511, 514-15 (Iowa 1973); In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987). The person seeking to change the custodial provisions of a dissolution decree must establish by a preponderance of the evidence the situation since the custodial provisions of the decree were entered has changed substantially, and the children's best interests support the requested change. See In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). Lyle has the burden to prove he is the superior parent and he can minister more effectively than Deborah to the children's well-being. See In re Marriage of Gravatt, 371 N.W.2d 836, 840 (Iowa App. 1985).

The record reflects that Lyle and Deborah have failed to cooperate with each other and to make the situation easy for the children. A recitation of the history and continuing saga of the battles between Lyle and Deborah would serve no useful purpose. Lyle and Deborah obviously both love their children and are of the opinion they act in their children's best interests. However, our review of the record convinces us the children have been harmed by their battles, and the children need for them to attempt to work with each other as mature adults. The issue before us, however, is substantially more serious than the parents' lack of cooperation. The critical issue in the modification was evidence that Scott was showing suicidal tendencies.

Shortly after the children returned to Iowa, they were interviewed by Paul Feilmann, a Licensed Social Worker and Mental Health Therapist at the Mercy Center in Council Bluffs, and by Stephen D. Starr, M.D., Staff Psychiatrist at the Creighton University Medical Center School of Medicine and the University of Nebraska Medical Center College of Medicine.

Feilmann, the social worker, made the following observations:

I met with Scott and Patricia McGlade at the request of their father, . . . In talking with Scott he was noticeably distraught and upset in talking about the idea of returning to his mother's home in Pennsylvania. He tried to refrain from crying but did break down and became very tearful during this discussion. . . . He indicates that he has very few activities and opportunities to play when he is out in Pennsylvania and indicates that his mother frequently leaves him in the care of his grandmother. . . . He feels unloved and unwanted by his grandmother when there and indicated that they are having situations where he has been physically punished. He notes that he receives physical punishment with a belt fairly consistently when he acts up. . . . In my discussion with Scott, he indicated that he has been thinking about harming himself. When I pursued this further with him he indicated that he has thought about shooting himself because he is so sad about not being able to see his father. I asked him how he would go about shooting himself. He indicated that his family in Pennsylvania does have guns in the home and he does know where the shells are. He indicated the main thing that keeps him from attempting to shoot himself has been the feeling that he will not be able to see his father ever again if he committed suicide. I felt that his discussion of the suicidal thinking was very genuine. His affect was very appropriate. He was very tearful and noticeably distraught in talking about thoughts of hurting himself.

I also met with Patricia and she was less open about the emotional turmoil that she is experiencing, but her affect was noticeably depressed and she confirmed some of the things that Scott said about the way that they are treated in Pennsylvania. She also expressed some feelings of depression and sadness about not being able to see her father.

. . . In light of Scott's depression and suicidal thinking, I see that sending him back without further mental health assessment could be potentially dangerous. (emphasis added).

Starr, the psychiatrist, determined:

From my preliminary psychiatric evaluation of Scott, he clearly reports and displays fear, increased anxiety, worry, and sadness when the thought of leaving his father in Iowa and returning to his mother and her parents in Pennsylvania is brought up. On more than one occasion when talking about returning to Pennsylvania, he became tearful and distraught. Scott reported incidents while he lived with his mother and her parents which caused him much unhappiness and great amount of stress. He reported entertaining frequent suicidal thoughts with a definite plan while he lived in Pennsylvania with them. He reports a return of his suicidal thoughts when he thinks about returning to Pennsylvania.

When I met with Patricia, she was more contained and less forthcoming; however, she appeared to be sad and related similar occurrences and incidents while living with her mother and her parents in Pennsylvania which were clearly associated with distress, anxiety, and feelings of unhappiness. Both children confirm that they were told by their mother and grandparents not to talk about any problems that they might have had in Pennsylvania.

Scott was very open and emphatic about his wanting and need to stay with his father. He seems to have a strong attachment to his father. Patricia also states that she wants to stay with her father. Both children appear to be very close to their father and paternal grandmother who does a lot of the caretaking when father is working.

From my information gained from father and the children, I have real concerns about the method, severity, and frequency of punishment to the children and regarding the question of physical abuse on one occasion while they lived with mother and grandparents in Pennsylvania.

Based on the results of my preliminary psychiatric evaluation, I feel that Scott is especially at risk for more serious depression and increased suicidal potential if he were to return to Pennsylvania at the time. I also feel that Patricia is quite distressed and at risk for a psychiatric illness. I would recommend that a more complete psychiatric evaluation possibly court ordered be done on both of these children. This would be important, not only to assess the emotional status of both of these children but also the assessment of their overall needs, including their living situation. I strongly recommend that they remain with their father in Iowa while this evaluation is done, especially given my concerns for Scott becoming increasingly depressed and suicidal. I would also recommend that great consideration be given to appoint a guardian ad litem since this be the best mechanism by which the children's emotional and physical welfare can be best represented. (emphasis added).

After the modification action was filed, an attorney was appointed for the children. The attorney filed a report. The attorney did not seek the further psychiatric evaluation recommended by the psychiatrist or advocate for the children's wishes "to stay with their father." Instead, the attorney assumed the role of a decision-maker and filed with the court a report making her own determination of the credibility of the witnesses and the weight to be given to the reports of the psychiatrist and the social worker who examined the children. The attorney in her report did not place much reliance on the psychiatrist's or social worker's opinions. The reason she gave for rejecting them was she determined the children would not have shown outward signs of depression in a two-week period. The attorney for the children presented

no expert opinions supporting her decision to give little weight to the psychiatrist's and social worker's strong opinions and warnings of Scott's potential for suicide.

An attorney who is appointed to represent children in a dissolution has his or her duties clearly set out in Iowa Code section 598.12(1) (1991).

1. The court may appoint an attorney to represent the interests of the minor child or children of the parties. The attorney shall be empowered to make independent investigations and to cause witnesses to appear and testify before the court on matters pertinent to the interests of the children. (emphasis added).

An attorney is to investigate and to secure the testimony of witnesses helpful to the cause of the children. In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979). There is no provision that an attorney report or make recommendations, and his or her findings are not made admissible as evidence in the case. Id. The attorney appointed for the children like the attorney for any client is to see that the interests of the children he or she represents get a full and fair airing at trial by the presentation of competent and relevant evidence. See id.

The trial court, in dismissing Scott's potential for suicide as a basis for modification, found:

The petitioner's allegation that Deborah's lifestyle and living conditions have caused severe emotional harm to Scott is an issue that could have been raised at the original Decree of Dissolution hearing. Dr. Beishel testified that Scott's stomach was a long time problem and did not arise until the original Decree of Dissolution of Marriage. Further, it is difficult for the court to believe the children would have developed

such outward signs of depression in less than a two week period from the time they arrived in Council Bluffs until the time of their alleged initial complaints.

We recognize there was evidence at the dissolution hearing that Scott was having mental problems. However, the evidence at the dissolution hearing did not indicate problems as serious as suicidal tendencies.

The major concern of any proceeding to modify the custodial arrangement in a dissolution decree is the best interest of the children. There is competent evidence that Scott's living situation is causing him to be at risk, and Patricia's living situation puts her at risk. The best interest of the children is clearly at stake. There is substantial evidence the environment of Deborah's home has created a climate that puts the children at risk for psychiatric illness. Lyle has met his burden of persuasion. We modify the decree to award physical care to Lyle.

We recognize the record did contain the deposition of a principal of the school the children had attended since the children lived in Pennsylvania. In this deposition, the principal indicated the children were getting along well in school. We have considered this testimony. However, this testimony does not address the problems identified by the psychiatrist.

MODIFIED.

Donielson, P.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I concur in the result only. I disagree with any inference in the majority opinion that it was improper for the court to consider the recommendations made by the attorney for the children.

As the majority points out, under Iowa Code section 598.12(1), the court has the power to appoint an attorney to represent the minor children of the parties. Iowa Code § 598.12(1) (1991). It did so in this instance. By that same section, the attorney is empowered to make "independent investigations." Id.

It is true there is no provision in the Code that the attorney report or make recommendations as to his or her findings, and it is equally true that if such findings are made, they are "not made admissible as evidence in the case." In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979). However, the supreme court in Joens further stated that the report and recommendation of the attorney could be considered when properly before the court by agreement or stipulation. Id. I note the trial court in this case considered the attorney's report, which leads me to believe that it was received by the court by agreement and stipulation of the parties.