



IN THE COURT OF APPEALS OF IOWA
IN RE MARRIAGE OF ROSA M. LEZA
AND ANTONIO V. LEZA

Upon the Petition of)
ROSA M. LEZA,)
Petitioner-Appellee,)
And Concerning)
ANTONIO V. LEZA,)
Respondent-Appellant.)

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9-251
88-1863

Appeal from the Iowa District Court for Muscatine County (D4007-1086), James E. Kelley, Judge.

Respondent appeals the decision of the district court which denied his application for modification of the physical care of the parties' minor children. **AFFIRMED AS MODIFIED.**

Douglas E. Johnston, Muscatine, for respondent-appellant.

Pamela Jo Lewis, Cedar Rapids, for petitioner-appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

In this appeal, Antonio V. Leza, the respondent, seeks to modify the primary physical custody of the three children of this marriage from Rosa M. Leza, the petitioner and the children's mother. He contends that there has been a change in circumstances since the entry of the decree of dissolution, making it in the children's best interests that primary physical custody be placed in him. In the alternative, if primary physical custody is not placed in him, he asks that we modify the trial court's visitation order to give him more liberal visitation and that we remove certain restrictions on his visitation.

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

In considering a modification of an initial award of custody, the court looks for a material and substantial change in circumstances. Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972). To show such changes in circumstances:

The parent seeking to take actual custody from the other has the burden to show some superior claim based on his ability to minister, not equally, but more effectively to the children's well being. This principle is but a corollary to our rule that custody of children, once fixed, should seldom be disturbed and then only for the most cogent reasons.

In re Marriage of Guttermuth, 246 N.W.2d 272, 274 (Iowa 1976) (citations omitted).

Except for the occasion when Rosa removed the children to Texas, it is apparent from the record that she did not hinder Antonio's visitation with the children. She did have reservations about allowing Antonio to keep the newborn baby overnight, and this was found to be understandable, under the circumstances. We do not find that her fears were unreasonable, given her feelings concerning Antonio's life style.

Having reviewed the record in this case, we find that the best interests of the children will be served by leaving their physical custody with Rosa. The record contains nothing that would permit a finding that Antonio and his new wife would be able to minister more effectively to the children. There is no evidence that at the time of the hearing in this matter there had been any substantial change in circumstances that would justify a modification of the custody provisions of the decree. We affirm the trial court's decision leaving the children's physical custody with Rosa, while continuing the joint legal custody in both parents.

The court's order on modification placed a restriction upon visitation so that the children were not to remain with their father overnight so long as he was living with an adult female not related to him by blood or marriage. That restriction is now moot as to the woman with whom he now lives, since they are married. We decline the

invitation to remove that provision from the order, since it is no longer relevant to this appeal.

The trial court also restricted the visitation with Antonio Leza Jr. until the child reaches the age of three. We find that provision to be unnecessarily restrictive. Accordingly, the limitation against visitation with Antonio Leza Jr. overnight is stricken, effective when that child attains the age of two.

The costs of this appeal shall be paid by Antonio. He is ordered to pay \$700 attorney's fees for Rosa's attorney.

AFFIRMED AS MODIFIED.

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

DONIELSON, P.J. (concurring in part, dissenting in part)

I concur with the majority that primary physical custody should stay with the mother, but I see not the slightest justification in not permitting visitation until Antonio Jr. attains the age of two. Antonio Sr. is now married and there is no evidence that Antonio Jr. would not be well cared for. As a matter of fact, the trial court found that Antonio Sr. was a "good parent."