IN THE COURT OF APPEALS OF IOWA

No. 1999-16 (9-126) / 98-1014
Filed April 30, 1999

IN RE THE MARRIAGE OF MARLENE SUNTKEN AND CHRIS DEN OUDEN

Upon the Petition of
MARLENE SUNTKEN a/k/a MARLENE DEN OUDEN,
Appellee,

And Concerning
CHRIS DEN OUDEN,
Appellant.

Appeal from the Iowa District Court for Polk County, D. J. Stovall, Judge.

Chris Den Ouden appeals a district court order denying his application to modify the parties' dissolution decree. **AFFIRMED.**

Thomas J. Levis and Stephanie L. Brick Drey of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellant.

Kolleen K. Samek, Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Overview: The respondent, Chris Den Ouden, appeals a district court order denying his application to modify the custody provisions of the parties' dissolution decree. We find that although the children's mother, Marlene, has multiple sclerosis, she continues to provide good care for the children. Her medical condition was not unforseen by the dissolution trial court and Chris has failed to carry his burden of proving a substantial change of circumstances warranting a change in the physical care.

Background: Marlene and Chris Den Ouden married in 1974. They have two children: Christian John ("C.J."), born in 1979, and Katherine ("Katie"), born in 1985. Marlene was diagnosed with multiple sclerosis in the early 1970s. The Den Oudens' marriage was dissolved in 1992. The dissolution decree awarded primary physical care of the children to Marlene, and allowed Chris liberal visitation. The decree also provided Chris was to pay $4,000 monthly child support[1] for the two children, and $2,250 monthly alimony.[2]

In 1994, Chris brought a modification action, seeking custody of the children. Chris cited Marlene's multiple sclerosis as a basis for changing custody. The parties settled the matter in 1995 by stipulation increasing visitation for Chris. There remained a fair amount of animosity between the parties and Chris's new wife.

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[1] The child support decreased to $3000 monthly when C.J. graduated from high school.

[2] The alimony ends no later than July 2006.

District court proceedings: In August 1997 Chris again applied for modification of custody claiming he is better able to care for the children, primarily because of Marlene's multiple sclerosis.

At trial, Dr. Stein, Marlene's neurologist testified her multiple sclerosis continues to progress slowly, affecting her both mentally and physically, but he opined she had changed little over the past few years and was able to care for the children. Dr. Hilliard, a court-appointed psychologist, tested Marlene and testified her illness has caused mental impairment to Marlene's attention, memory, and her ability to organize her thoughts. It also affects her impulse control. He recommended the children should be in Chris's custody. Chris introduced evidence C.J. and Katie both were troubled by Marlene's outbursts of anger. Another of C.J.'s concerns was whether his mother could care for Katie after he left for college in Michigan, because he said he had been providing much of Katie's care.

The court denied the application, finding both children were thriving in Marlene's custody, and it remained in their best interest to leave the custody arrangements undisturbed. The court concluded "the question is not which home is better, but whether the moving party can offer *superior* care." *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa App. 1994) (Emphasis in court's order). The court also concluded circumstances did not warrant a change in child support or alimony payments. The court ordered Chris to pay court costs and $1,500 of Marlene's attorney fees. Chris appeals.

I. Scope of review. Review of actions to modify child custody is de novo. Iowa R. App. P. 4. The principal question is whether appellant established by a preponderance of evidence conditions since the dissolution decree have so materially and substantially changed that the child's best interests make it expedient to change her custody to him. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983); *In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa App. 1993). The changed circumstances must not have been contemplated by the trial court when the decree was entered. They must be more or less permanent or continuous, not temporary, and must relate to the welfare of the children. *Hobson v. Hobson*, 248 N.W.2d 137, 139-40 (Iowa 1976). The parent seeking to take custody from the other must show some superior claim based on his or her ability to minister, not equally, but more effectively to the child's well being. *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *Spotts v. Spotts*, 197 N.W.2d 370 (Iowa 1972); *Schulz v. Schulz*, 195 N.W.2d 131 (Iowa 1972). This heavy burden 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 Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980); *see In re Marriage of Melton*, 256 N.W.2d 200, 205 (Iowa 1977).

II. Substantial change of circumstances. Chris argues a substantial change in circumstances has occurred since the 1995 modification order. He contends Marlene's emotional and psychological health has deteriorated to the point she is unable to take care of the house or the children properly. Because Chris believes C.J.

had assumed a role as Katie's caretaker in Marlene's home, Chris argues it is in Katie's best interest to grant him custody of her because C.J. is leaving home for college in Michigan. Chris believes he and his current wife can provide superior care to Katie in a structured and safe environment they claim is currently missing from her life. He also claims they are better able to promote the children's relationship with both parents.

When Marlene was evaluated in 1994 as part of a court-ordered home study, the psychological testing revealed some mental deterioration from her illness, but not enough to recommend changing custody to Chris. At that time, the psychologist opined Marlene's multiple sclerosis would continue to progress, making her unable to care for the children. Drs. Stein and Hilliard disagree whether or not that time has come.

Marlene has been living with multiple sclerosis for many years. Chris has failed to present evidence that her present condition is a substantial change in circumstances not within the contemplation of the district court affecting the welfare of the children. Rather, the evidence demonstrates the children have done well under Marlene's care and with liberal visitation by Chris. C.J. is now in college and Katie a young teenager. Certainly Marlene's illness requires the children to help more with household duties. However, there was no evidence that Marlene put either C.J. or Katie at risk or was not able to tend to their individual needs. We find no basis for modifying primary physical care of Katie to Chris.

Marlene seeks an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). We are to 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 Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). Chris is much better situated financially than Marlene to pay attorney fees. Marlene was forced to defend the district court's decision on appeal. We order Chris to pay $2,000 of Marlene's appellate attorney fees. Costs on appeal are assessed to Chris.

AFFIRMED.

No. 98-1014. [1999-16 (9-126)] IN RE MARRIAGE OF DEN OUDEN

Appeal from the Iowa District Court for Polk County, D. J. Stovall, Judge. **AFFIRMED.** Considered by Sackett, C.J., and Vogel and Zimmer, JJ. Opinion by Vogel, J. (6 pages $2.40)

Marlene and Chris Den Ouden married in 1974. They have two children: Christian and Katherine. Marlene was diagnosed with multiple sclerosis in the early 1970s. The Den Oudens' marriage was dissolved in 1992. The dissolution decree awarded primary physical care of the children to Marlene. In 1994, Chris brought a modification action, seeking custody of the children. Chris cited Marlene's alleged declining abilities to parent due to her multiple sclerosis as a basis for changing custody. The parties settled the matter in 1995 by stipulation. In August 1997 Chris again applied for modification of custody claiming he is better able to care for the children, primarily because of Marlene's multiple sclerosis. The court denied the application, finding both children were thriving in Marlene's custody, and it remained in their best interest to leave the custody arrangements undisturbed. **OPINION HOLDS:** Chris has failed to present evidence that her present condition is a substantial change in circumstances not within the contemplation of the district court affecting the welfare of the children. Rather, the evidence demonstrates the children have done well under Marlene's care. There was no evidence that Marlene put either C.J. or Katie at risk or was not able to tend to their individual needs.