

IN THE COURT OF APPEALS OF IOWA

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JOY MARIE McNURLIN,

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CLERK SUPREME COURT

Petitioner-Appellant,

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Filed November 26, 1980

vs.

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PAUL F. McNURLIN,

)

0-269

4-64272

Respondent-Appellee.

)

Appeal from Black Hawk District Court - Dennis D. Damsgaard, Judge.

Mother appeals from trial court's order transferring custody of minor child to father alleging trial court erred 1) in finding the father established a material and substantial change of circumstances justifying modification and 2) in failing to award attorney fees to her pursuant to section 598A.7(7), The Code 1979. AFFIRMED.

Robert W. Thompson of Rickert, Thompson & Kazragis, Reinbeck, Iowa, for petitioner-appellant.

William Ball of Ball & Nagle, P.C., Waterloo, Iowa, for respondent-appellee.

Ross S. Randall of Zellhoefer, Randall & Anfinson, Waterloo, Iowa, for minor child.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner-mother, Joy Marie McNurlen, appeals from trial court's order transferring custody of the parties' minor daughter, Holly Lorraine, to respondent-father, Paul S. McNurlen. She alleges trial court erred 1) in finding that Paul established a material and substantial change of circumstances since entry of the original decree and 2) in failing to award attorney fees to her pursuant to section 598A.7(7), The Code 1979. We affirm.

The parties were married in 1964 and divorced pursuant to a Michigan decree entered May 10, 1974. Joy received custody of Holly, born November 20, 1972. Paul agreed to the custodial arrangement because he was recovering from a near-fatal automobile accident which occurred in September of 1973. In June, 1979, during Holly's visit with Paul in California, she related that Joe Ede, the 14-year-old son of Joy's then-boyfriend, Richard Ede, had exposed his genitals to her and had asked her to touch him. Paul became upset and refused to return Holly to Waterloo, Iowa, where Joy was living. Paul then commenced proceedings in California for a change of custody. On July 19, 1979, Joy filed a petition in the Black Hawk County District Court praying for an order requiring Paul to return Holly to her. By an order dated August 16, 1979, a judge of the Superior Court of Los Angeles County, California found jurisdiction was in Black Hawk County, quashed the California proceeding, and ordered Holly's return to Joy within forty-eight hours after the court's receipt of a telegram stating that Joy would not see Richard Ede until after a hearing on the matter, then set for September 12, 1979, in Black Hawk County District Court. On September 4, 1979, the Iowa hearing was reset for October 16 and 17, 1979. On September 24, 1979, Black Hawk County district judge Roger Peterson ordered revocation of the California order restraining Joy from associating with Richard Ede. He further ordered "that Holly . . . not be left, or be in the company of one Joseph Ede, pending hearing on this matter." Paul filed his application for modification in Black Hawk County on October 15, 1979. His application was heard on October 16, together with Joy's petition, by agreement of counsel.

Following hearing, trial court "reluctantly arrived at the conclusion that the best interests of the child require that the care, custody and control of Holly should be transferred from the Petitioner to the Respondent, Paul McNurlen." Joy filed her notice of appeal November 9, 1979. Her application for a temporary stay of trial court's order pending appeal was denied by order of the supreme court entered November 19, 1979. On December 10, 1979, Joy filed an application under rule 179 alleging, inter alia,

that trial court failed to address petitioner's request for attorney fees. In its December 20th ruling, trial court found that, by perfecting an appeal, Joy waived and abandoned her rule 179 motion.

I. Scope of Review. Our review of a proceeding to modify custody provisions of a dissolution decree is *de novo*. Iowa R. App. P. 4; In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). The principles governing such proceedings are well established. The best interests of the minor child is our guiding concern. *Id.* The noncustodial parent has the burden of establishing by a preponderance of the evidence that there has been a material and substantial change of circumstances since entry of the original decree, not within the contemplation of trial court at that time, which makes it expedient to change custody. In re Marriage of Snyder, 276 N.W.2d 402, 404 (Iowa 1979). Where the custodial parent has properly provided for the child's social, moral, and educational needs, and the child has become attached to its environment, the court is not justified in transferring custody except for the most cogent reasons. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). The parent seeking to take actual custody must show some superior claim based on his or her ability to minister, not equally but more effectively, to the child's well being. Melton, 256 N.W.2d at 205. We apply these principles in light of the factors enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979); In re Marriage of McCreary, 276 N.W.2d 399, 400 (Iowa 1979).

II. Modification of Custody. In his October 1, 1979 deposition, made a part of the record by agreement of counsel, Paul listed the following reasons for requesting a change of custody: 1) Joy's demonstrated poor judgment; 2) Joy's instability throughout the marriage and afterwards, including prolonged psychiatric care; 3) the incident involving Joe Ede and Joy's poor judgment thereafter; 4) Joy's reliance on prescription drugs; 5) Joy's sporadic work habits; and 6) Paul's situation following his remarriage.

Our review of the record leads us to agree with trial court's finding that Joy has been a good mother for Holly in the past, that there is a great deal of love between Joy and Holly, and that Joy is still capable of providing for Holly's physical needs. We further commend Joy for her efforts in encouraging Holly's relationship with Paul. We agree with trial court's conclusion, however, that the circumstances existing since May, 1979, are sufficient to require a change of custody. A detailed recitation of those circumstances is unwarranted, as trial court has adequately set forth its concerns and reasons on the record. Our review of the evidence leads us to agree. We are not

overlooking the fact that Holly appears happy and well-adjusted or that it might be desirable to wait longer to see if Joy's present situation stabilizes. However, "[c]ourts must act to prevent wounds from being inflicted on children and should not wait until injury occurs." Zaerr v. Zaerr, 222 N.W.2d 476, 478 (Iowa 1974). We believe that the potential for harm in Joy's present living environment is too great to ignore. We further find that Paul has adequately demonstrated his superior capabilities. In light of Holly's need for a stable and predictable environment, we conclude that trial court properly transferred her custody to Paul.

III. Attorney Fees. Joy also contends trial court erred in failing to award her attorney fees for costs she incurred in the California action and the Iowa modification action. She relies on section 598A.7(7), which states, in part:

If it appears to the court that it is clearly an inappropriate forum, it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

We will not address the merits of this contention, however, due to Joy's failure properly to raise the issue in the court below.

In her trial brief, filed November 7, 1979, Joy requested attorney fees under section 598A.7. On November 10th, she filed her notice of appeal. Her application under rule 179 was filed December 10, 1979. Rule 179(b) provides:

On motions filed with or filed within the time allowed for a motion for a new trial, [rule 247] the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted.

Iowa R. Civ. P. 247 requires motions for new trial to be filed within ten days after the verdict, report or decision unless the court grants additional time, not to exceed 30 days, upon a showing of good cause. Thus, Joy had ten days following trial court's ruling of November 7, 1979 to apply for rule 179 relief or to file a request for additional time. See Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836 (Iowa 1980); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550, 554 (Iowa 1980). She failed to do either. Her application thus is untimely. See 2 A. Vestal & P. Wilson, Iowa Practice, 43.02(1) (1974). Since "a rule 179(b) motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense or legal theory properly submitted for adjudication . . . [,]" Arnold v. Lang, 259 N.W.2d 749, 753 (Iowa 1977), we will not review the issue of attorney fees in this case.

Judgment of trial court is affirmed. Costs of this appeal are assessed equally against each party.

AFFIRMED.