FILED 424
JUN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF EDWARD M. MOORE AND SALLY MOORE

Upon the Petition of

EDWARD M. MOORE,

Petitioner-Appellant,

And Concerning

SALLY MOORE,

Respondent-Appellee.

Filed June 30, 1981

1-92
3-65656

Appeal from Poweshiek District Court. Dick R. Schlegel, Judge.

Petitioner husband appeals from trial court's modification of dissolution decree to transfer custody of the children to respondent wife contending that trial court erred in granting the application to modify and in providing for joint custody of the children.

AFFIRMED.

Michael R. Steward, of Bierman, Bierman & Steward, Grinnell, Ia., for petitioner-appellant.

Mark T. Hamer, of Meardon, Sueppel, Downer & Hayes, Iowa City, Ia., for respondent-appellee.

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

Snell, J., takes no part.

PER CURIAM

Petitioner, Edward Moore, appeals from trial court's modification of dissolution decree to transfer custody of two minor children to respondent, Sally (Moore) Blackmon and petitioner, jointly. We affirm.

The parties' marriage was dissolved in 1977. The final determination as to child custody was not made, however, until 1978. Edward had temporary custody of the son and daughter during the interim and was awarded permanent custody after a hearing on the issue. Sally filed application for modification in 1980. The trial court granted modification and awarded joint custody of the children to Edward and Sally. Edward appeals that order. Our review is de novo. Iowa R. App. P. 4.

To justify modification the non-custodial parent must establish by a preponderance of the evidence that there has been a material change since the prior decree, not within comtemplation of the court or the parties that substantially effects the best interests of the children making it expedient to change custody provisions. In re Marriage of Synder, 276 N.W.2d 402, 404 (Iowa 1979). Joint custody as provided in section 595.21, The Code 1979, is feasible if certain tests are met. Those tests are set forth in In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979).

We find a material and substantial change in circumstances necessitating a change in custody. The marriage deteriorated, partly as a result of Edward's drinking habits and Sally's inability to cope with them. At the original custody hearing, however, no issue was made concerning Edward's drinking. Edward argues that whatever drinking problem existed was in the contemplation of the parties at that time and no change has since occurred. We find a substantial and material change has taken place since that time; that is, the children's awareness and deep concern of their father's alcoholic consumption and resulting behavior. They no longer feel secure under his care. This evidence was elicited by their own testimony and the testimonies of those with whom the children had sought counsel during the past year. In addition, the children stated their preference of living with their mother.

Sally has demonstrated her parenting abilities to be more effective than Edward's in providing support to the children in their understanding of Edward's behavior. Edward, on the other hand, refuses to acknowledge any problem or concern exists. While we cannot say Edward has a drinking problem or is an alcoholic, we find an issue

exists as far as the children's perception of their well-being in his care.

The trial court determined that joint custody would be in the best interests of the children. We are inclined to agree in as much as the parties' have been very cooperative in visitation and providing various activities for the children. Furthermore, the environment at Edward's does not pose a threat to the children's well-being necessitating removal. Rather, it would afford a modicum of continuity throughout their adolescent years. The contact with Edward throughout the summers will best enhance the children's understanding of his behavior. The needs of the children will best be served by the joint custody arrangement as set forth by the trial court.

AFFIRMED.

All judges concur, except Carter, J. who dissent.

CARTER, J. (dissenting)

In spite of the very serious allegations made by respondent that petitioner suffers from alcoholism and that this condition adversely affects the children, I find the evidence offered in support of such claims to be quite unconvincing. In its entirety, I cannot accept plaintiff's evidence as sufficient to support a favorable finding in her behalf. The application for modification of decree should have been denied for lack of satisfactory proof.