FILED
JUN 29 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF PATRICIA ANN CARLSON
AND DARRELL DEAN CARLSON

Upon the Petition of)

PATRICIA ANN CARLSON,)

Petitioner-Appellee/)
Cross-Appellant,)

And Concerning)

DARRELL DEAN CARLSON,)

Respondent-Appellant/)
Cross-Appellee.)

Filed June 29, 1988

8-178
87-1426

Appeal from the Iowa District Court for Boone County (No. 2197), Paul E. Hellwege, Judge.

Respondent former husband appeals and petitioner former wife cross-appeals from the trial court's ruling on respondent former husband's petition for modification of a marriage dissolution decree. **AFFIRMED.**

Thomas P. Schlapkohl, Des Moines, for appellant.

John D. Jordan of Jordan, Mahoney & Jordan, Boone, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J. 33

The parties' marriage was dissolved by decree of court on March 31, 1986. A stipulated agreement, dated December 17, 1985, was approved by the trial court and made a part of the dissolution decree. Under that decree, the petitioner-appellee, Patricia Carlson, was awarded custody of their two minor children, Brandon, born February 22, 1974, and Alicia, born July 25, 1978. In his modification application, the appellant sought custody of the two children. Prior to hearing the parties agreed, with court approval, that custody of Brandon would transfer to respondent-appellant. Hearing then proceeded as to the custody of Alicia. The trial court denied modification. We affirm.

The petitioner-appellee's custody award was subject to the respondent's right of liberal visitation at reasonable times and places. The stipulation further provided, subject to certain conditions, that the respondent should pay child support in the amount of $350 per month. In addition, the respondent is obligated to maintain medical and dental insurance coverage and he is responsible for all medical, dental, and eye expenses not covered by the health insurance that he maintains.

There are several issues raised on appeal. The most significant is whether there has been a substantial and material change of circumstances since the entry of the decree to warrant changing the custody of Alicia from petitioner to respondent.

I.

Iowa Code section 598.21 provides in relevant part:

> 8. The court may subsequently modify orders made under this section when there is a substantial change in circumstances. In determining whether there is a substantial change in circumstances, the court shall consider the following:
>
> a. Changes in the employment, earning capacity, income or resources of a party.

b. Receipt by a party of an inheritance, pension or other gift.

c. Changes in the medical expenses of a party.

d. Changes in the number of needs or dependents of a party.

e. Changes in the physical or emotional health of a party.

f. Changes in the residence of a party.

g. Remarriage of a party.

h. Possible support of a party by another person.

i. Changes in the physical, emotional or educational needs of a child whose support is governed by the order.

j. Contempt by a party of existing orders of court.

k. Other factors the court determines to be relevant in an individual case.

Although the case of In re Marriage of Frederici was decided prior to enactment of paragraph *8 of Iowa Code section 598.21, the following* excerpt from the case is applicable:

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody 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 Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

Again in the case of In re Marriage of Phipps, we find the following:

> The first and governing consideration is the best interests of the child. A person seeking a change of custody must show a superior claim, based upon an ability to minister to the child's needs more effectively than the custodial parent. The custody of children who are receiving proper care should not be disturbed in absence of cogent or compelling reasons.

In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa App. 1985) (citations omitted).

As the aforesaid citations reveal, it is settled law in this state that once custody of children is fixed it should be disturbed only for the most cogent reasons. Here, on December 17, 1985, custody of the two children was fixed, by

agreement of the parties, with the petitioner. This arrangement continued except for the month of November of 1986, when both children were with respondent until sometime during the second week of December 1986, when by agreement of the parties Brandon's custody was transferred to the respondent. Thus, for all practical purposes, petitioner has had custody of Alicia from December of 1985 to this date, and she had custody of Brandon from December of 1985 to December of 1986.

The trial court found, and we agree, that the respondent has failed to show "a superior claim, based upon an ability to minister to the child's needs [Alicia] more effectively than the custodial parent [petitioner-appellee]." In this respect, the respondent urges a number of behavioral circumstances on the part of the petitioner that he asserts warrants modification of the court decree.

He contends that the petitioner began shortly after the dissolution to frequent bars on a more-than-a-weekly occasion. On several occasions, once the bar closed, she would invite friends to her house and they would stay the rest of the night. He conceded at trial, however, that upon the filing of the petition for modification the petitioner's visits to the bar had been reduced to a weekly or semi-weekly basis.

At the time of the original separation of the parties, the respondent admitted that he wanted to preserve the marriage. There was no showing that during the course of the marriage there was either physical or verbal abuse by either party upon the other. Subsequent to the original separation, this changed. On at least four occasions since the decree of dissolution, the respondent admitted physically abusing the petitioner by assaultive behavior, and, in addition, admits that on several occasions he verbally abused the petitioner. On one or more of these occasions, the verbal and physical abuse occurred in

the presence of the children. On at least one occasion, the verbal abuse occurred in the presence of one or both of the children with the respondent referring to the petitioner as a "slut."

The respondent points out that the petitioner has been charged with the crime of operating while intoxicated, yet the record indicates that on one occasion since the decree the respondent has been arrested for public intoxication. The respondent argues that the occasion on which he referred to the petitioner as a slut was a result of his learning that she was sleeping with a friend of his, and yet he admitted at trial that at least one female friend had spent the night in his home. It is clear that whatever sexual encounters that took place were outside the presence of the children.

We are concerned that the children have been separated. The Iowa Supreme Court has stated that brother and sister should not be separated and lack the benefit of constant association without a showing of good and compelling reasons. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517 (Iowa 1976). Split custody deprives children of the benefit of constant association with each other. As the innocent victims of marital bankruptcy, they should not be denied this benefit except where their best interests require it. In re Marriage of Wahl, 246 N.W.2d 268, 271 (Iowa 1976). However, separation is proper if it promotes the children's long-term best interests. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981).

The children have been separated since December of 1986. Both appear to be doing well. They live within ten blocks of each other and the parents, in accordance with visitation rights, have them together quite frequently. We encourage them to continue in this regard.

We have examined the record and find it fully supports the trial court findings. The trial court had the added advantage of being able personally to

watch and listen to the parties and their witnesses. We approve the court's disposition of the custody issue.

II.

The respondent next argues that petitioner should be required to pay child support for Brandon. When the parties agreed in February of 1987 that the respondent should receive custody of Brandon, the petitioner was not required to pay child support. The record shows that the respondent's earnings and net worth are substantially higher than petitioner's. When the trial court overruled respondent's motion to enlarge, it correctly found that respondent's take-home pay of $2,077 was three times greater than petitioner's. Respondent's savings account totaled $19,000 as compared to petitioner's account of $48. We find from the record that the petitioner does not have the resources to pay such an award of support. If the trial court had required petitioner to pay child support, the petitioner would not have sufficient money to support herself and her daughter since the family's home expenses exceeded the petitioner's net income.

Child support should be apportioned based upon a parent's ability to pay. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). Since petitioner does not have the ability to pay and the respondent does not have the need for the support, based on the record before us, the trial court's decision not to assess child support payments against the petitioner is affirmed.

III.

The respondent contends that the trial court directed him to pay the trial court costs, including the costs of the custody evaluation investigation. The cost of the custodial investigative services were to be charged to the party responsible for court costs. The respondent was not the prevailing party and was assessed all costs by the court as provided by Iowa Code section 598.12(3).

We find no grounds from the record on which to reverse the trial court on this issue Accordingly, we affirm

IV

The petitioner alleges in her cross-appeal that she should have been awarded attorney fees at trial The awarding of attorney fees in a dissolution and modification action depends upon the relative financial circumstances and earnings of both parties In re Marriage of Vrban, 359 N W 2d 420, 428 (Iowa 1984). The trial court had statutory authority to award reasonable attorney fees to the prevailing party *Iowa Code § 598 36 (1987) It declined* to do so. We affirm.

V

Costs on appeal are to be assessed in full against the respondent. Attorney fees on appeal are to be awarded the petitioner in the amount of $750.

AFFIRMED.