IN THE COURT OF APPEALS OF IOWA

No. 8-119 / 97-1483

FILED
APR 24 1998
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARIA LYNN KILPATRICK AND MARK ANTHONY KILPATRICK

Upon the Petition of
MARIA LYNN KILPATRICK n/k/a **MARIA LYNN HASENBANK,**
Appellant,

And Concerning
MARK ANTHONY KILPATRICK,
Appellee.

Appeal from the Iowa District Court for Linn County, William Eads, Judge.

Maria Kilpatrick (now Maria Hasenbank) appeals a district court ruling on her application for determination of school. **AFFIRMED.**

Stephen B. Jackson, Sr., and Stephen B. Jackson, Jr., Cedar Rapids, for appellant.

Gary Robinson, Cedar Rapids, for appellee.

Considered by Sackett, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Factual and procedural background. Mark and Maria Kilpatrick married in 1990. Their daughter, Anna, was born June 19, 1991. The district court dissolved their marriage by decree filed June 15, 1994. The court awarded the parties joint legal custody with *shared* physical care—each party had Anna for seven days at a time. The decree contained no provisions concerning Anna's schooling, since she was only about three at the time. The parties live on opposite sides of Cedar Rapids, in different school districts, approximately fourteen miles apart. The parties were unable to agree on which school Anna would attend for kindergarten for school year 1996-97. In June, 1996, Maria filed an Application for Determination of School and Application to Modify (seeking primary physical care of Anna).

Following a hearing on July 24, 1996, the court entered an order addressing the school issue, ordering that Anna "attend Jackson school as requested by Mark Kilpatrick for the school year 1996-97, or until other order of the court."

Following a voluntary dismissal of the application to modify physical care, on January 17, 1997, the court ruled the Application for Determination of School was not dismissed and remained for adjudication. A hearing on the Application was held on June 16, 1997. The court found Anna attended Jackson and did well in school, both academically and socially.

In its conclusions, the court applied a "modification" standard to the determination of school, stating, "The Court concludes that there has been no showing of a substantial material change of circumstances that would justify the Court in changing the elementary school for the child, Anna."

Legal principles. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Issues not addressed in the original decree of dissolution may be litigated in subsequent proceedings as additional determinations, incident to the decree but not modifications of the decree. *In re Marriage of Teepe*, 271 N.W.2d 740, 742 (Iowa 1978); *Metallo v. Musengo*, 353 N.W.2d 872, 875 (Iowa App.1984). Temporary orders entered during the pendency of an action remain in force, unless modified, until the action is dismissed or finally adjudicated. *See In re Marriage of Springer*, 538 N.W.2d 897, 900-01 (Iowa App. 1995) ("If the order is not so modified it shall continue in force and effect until the action is dismissed or a decree is entered dissolving the marriage.").

Temporary order. A review of the language of the July 1996 order regarding which school Anna should begin at reveals the order was intended to be temporary,

lasting for the school year or until the final adjudication of the matter. In January 1997, when the trial court dismissed the application for modification, it referred to the July 1996 order as temporary. After a hearing, a final adjudication of the school issue was made in June, 1997. This final determination was not a modification of the 1996 order. Rather, it superseded the temporary order.

The trial court, applying a modification standard, determined Maria had not proven a material and substantial change in circumstances warranting a change in schools. Because the 1997 adjudication of the school issue was not a modification, we conclude the trial court applied an erroneous standard. Consequently, in our *de novo* review, we look instead to the best interests of Anna in a determination of which school she should attend.

Determination of School. This case presents us with one of the difficulties in a shared physical care arrangement. *See In re Marriage of Brainard*, 523 N.W.2d 611, 615 (Iowa App. 1994) (Shared physical care often causes problems with parenting, and deprives children of the needed stability in their lives); *see also In re Marriage of Levsen*, 510 N.W.2d 892, 894 (Iowa App. 1993); *In re Marriage of Coulter*, 502 N.W.2d 168, 171 (Iowa App.1993); *In re Marriage of McElroy*, 475 N.W.2d 221, 223 (Iowa App.1991); *In re Marriage of Muell*, 408 N.W.2d 774, 776 (Iowa App.1987). As the child spends an equal amount of time with each parent, one house is not the primary residence for purposes of determining school attendance.

Furthermore, as the parents live fourteen miles apart, Anna must be transported one half of the time, fourteen miles to school and to school-related functions.

We agree with the trial court the testimony supports Wilkens to be somewhat academically superior to Jackson. However, we must weigh that against any trauma a change in schools may present to Anna if she were to leave Jackson School. We note Anna's cousin attends Jackson, but some of her friends from camp attend Wilkens. We do not find it to be in Anna's best interest to change to Wilkens School at this time. Stability is a great consideration in this case. Anna has done well attending Jackson School under the temporary order. *See generally In re Marriage of Wessel*, 520 N.W.2d 308 (Iowa App. 1994) (Consideration given to how parents functioned under temporary custody order). We do not find transferring to a new school would provide Anna with a significant academic benefit that would outweigh the benefits of stability provided by staying in Jackson School.

AFFIRMED.

Mahan, J., concurs; Sackett, P.J., specially concurs without opinion.