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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF WAVA J. BUSCHMANN AND PHILIP J. BUSCHMANN

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UPON THE PETITION OF
WAVA J. BUSCHMANN,

Petitioner-Appellee,

AND CONCERNING
PHILIP J. BUSCHMANN,

Respondent-Appellant.

Filed November 20, 1984

4-446
84-501

Appeal from the Iowa District Court for Keokuk County—Robert Bates, Judge

Appellant-respondent, Philip J. Buschmann, appeals from an order modifying his decree of dissolution and awarding custody of his minor daughter to Appellee-Petitioner, Wava Buschmann. REVERSED AND REMANDED.

Ione G. Shadduck, West Des Moines, for respondent-appellant.

John F. Heslinga, Oskallosa, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

SACKETT, J.

Wava and Philip's marriage was dissolved on December 21, 1981. The decree incorporated and approved a stipulation of the parties which provided custody of Aaron, born December 22, 1978, would be with Wava and custody of Michelle, born March 31, 1975, be with Philip. During the separation Aaron had lived with his mother; Michelle with her father.

Since the decree both parties have remarried. Wava married a chiropractor and lives in a neighboring community. She and her husband have a child of their own. Her husband has two children by a prior marriage who live with their mother. Philip has married Michelle's former kindergarten teacher. She has a child by a prior marriage who lives with them.

In April of 1983, Wava filed an application for modification alleging that there had been a substantial change of circumstance since the decree was filed and that it is in the best interests of the child Michelle that her legal custody be given to Wava. The matter came on for hearing in November of 1983, and the trial court entered an order modifying the decree and awarding custody of Michelle to Wava.

Philip has appealed, contending that the trial court should not have reconsidered the issue of split custody and should not have awarded custody of Michelle to Wava.

I. Scope of Review

Our review is de novo. In Re Marriage of Deck, 342 N.W.2d 892, 894 (Iowa Ct. App.1983). We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Split Custody

Philip complains that the trial court reconsidered the issue of split custody when such issue had already been resolved by the original decree. Philip points to a provision of the decree where the trial court found: ". . . [t]he custody issue

was never completely and fully thought through by the parties. Ultimate hearing on the matter was probably inevitable."

The parties here entered into a stipulation with reference to custody. When the stipulation was merged into a decree, it became a final judgment of the court. Prochelo v. Prochelo, 346 N.W.2d 527, 528 (Iowa 1984). Custody was settled in the decree terminating the marriage. It was no longer an open question. In Re Marriage of Mikelson, 299 N.W.2d 670, 673 (Iowa 1980).

What is being considered here is not the events that precipitated in the parties entering into a stipulation. We are considering an application to modify a decree. See Crary v. Curtis, 799 N.W.2d 319, 321 (Iowa 1972). Our review is de novo and we make our own independent evaluation of the facts.

The trial court found: ". . .The record is replete with the love and attachment of the two children. This factor alone weighs more heavily upon this court than perhaps any other factor. There is no rational basis for dividing the custody of these two children. . ."

We have said in attempting to foster children's best interests, the court ordinarily attempts to keep children of broken homes together. This rule has been held to not be immutable, but may be departed from if there exists good and compelling reasons. In Re Marriage of Grandenette, 342 N.W.2d 876, 878-879 (Ia. Ct. App. 1983).

Philip contends that the trial court is in fact relitigating the split custody issue. The decree was entered providing for split custody. The custody of the two siblings is now split. That issue was clearly before the trial judge when he entered the first decree. The failure of the parties themselves to fully think through the custody issue before decree does not turn a modification into an original custody proceeding nor does the fact that siblings were split in the original decree in and of itself provide a basis for modification. Because we must never lose sight of the first and governing consideration of the best interests of the child, we must look at the effect the split custody has had on Michelle.

Before passing on the custody determination reached by the trial court, we have a duty to examine the whole record and adjudicate rights anew on issues properly presented. In doing so, we give weight to the findings of the trial court but will not abdicate our responsibility to review the record on appeal. As in all cases, we must determine this case ultimately on its own facts. In Re Marriage of Morton, 244 N.W.2d 819, 821 (Iowa 1976).

III. Was The Trial Court Correct In Modifying The Decree?

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).

The custody of children who are receiving proper care should not be disturbed in absence of cogent or compelling reasons. In Re Marriage of Deck, 342 N.W.2d 892, 895 (Ia. Ct. App. 1983).

Philip has maintained a very fine home for Michelle. Michelle is healthy, well-dressed and has attended school regularly In the prior school year she has only one absence and no tardies. Her father and stepmother are upstanding citizens. They provide a stable and supportative relationship. Harvey A. Disenhouse, Ph. D. a licensed psychologist at Ottumwa Pediatrics, P.C., found

they provide a warm, loving and nurturing environment in which Michelle will be able to survive. They are interested in and are supportative of Michelle's progress. Michelle is a child of average ability, but she has had some difficulty with math and reading. These difficulties have manifested themselves since her parents' dissolution. Michelle is considered to have a learning disability and is receiving special help in addition to her regular classroom activity. She is making substantial progress in overcoming the disability. School records reflect that the father and stepmother have cooperated fully with the school in getting supplemental help for Michelle. School records further show Michelle has no problem making and keeping friends. She has a good relationship with her peers, but has had some problems adjusting to her parents' divorce. She is concerned about her natural mother. She is a well-behaved child who is kind to and sensitive to the feelings of others. Michelle presents a positive self concept and attitude to school. She displays no observable signs of significant emotional problems. The record reflects that Philip is aware of the necessity of helping Michelle maintain a positive attitude toward her natural mother, and Philip's current wife is sensitive to this issue.

Michelle professes to have equal love for both of her natural parents. She misses either parent when she is away from them. She had little visitation with her mother after the dissolution and manifested signs of lonesomeness for her mother. Michelle is close to her stepmother. Her stepmother was her kindergarten teacher before she married Michelle's father, which fact has contributed to the fine relationship she and Michelle have. The record reveals that Michelle feels good about herself, although she exhibits signs indicative of a child who is coping with the very real pain of a divorce situation. But Michelle is coping.

Certain problems obviously follow a child after a dissolution. Here is a child who loves both of her parents and is going to miss the parent she is not with. The

learning disability problems may well have manifested themselves absent the dissolution. We recognize it is normal for a child to feel remorse after a dissolution and exhibit signs of lonesomeness for the absent parent.

Dr. Garfield, who examined Michelle on Wava's request for trial purposes and testified for Wava at the hearing, blames the learning disability on Michelle's attachment for her mother. He feels if she is with her mother the problem will be alleviated and a failure to change custody will result in a continuation of the problem. There is no other evidence in the record to support such a conclusion. Dr. Garfield's time with Michelle was limited and the visits were primarily for the purpose of providing Dr. Garfield with information to testify on Wava's behalf. We recognize Dr. Garfield's fine credentials and have carefully considered his testimony.

Michelle's school records were entered as exhibits. Because they reflect evaluations made over a longer period of time for educational purposes we have given them serious consideration. They depict Michelle as a healthy, well-adjusted child with excellent school attendance. They indicate she has a learning disability and that with additional help she is making progress toward eliminating the disability. The school records indicate that the school is receiving the assistance and cooperation of an attentive father and stepmother. We consider too that Michelle has an excellent relationship with her stepmother.

Michelle's stepfather testified he is fond of Michelle. However, there is evidence that his reaction to Michelle when he first dated her mother was not positive. If Michelle leaves her father's home, she will be living in a home with a new father. Her stepfather's children visit the home regularly and she will have the additional problem of coping with these children.

After a careful review of the record, we determine the evidence falls short of showing a superior claim on Wava's behalf to administer to Michelle's well-

being more effectively than Philip, and any changes that have been made do not rise to sufficient proof of need for modification of the decree.

The decree of the trial court is reversed and the cause remanded for entry of a decree in conformance herewith.

REVERSED AND REMANDED