FILED
OCT 23 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF TERRY EUGENE SWIFT AND NANCY KAY SWIFT

438

Upon the Petition of	)	
TERRY EUGENE SWIFT,	)	Filed October 23, 1984
Petitioner-Appellant,	)	
And Concerning	)	
NANCY KAY SWIFT,	)	4-327 83-1540
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Lee County - D. B. Hendrickson, Judge.

Petitioner appeals from a modification of the decree which dissolved the parties' marriage. AFFIRMED.

Kent Hutcheson, Fort Madison, Iowa, for petitioner-appellant and the children.

Patricia N. Fetzer, Cedar Rapids, Iowa, for respondent-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

Petitioner appeals from a modification of the decree which dissolved the parties' marriage. He asserts that the trial court should have transferred custody of all three children to him, rather than splitting custody between the parties.

Respondent, Nancy Swift, was initially married to Danny Himes, with whom she had two children, Debbie and Bonnie. The girls were ten and nine years of age, respectively, at the time of the modification hearing. When Danny was convicted of second-degree murder Nancy divorced him and shortly thereafter married petitioner, Terry Swift, with whom she had a son, Jeremiah, age five at the time of the modification hearing. While Danny was in prison he relinquished his parental rights and the girls were adopted by Terry. The marriage of Terry and Nancy was dissolved in 1980 and Nancy was awarded custody of the three children. In 1982 Danny was released from prison and began living with Nancy and the children. In 1983 a report of child abuse by Danny was made regarding Debbie. CHINA proceedings were brought and Debbie was removed from Nancy's home and placed with Terry.

Terry filed an application for modification of the dissolution decree, requesting that custody of all three children be transferred to him. The trial court transferred custody of Debbie, but left Bonnie and Jeremiah with Nancy.

Our review of this proceeding in equity is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the district court, we do give weight to them, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

A noncustodial parent seeking to modify the provisions of a dissolution decree must establish by a preponderance of the evidence that conditions have so materially and substantially changed since the entry of the decree that the children's best interests make a change of custody expedient. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980). The changed circumstances must be permanent and continuous in nature and must relate to the welfare of the child.

Id. They must also not have been contemplated by the trial court when the decree was entered. Id. This heavy burden is due to the principle that once custody is fixed it should be disturbed for only the most compelling reasons. Id.

The trial court's conclusion that there had been a change of circumstances justifying a change of Debbie's custody is not an issue in this appeal. The trial court cited Danny's presence and physical punishment of Debbie as reasons for the modification. However, the trial court did not find that those same reasons justified a change of custody for the other two children as well. After reviewing the entire record, we affirm the trial court's decision.

The evidence in this case was disputed. Much of the evidence relied upon by Terry came from Debbie's testimony. There was evidence that Debbie's testimony could be colored by her strong desire to live with Terry and receive the material possessions which Nancy could not give her. Bonnie testified that she saw Danny hit Debbie "hard" in the face with his fist. She stated that neither she nor Jeremiah had ever been hit in the face, although they had both been hit with a leather belt on their bottoms and legs. Except for this incident between Danny and Debbie, there was no evidence of excessive force used against the children. Several neighbors and acquaintances testified that the children were clean, well-behaved, and well-adjusted. None of these witnesses had noticed any signs of physical abuse. They also testified that Nancy's home was neat and clean. It was also brought out that Debbie was more of a discipline problem than were the other two children.

We certainly do not intend to leave children in a home where they are abused. In this case, however, the most the evidence will support is a finding that Danny did strike Debbie inappropriately on one occasion after she left home without telling anyone where she was going. We do not consider this incident to be a compelling reason for changing the custody of the two children who were not involved, especially when they appear to have a closer relationship with Nancy and Danny than does Debbie.

There was also evidence presented that both Nancy and Danny smoked marijuana in front of the children and that Danny drank excessively. Both of them testified that they had given up these habits after they started attending church regularly. Bonnie also testified that they did not smoke marijuana anymore.

Finally, Terry cites the proposition that siblings should not be separated in support of his attempt to gain custody of all three children. The supreme court has been willing to separate siblings, however, where, as is the case here, there is a strained or difficult relationship between one child and the custodial parent or stepparent. In re Marriage of Junkins, 240 N.W.2d 667, 668 (Iowa 1976); In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). We agree with the trial court's conclusion that Terry has not shown a superior ability to meet the needs of the younger children. It is in their best interests to remain with their mother who has been their primary caretaker all of their lives.

AFFIRMED.