

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 28 1983

CLERK SUPREME COURT

IN RE MARRIAGE OF LAURA L. BEAUCHAMP AND JEFFREY L. BEAUCHAMP

Upon the Petition of)

LAURA L. BEAUCHAMP,)

Filed June 28, 1983

Petitioner-Appellant,)

And Concerning)

JEFFREY L. BEAUCHAMP,)

3-152
3-69163

Respondent-Appellee.)

Appeal from Cass District Court - Glen M. McGee, Judge.

Petitioner-wife appeals from the trial court's order denying her application to modify the child custody provisions of the parties' dissolution decree.

AFFIRMED.

Victoria L. Meade and Ted E. Marks of Marks, Marks & Marks, Des Moines, Iowa, for petitioner-appellant.

Ronald D. Bonnett of Wilson, Bonnett & Christensen, Lenox, Iowa, for respondent-appellee.

Heard en banc.

PER CURIAM

Petitioner-wife appeals from the trial court's order denying her application to modify the child custody provisions of the parties' dissolution decree. She claims that there has been a substantial change of circumstances since the entry of the decree such that she should now be awarded custody of the two children. She also claims that the trial court should not have reduced her visitation rights and that the court should have either found respondent-husband in contempt for interfering with her visitation or should have issued mittimus which was withheld on a previous contempt citation. Our review is *de novo*. Iowa R. App. P. 4. We affirm.

This is the third time this dispute has been before the appellate courts of this state. The 1981 decree dissolving the marriage of Laura and Jeffrey Beauchamp awarded Jeffrey custody of the parties' two children (Jesstin, born in 1976, and Jason, born in 1978). Laura was allowed visitation of one weekend a month, two weeks in the summer and alternate holidays. Laura was also directed to pay \$50 a month child support. On her appeal from that decree, we affirmed. In re Marriage of Beauchamp, No. 3-66813 (Iowa Ct. App. Jan. 26, 1982).

The hostility between the parties continued after the decree was entered, and apparently in part to escape harassment by Laura and her relatives, Jeffrey moved with the parties' two children to Nevada. He neglected to tell Linda of the move, however, and when she discovered where he was, she filed an application to cite him for contempt for taking the children from Iowa and preventing her from exercising her visitation rights. Jeffrey filed a special appearance, alleging that he was not properly served with notice of Laura's application and, therefore, the court did not have jurisdiction over his person. The court overruled his special appearance, granted Laura's application and found Jeffrey in contempt. The court, however, deferred punishment because of "extenuating circumstances"—the harassment by Linda's relatives—and it stated that punishment would be imposed

if Jeffrey again interfered with Linda's visitation. Jeffrey appealed from the order overruling his special appearance. The supreme court treated the appeal as a petition for a writ of certiorari and granted the petition. In January of 1983, the court sustained the writ, based on its finding that the trial court had not acquired jurisdiction of Jeffrey because the rule to show cause had not been properly served on him. Beauchamp v. Iowa District Court in and for Cass County, 328 N.W.2d 527 (Iowa 1983).

While the certiorari proceeding was pending, Laura filed an application to modify the decree to transfer custody of the parties' two children to her. She asserted as the changes in circumstance Jeffrey's move to Nevada, his interference with her visitation, and her now superior ability to minister to the children's needs. Laura also filed another application for contempt citation and an application for issuance of mittimus on the prior contempt finding. She asserted visitation problems as grounds for both applications. After a hearing, the trial court denied Laura's application for modification of the decree, based on its finding that there had not been a substantial change of circumstances since the decree which warranted a custody transfer. The court also changed Laura's visitation to one month each summer and every other Christmas holiday. This was based on its conclusion that the visitation provisions of the original decree were impractical since the children are now in Reno, Nevada. The court denied Laura's application for contempt citation and her application for issuance of mittimus on the prior contempt finding. This appeal followed.

I. The primary issue in this appeal is whether the trial court was correct in denying Laura's application to modify the child custody provisions of the decree in her favor. The guiding principles in determining applications to modify custody provisions were summarized in In re Marriage of Powers, 226 N.W.2d 810, 811-12 (Iowa 1975):

[T]he party seeking the change in custody has the burden of showing the circumstances which existed at the time the original decree was entered have so materially and substantially changed that a transfer of custody is indicated. The parent seeking to obtain custody of minor children from the other parent must show some superior claim based on his or her ability to minister, not equally, but more effectively to the well being of the children. . . . The best interests of the children remain in this case as it does in all cases involving the question of custody, the first and governing consideration. [citations omitted]

We do not believe Laura has sustained her burden of proving a superior ability to minister more effectively to the children's well being than can Jeffrey. The evidence shows that the children are doing very well with Jeffrey in Nevada. We are gratified that Laura has matured a great deal since the decree and has exhibited a new willingness to assume the responsibilities of marriage to her new husband as well as parenthood. We do not believe, however, that she has shown herself to be better able to minister to the immediate and long-range best interests of the children than is Jeffrey. Such a showing is an essential part of her burden of proof under Powers; her failure in this regard means that she cannot prevail on this issue.

It is also apparent that the trial court found that Jeffrey and the witnesses on his behalf were more credible than were those testifying for Laura. Given the extremely contradictory nature of the testimony presented by the opposing sides, we believe this case to be an especially appropriate one in which to give special deference to the court's findings. See Iowa R. App. P. 14(f)(7).

Finally, we must agree with the trial court that the record does not sustain Laura's claim that Jeffrey, by moving himself and the children to Nevada, engaged in a deliberate campaign to maliciously deprive Laura of her visitation rights. We do not condone Jeffrey's actions in not informing Laura of their precise whereabouts or of his telephone number. We do agree with the trial court, however, that Jeffrey's actions resulted from Laura's and her relatives' conduct in continually harassing and threatening Jeffrey and his relatives after he was

awarded custody of the children. Under these circumstances, we refuse to assign any moral culpability to Jeffrey's actions; they were not a willful and deliberate attempt to deny Laura visitation.

II. Next Laura claims that the trial court should not have reduced her visitation rights. We see no reason to disturb the court's decision. Laura does not really dispute the court's finding that "the visitation as prescribed in the original decree of dissolution could not be effected with the children in Reno, Nevada." To reflect this new situation and in recognition of the travel expense involved, the court reduced the minimum amount of visitation to which Laura is entitled. We cannot say that this decision fails to do equity. See Pucci v. Pucci, 259 Iowa 427, 432, 143 N.W.2d 353, 357 (1966). We certainly encourage the parties to make all reasonable and sincere attempts to provide more visitation for Laura than the specific terms in the decree as modified below.

III. Finally, Laura claims that the trial court should have issued mittimus on the October, 1981, contempt citation and should have granted her current application to cite Jeffrey for contempt. The supreme court's decision in January of 1983 sustaining Jeffrey's jurisdictional challenge to the 1981 contempt citation determines the mittimus claim—since the trial court had no jurisdiction over Jeffrey in that proceeding, the contempt citation was void and mittimus, therefore, may not be issued on that citation.

With regard to Laura's claim that Jeffrey should now be cited for contempt, we note that it is only the willful disobedience of a court order that will justify a contempt conviction. Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974). We have already stated our agreement with the trial court's conclusion that Jeffrey's action in moving himself and the children to Nevada was not done in willful disregard of Laura's visitation rights. Rather, he did so to avoid the continual threats and harassment from Laura's family. The record in this case does not justify a finding of contempt on Jeffrey's part.

The trial court's order is affirmed in all respects.

AFFIRMED.