

SUSAN C. STRANG,

)

Petitioner-Appellant,

)

Filed April 29, 1980

vs.

)

DAVID L. STRANG,

)

368

3-63454

Respondent-Appellee.

Appeal from Fayette District Court - Frank D. Elwood, Judge.

Mother appeals trial court's order transferring custody of three minor children to father alleging trial court erred in finding father had established a material and substantial change of circumstances since entry of the original decree and in ruling her application to leave the State of Iowa was moot. REVERSED WITH DIRECTIONS FOR ENTRY OF ORDER.

John R. Sandre and Dennis L. Ruben of Sealise, Scism, Gentry, Brick & Brick, Des Moines, Iowa, for petitioner-appellant.

Tom Riley of Simmons, Perrine, Albright & Elwood, Cedar Rapids, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Petitioner-mother, Susan C. Strang, appeals trial court's order transferring custody of three minor children born of her marriage to respondent-father, David L. Strang. She alleges trial court erred in finding respondent had established a material and substantial change of circumstances since entry of the original decree and in ruling her application to leave the State of Iowa was moot. We reverse with directions.

Susan and David Strang's twelve-year marriage was dissolved by a decree filed September 2, 1976, wherein petitioner was awarded custody of the three minor children: David, Jr., born December 27, 1965; Cristin, born April 7, 1969; and Emily, born August 22, 1972. Respondent was granted visitation rights. The decree prohibited removal of the children from the State of Iowa except after hearing and specific order of court. A supplemental order, filed March 4, 1977, resolved remaining issues of property and support.

On August 10, 1977, respondent filed an application for modification of the custody provisions of the decree alleging a change of circumstances warranted transfer of custody to him. Petitioner thereafter filed an application for permission to remove the children to California. An attorney, appointed to represent the children, recommended petitioner retain custody of David, Jr., but found respondent better able to provide for Cristin and Emily.

Trial court, on April 20, 1979, entered its order modifying the custody provisions of the 1976 decree based on the following change of circumstances: 1) respondent's remarriage in December, 1976; 2) his creation of a good family-type home; 3) the affair of petitioner with an individual named Russ Phelps and the circumstances surrounding that relationship, including Phelps' spending numerous nights in petitioner's home, and her endeavor to obtain David, Jr.'s approval and understanding of her behavior with Mr. Phelps; 4) petitioner's opportunities in California; 5) petitioner's move to Waterloo from Oelwein since entry of the decree. The court also concluded petitioner's application to remove the children to California was moot upon filing of the order.

On appeal, petitioner asserts respondent failed to meet his burden of proving a change of circumstances justified modification of the original decree. Petitioner also asserts she has established the children's welfare will be served better in California and asks this court grant her application for permission to leave the State of Iowa.

I. Scope of Review. Appellate review of a proceeding to modify custody provisions of a dissolution decree is de novo. Iowa R. App. P. 4; In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977).

II. Modification of Custody.

A. Applicable Principles. The principles governing custody modifications are well established. The best interests of the children is our guiding concern. Id. Respondent has the burden of establishing by a preponderance of the evidence there has been a material and substantial change of circumstances since entry of the original decree, not within the contemplation of trial court at that time, that make it expedient to change custody to him. Where the custodial parent has properly provided for the children's social, moral, and educational needs, and the children have become attached to their environment, the court is not justified in transferring custody except for the most cogent reasons. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). The parent seeking to take actual custody must show some superior claim based on his or her ability to minister, not equally but more effectively, to the children's well being. Melton, 256 N.W.2d at 205. We apply these principles in light of the factors catalogued in In re Marriage of Winters, 223 N.W.2d 165, 166-67 (Iowa 1974). In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979); In re Marriage of McCreary, 276 N.W.2d 399, 400 (Iowa 1979).

B. Discussion. In light of these principles, we do not believe respondent sustained the heavy burden the law imposes on him to demonstrate his superior claim to custody due to changed circumstances. We emphasize this is not an initial determination of custody, wherein trial court appropriately concludes which parent is preferable for permanent custody. Trial court, in its modification order, found both homes to be qualified. The court further found petitioner had maintained a good home, the children had done very well in school, all were healthy, and the family happy. We note petitioner moved from the Oelwein area to Waterloo only after she had obtained permission to move from the court as required by the original decree.

While we do not condone petitioner's handling of the situation with Mr. Phelps, this is only one factor to be considered. Petitioner in all other respects has continued to demonstrate her ability to attend properly to the children's social, moral, educational and religious needs. Respondent, while demonstrating his ability to be an effective parent, has failed in his burden to show any change of circumstances justifies modification of the original custody provision.

III. Application to Remove Children from the State of Iowa. In light of our determination regarding custody, we must dispose of petitioner's application to remove the children to California. In so doing, we accept neither petitioner's argument respondent had the burden of proving the move would not be detrimental to the children nor respondent's argument petitioner was seeking a modification of the original decree and thus required to prove a material and substantial change of circumstances justified the move. We distinguish this case from In re Marriage of Lower, 269 N.W.2d 822 (Iowa 1978), where the initial decree was silent concerning removal of the children from the state, leading the court to conclude the father's request to prohibit the mother's move was an application for modification. Id. at 827. In this case, the original decree prohibited removal only on specific order of the court. We conclude this determination should be founded solely on a consideration of the best interests of the children. In this regard, we believe the court's reasoning in Lower is persuasive. Based on the evidence, it appears the move to California would enable petitioner to obtain employment and be better able to provide financially for the children. Petitioner also will have significant support from her family whose members reside in the immediate area. Finally, petitioner is willing to permit liberal visitation of the children by respondent, who certainly is financially able to contribute to the cost of such visitations.

We consequently reverse trial court's modification order granting visitation rights to petitioner. Effective upon completion of the present school year in May or June of 1980, the children shall reside in the home of petitioner as custodial parent. Respondent shall have reasonable visitation and specifically not less than the following:

I. In the event petitioner moves to California:

A. From July 15, 1980, until August 15, 1980.

B. Christmas vacation during the 1980-81 school year.

C. Thereafter, 1) four weeks each summer, provided respondent shall give petitioner notice by May 31st of each year specifying the four weeks he wishes to exercise visitation and 2) each Christmas vacation period, provided every other Christmas vacation period beginning in the 1981-82 school year, the visitation shall start the second day after Christmas, so that respondent and petitioner each shall have the children every other Christmas Eve and Christmas Day in his or her respective home.

It shall be the responsibility of respondent to pay for the transportation of the children to and from the beginning of summer vacation and the responsibility of petitioner at Christmas vacation time.

II. In the event petitioner chooses not to move to California as indicated, then respondent shall have visitation not less than the following in this state:

A. Two months during the summer as above indicated.

B. Christmas vacation period as indicated above.

C. Every other weekend from Friday at 5:00 p.m. to Sunday at 9:00 p.m.

If petitioner remains in the state and transportation of the children cannot be mutually agreed upon, then it shall be the responsibility of respondent to cause the transportation of the children to be made to and from petitioner's residence at the time of the summer vacation, the responsibility of respondent at Christmas, and the responsibility of petitioner of one-half of the alternate weekends, and the responsibility of respondent for the other one-half of the alternate weekends.

Judgment of trial court is reversed with directions to enter an order consistent with this opinion. Costs of this appeal are assessed against respondent.

REVERSED WITH DIRECTIONS FOR ENTRY OF ORDER.

All judges concur except Carter and Snell, JJ., who concur specially.

CARTER, J. (concurring specially)

I agree that David's showing is factually insufficient to sustain a modification of the custody provisions of the original decree. But I do not join in the court's action with respect to the issues of removal of the children from the State or modification of visitation. I believe the trial court should be given the opportunity to pass on these important issues in the first instance rather than having such matters determined for the first time on the appellate level.

Snell, J., joins in this special concurrence.