IN THE COURT OF APPEALS OF IOWA

No. 1999-156 (9-372) / 98-2177
Filed January 26, 2000

IN RE THE MARRIAGE OF ALICE BLOSS AND ANTHONY R. BLOSS

FILED
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CLERK SUPREME COURT

Upon the Petition of
ALICE MORRIS, f\k\a ALICE BLOSS,

Appellant,

And Concerning
ANTHONY R. BLOSS,

Appellee.

Appeal from the Iowa District Court for Warren County, James W. Brown, Judge.

Mother appeals the denial of her petition to modify child custody. **AFFIRMED.**

James S. Blackburn of Williams, Blackburn, Hudson & Maharry, P.L.C., Des Moines, for appellant.

John P. Roehrick of Roehrick, Hulting, Blumberg, Kirlin & Krull, P.C., Des Moines, for appellee.

Heard by Streit, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

Alice Morris, formerly Alice Bloss, appeals the trial court's denial of her application to modify child custody and its grant of sole legal custody of the children to her former spouse, Anthony Bloss. We affirm.

I. Background Facts and Proceedings. Alice and Anthony married in 1983 and divorced in February of 1987. They have two minor children, Megan, born in June of 1984, and Nicholas, born in September of 1985. The dissolution decree provided for joint legal custody, awarded primary physical care to Alice, and granted visitation to Anthony.

Unfortunately, the roots of the present controversy reach back more than ten years. Difficulties with visitation arose shortly after the divorce. In the fall of 1987, Anthony filed a contempt proceeding involving his exercise of summer visitation. The matter was eventually resolved. In February 1989, Alice filed a petition to modify, asking the district court to prohibit Anthony from having overnight visitations. She contended Anthony failed to properly care for the children and either intentionally or negligently subjected them to physical harm. The court found her allegations to be without merit and determined that visitation should not be restricted in any way.

In September 1990, Anthony filed an application for injunctive relief after Alice enrolled the children in school under the surname of her second husband, Pat Morris. The district court found her action violated the spirit of the joint custody arrangement and enjoined Alice from taking such action in the future.

In 1996, Alice filed an application to modify child support, and Anthony sought a modification of primary physical care. Trial was held in April 1997. In May 1997 the district court ruled Anthony had met his burden of showing a material and substantial change in circumstances. The court awarded Anthony primary physical care of Megan and Nicholas but continued joint legal custody. Alice appealed the district court's decision. In March 1998, the Iowa Court of Appeals affirmed the trial court's award of primary physical care to Anthony. *See In re Marriage of Bloss,* 8-044\97-0968 (Iowa App. March 27, 1998). The custody change was affirmed because Alice consistently denied Anthony contact with the children, denigrated his role as their father, and refused to recognize that Anthony should play a significant role in his children's lives.

Approximately three months after the court of appeals' decision, Alice filed a petition for modification of primary physical care. She asserted a number of circumstances had changed since Anthony became the children's primary physical caretaker in June of 1997. She claimed: (1) Anthony had physically abused Nicholas; (2) Anthony had intimidated the children; (3) the children wished to live with her; and (4) Nicholas was performing poorly in school. Anthony resisted and counterclaimed for sole legal custody. The modification was consolidated for trial with a contempt action Anthony had filed previously. A four-day trial commenced on October 28, 1998. The trial court declined to modify primary physical care and granted Anthony's request to become sole legal custodian of the children. The trial court also found Alice in contempt for failing to become current in her child support

obligation and to pay the uninsured medical expenses as required by the modified decree.

Alice appeals. She contends the district court erred in: (1) failing to determine there had been material and substantial changes in circumstances since the last modification; (2) ignoring the children's preference to live with her; (3) punishing her by awarding sole legal custody to Anthony; and (4) awarding Anthony attorney fees. She does not challenge the trial court's finding that she was in contempt of court.

II. Standard of Review. Modifications of custody are tried in equity and our review is de novo. *See In re Marriage of Walton,* 577 N.W.2d 869, 871 (Iowa App. 1998). We examine the entire record and adjudicate anew rights on the issues properly presented. *See In re Marriage of Smiley,* 518 N.W.2d 376, 378 (Iowa 1994). At the same time, we recognize the value of the district court's first-hand observations of the parties and witnesses. *See In re Marriage of Ford,* 563 N.W.2d 629, 631 (Iowa 1997). Consequently, we give weight to the findings of the trial court. *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (Iowa 1999).

III. Modification of Custody. Modification of the custodial terms of a dissolution decree should occur only when there has been a substantial change in circumstances since the time the decree was entered. *Walton,* 577 N.W.2d at 870. The change must be more or less permanent and relate to the welfare of the children. *Id.* The party seeking to alter custody bears the significant burden of showing that the best interests of the child or children require the change. *Id.* The district court possesses reasonable discretion in determining whether modification

is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. *In re Marriage of Courtade,* 560 N.W.2d 36, 37 (Iowa App. 1996) (citations and quotations omitted).

The question in this modification action is not which home is better, but whether Alice has demonstrated she can offer the children superior care. *See In re Marriage of Whalen,* 569 N.W.2d 626, 628 (Iowa App. 1997). Alice must show an ability to administer to the children's needs superior to Anthony. *See id.* In custody determinations, we consider a parent's ability to cooperate and communicate with the other parent. *See id.* at 629 (noting that a parent's failure to communicate and cooperate can result in loss of custody).

Alice claims several factors constitute a substantial change in circumstances sufficient to justify a modification of primary physical care.

A. Physical Abuse. This allegation stems from an incident when Anthony spanked Nicholas three times with a belt leaving marks. The incident occurred after Nicholas struck a girl at school and later boasted about the event. When confronted, Nicholas repeatedly lied to Anthony, who temporarily lost control, took Nicholas into a bedroom, and spanked him. The trial court found this issue was a one-time event which was unlikely to be repeated. No one claims that it has been. The court further found the incident was not indicative of an inappropriate disciplinary environment in Anthony's home. While we do not condone Anthony's behavior, we conclude this incident does not support a transfer of primary physical care.

B. Intimidation of the Children. Alice complains Anthony rules the children by threat and they fear him. We find this allegation unsupported by the evidence. The trial court's interview of the children reveals they merely feel Anthony is too strict and is sometimes difficult to talk to. While Anthony has imposed more and stricter rules on the children, the allegation that the children are fearful of and intimidated by him is not borne out by the evidence presented.

C. The Children's Preference. Both children expressed a preference to live with Alice. The trial court gave due consideration to the wishes of the children, but concluded their expressed preference was not a sufficient basis to modify custody. The trial court found Alice and her current husband were attempting to attract the children back to them and Alice continued to disparage Anthony's custody. The trial court observed: "Alice made no secret of her animosity toward Anthony. She expressed to the children that she wished him dead. Her husband gave two smoke bombs to Nicholas and suggested they be used to asphyxiate Anthony." She does not encourage the children's relationship with Anthony and takes no responsibility for cooperating with him on custody issues. In light of Alice's behavior, we conclude the trial court was correct in giving less weight to the preferences of the children. *See In re Marriage of Mayfield,* 577 N.W.2d 872, 873 (Iowa App. 1998) (noting children's preference given less weight in modification than in original custody proceeding).

D. Nicholas' School Performance. The trial court correctly characterized Nicholas' performance during the 1997-98 school year as atrocious. Nicholas received several "half" grades and was repeatedly disciplined for behavioral

problems. Alice attributes this dismal record entirely to Anthony. The record does not support her contention.

School officials confirmed that Anthony has had regular contacts with them to try to improve Nicholas' performance. Anthony demonstrated a great deal of concern about Nicholas' progress at school and helped him with his homework. Despite this involvement, Nicholas would sometimes fail to turn in assignments even though they had been completed. In addition, evidence from school personnel strongly suggests that academic problems which manifested in 1997 originated in earlier years when Alice was the primary physical caretaker. Nicholas performed better during the end of the 1997-98 school year and his academic and behavioral records had improved greatly before the time of trial. Nicholas was upbeat about school in his interview with the court. We conclude, as the trial court did, that Nicholas' school situation does not justify change in the current custodial arrangement.

An experienced trial judge observed the parties for four days, listened to their testimony, personally interviewed the children, and gave thoughtful consideration to all the evidence presented. Giving due deference to the trial court's findings in a very difficult case, we affirm the trial court's conclusion Alice failed to meet the burden necessary to modify primary physical care.

IV. Termination of Joint Legal Custody. Alice contends the trial court's decision to award sole legal custody to Anthony was completely unjustified and intended to punish her. Upon de novo review of the record, we reach a different conclusion.

When there has been a failure of communication and cooperation between parents under a joint legal custody arrangement, a modification of custody status is appropriate. *In re Marriage of Rolek,* 555 N.W.2d 675, 677 (Iowa 1996). In addressing the termination of joint custody, the trial court made the following observations:

> The record in this case, developed over four days of trial, extensively documents the problems these parents have with communication. It was this precise problem, together with Alice's unwillingness to concede Tony's role as a parent, which resulted in the change in physical care in 1997. The obvious antagonism with which Alice still regards Tony affects her relationship with her children. She is unable to foster a relationship between her children and their father. It makes her unable to communicate with Tony, at any level, concerning the children, even after she must have known this was a substantial factor in her loss of physical care. Not once since April of 1997 did she discuss, or attempt to discuss, educational or behavioral problems of the children with Tony. She once responded by letter, refusing his request for a modification of the summer visitation schedule so Megan could attend a wedding. She blames this inability to communicate on mistreatment by Tony before their divorce, but she is apparently not willing or able to make an effort to improve the situation. Although the children explain her wish that Tony was dead on her distraught emotional condition after the April 1997 decision and that Pat Morris was not serious in his smoke bomb suggestion [sic], nevertheless these are things these children should simply not have to confront.

We recognize Anthony has also been less than perfect in his communication with Alice concerning the children. He has not advised her of some occasions and events which are in the joint custody domain. However, after the trial in 1997, Alice refused to talk with him on the telephone and Pat Morris would not allow him to speak with Alice by telephone. Anthony has written many letters to Alice attempting to keep her apprised of developments regarding the children. Alice only

responded once. It is thus somewhat understandable that Anthony became discouraged in his attempts to convey information about the children.

The trial court concluded principal responsibility for the almost total absence of cooperation and communication must be borne by Alice. Joint legal custody presupposes some ability to exchange information and assumes at least a minimum of respect for the other parent's role. When those qualities are not present, the concept of joint custody exists in name only. The findings and conclusions of the trial court are amply supported by the record. We affirm the trial court's decision to grant sole legal custody of Megan and Nicholas Bloss to Anthony.

V. Attorney Fees. Alice argues the trial court erred in awarding attorney fees to Anthony. The court may award attorney fees to the prevailing party in a modification action. *See* Iowa Code § 598.36 (1997). The court awarded Anthony attorney fees of $1,000 on the basis he was prevailing party. We affirm the award. Costs of this appeal are taxed to Alice.

AFFIRMED.