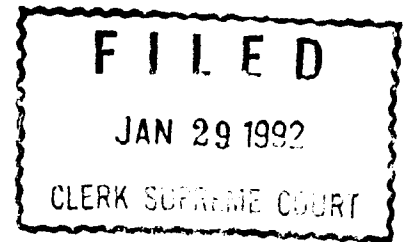


IN THE COURT OF APPEALS OF IOWA

No. 1-439 / 90-1917



ALBERTA ELLISON (TROPF),

Appellant/Cross-Appellee,

vs.

ROBERT E. TROPF,

Appellee/Cross-Appellant.

203

Appeal from the Iowa District Court for Jackson County,
Max Werling, Judge.

Alberta appeals, and Robert cross-appeals, a district court order modifying the custody provisions of their foreign divorce decree. **AFFIRMED AS MODIFIED.**

Alan M. Pape, Maquoketa, and Todd Elverson and John A. Vasey of Eichorn, Elverson & Vasey, Des Moines, for appellant.

Corliss C. Baty, Maquoketa, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

Robert and Alberta were married in 1970. Two children were born of this marriage, Benjamin and Spencer. At the time of this action Ben was twelve and Spencer was eight. In October 1984 the parties separated and were eventually divorced. Both parties resided in Virginia. In January 1987 a final order was filed in the circuit court of Fairfax County, Virginia, awarding custody of the parties' two minor children to Robert. Alberta's child support obligation was set. Subsequent to the separation, Robert moved to Maquoketa, Iowa, with the children.

In February 1990 Alberta filed a petition for custody in Iowa pursuant to Iowa Code chapter 598A. Alberta was still a Virginia resident, but Robert and the children resided in Iowa. Alberta sought custody of both minor children. After a trial, the district court entered its findings of fact and judgment. The court noted there had been five physical abuse complaints made concerning Robert's treatment of Ben. Those complaints were made in 1985, 1989, and 1990, and the court determined a founded report of physical abuse was made in three cases. The court further noted, though, that no evidence was presented concerning the treatment of Spencer. Based on its finding, the court awarded physical custody of Ben to Alberta while keeping Spencer in Robert's care. The court then ordered Alberta to pay \$100 per month child support for Spencer. Alberta appeals, and Robert cross-appeals.

Our review in this matter is de novo. Iowa R. App. P. 4. In child custody cases, the best interests of the children is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

I.

To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the 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. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well

being. Id.; see In re Marriage of Gravatt, 371 N.W.2d 836, 838 (Iowa App. 1985). This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

We determine the circumstances have materially changed since the original decree such that a change of custody is warranted. The trial court believed this action was precipitated by Ben's complaints. There have been five physical abuse complaints made involving Robert's treatment of Ben. The first incident was on December 4, 1985, where Ben had been hit in the face and injured. The Department of Human Services declared this to be a founded complaint and counseling services were recommended for Robert. The last founded complaint in our record was made on April 17, 1990, at which time Ben had an injury to his mouth due to Robert's slapping him in the mouth while riding in the car. Robert has participated in counseling services since the original child abuse report. The last founded report occurred after he had gone through the parental counseling program offered by DHS. We believe counseling has not yet had its desired effect on Robert and that these incidents constitute a substantial change in circumstance.

II.

Robert in his cross-appeal argues the trial court lacked subject matter jurisdiction to enter its order in this matter. He feels the court failed to apply the

provisions of Iowa Code chapter 598A to determine whether or not it was appropriate to take jurisdiction to modify the Virginia decree. We determine the district court properly assumed subject matter jurisdiction of this case.

Iowa Code section 598A.3(1) (1991) states:

A court of this state which is competent to decide child custody matters has jurisdiction to make a custody determination by initial or modification decree if:

a. This state is the home state of the child at the time of the commencement of the proceeding, or had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of removal or retention by a person claiming custody or for other reasons, and a parent or person acting as parent continues to live in this state

. . .

"Home state" is defined as "the state in which the child, immediately preceding the time involved, lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months . . . " Iowa Code § 598A.2(5) (1991).

In this case Ben and Spencer had resided more than six months in Iowa; they have lived there since the summer of 1985. The children had lived in Iowa for almost five years at the time of the trial court order. All physical abuse complaints were made and investigated in Iowa. We determine the trial court had jurisdiction under Iowa Code chapter 598A, and the court properly heard the case.

III.

Alberta argues the trial court erred by separating the two children and transferring physical custody of only one child to her. Robert claims the trial court should have kept Benjamin's physical custody with him.

Splitting custody of children is discouraged. In re Marriage of Wahl, 246 N.W.2d 268, 270 (1976). Our court in In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa App. 1983), stated "the underlying rationale is that split custody deprives children of the benefit of constant association with each other which, as innocent victims of marital bankruptcy, they should not lightly be subjected to." This rule may be departed from if there are "good and compelling reasons," id. (citing In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979)), such that the separation better promotes the long-range interests of the children, Wahl, 246 N.W.2d at 270.

The district court determined that because of Ben's conflicts with his father, his physical custody had to be changed to his mother. The court noted:

The evidence introduced is almost entirely directed at the relationship between Ben and Respondent. The only evidence relating to Spencer is Ben's statement that he feels Spencer will become the object of Respondent's abuse once he is out of the house.

The evidence is overwhelming that Ben must be removed from this home. There is no evidence one way or another regarding Spencer. The record supports dividing the two boys.

We determine the separation of the children does not

promote the long-range interests of the children. Robert and Spencer live in Iowa; Alberta and Ben reside in Virginia. With the exception of expensive visits, the boys will only have contact during the summers. Previous to this disposition the two children had lived together since birth.

We do not believe the children should be separated for the reason the primary evidence in the case was directed at Ben and Robert's relationship. We realize Robert has been the children's primary care giver, but we share Ben's concern that his father may use inappropriate discipline with Spencer. A psychologist who examined Ben testified that Robert needed a lot of help appreciating and understanding the dynamics between an adult and child.

We find no compelling reasons to separate the two children. Accordingly, we modify the district court order to award physical custody of both children to Alberta. Robert shall have the children for summer vacation for the period ten days after the end of school until ten days prior to the beginning of school. In addition, he shall have visitation with the children at any time, including Christmas vacation, provided two weeks' notice is given Alberta.

IV.

We next address the issue of child support. Robert had a job-related injury to his back and is now on disability retirement. The trial court determined Robert's net income

from his disability pension is \$1650 per month. Alberta has a net monthly income of \$1789. Using the December 31, 1990, guidelines, see In re Marriage of Ladely, 469 N.W.2d 663, 664 (Iowa 1991), Robert's child support would be thirty percent of his net monthly income or \$495. Robert has health and accident insurance for the children. In addition, because he has no tax liability due to his disability pension, Alberta can be awarded full income tax deductions for both boys. Further, Robert is disabled and not able to add to his income. Accordingly, we find strict application of the guidelines would be inappropriate in this circumstance. To do otherwise would result in a substantial injustice to Robert.

We determine Robert should maintain the health and accident insurance for Ben and Spencer. Alberta should pay medical expenses over and above those paid for by this insurance. Further, Alberta shall be entitled to the income tax deduction for both children, and Robert is ordered to execute the necessary documents. Robert shall pay Alberta \$400 per month for child support.

V.

We modify the district court order to place both Ben and Spencer in the physical custody of their mother, Alberta. In addition, we determine Robert should pay Alberta \$400 per month for the children's support. We affirm all other provisions of the district court order. Each party is to pay his or her own attorney fees, and costs shall be taxed one-half to each party.

AFFIRMED AS MODIFIED.