

IN THE COURT OF APPEALS OF IOWA

No. 9-628 / 89-817

FILED

APR 24 1990

CLERK SUPREME COURT

IN RE THE MARRIAGE OF SHERRY DURANT AND DOUGLAS DURANT

Upon the Petition of

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SHERRY DURANT,

Appellee,

And Concerning

DOUGLAS DURANT,

Appellant.

Appeal from the Iowa District Court for Jasper County,
Dale B. Hagen, Judge.

Douglas appeals a district court order refusing to significantly modify the custody provisions of a dissolution decree. **AFFIRMED.**

Lee M. Walker and Eugene Knopf of Walker, Knopf & Billingsley, Newton, for appellant.

William L. Springer, Marshalltown, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

OXBERGER, C.J.

Douglas Durant appeals the district court's denial of his modification of custody provisions of a dissolution decree. Douglas contends that he should be awarded the primary care of the parties' two minor children and that Sherry should then pay him child support. We affirm the decision of the district court.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases, though helpful, have little precedential value since we must base our decision here primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

The marriage of Sherry Durant and Douglas Durant was dissolved by decree in May 1985. Two children were born of this marriage, Heather on September 4, 1980, and Jonathan on March 12, 1984. Sherry also had a child from a previous relationship. Pursuant to the decree, Sherry was awarded sole custody of the parties' children, subject to reasonable visitation for Douglas. Douglas was required to pay child support.

On April 6, 1988, Douglas filed an application⁷⁷ for modification of decree of dissolution of marriage. Specifically, Douglas sought custody of the two children claiming a material and substantial change in the circumstances.

Following trial, the district court changed custody from sole custody to joint custody but kept the primary residence of the children with Sherry. Douglas filed this appeal.

Douglas contends the district court erred in refusing to modify the custody provision of the dissolution decree. He argues that there has been material and substantial changes and that it would be in the children's long-term best interest to be removed from their mother's primary physical custody and placed in his home.

The basic rule required to modify a dissolution decree is a material and substantial change in the conditions or circumstances of the parties must have occurred since the dissolution. This was aptly expressed by our court in the case of In re Marriage of Mayer, 347 N.W.2d 681 (Iowa App. 1984), as follows:

Such changed conditions must be such as were not within the knowledge or contemplation of the court when the former decree was entered, and a modification should be based upon a change of circumstances more or less permanent or continuous, not temporary. (Citations omitted.)

Id. at 683.

A party requesting a change of custody must establish by a preponderance of the evidence that conditions have materially and substantially changed; that the children's best interests make it imperative to make a modification. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). The parent seeking a change of custody has the burden to show a superior claim based on the ability to minister more effectively, not equally, to the children's well being. Once custody of a child has been determined, it should be disturbed only for the most cogent reasons. In re Marriage of Weidner, 338 N.W.2d 351, 360 (Iowa 1983).

Douglas provides eighteen reasons to support his contention that there has been a substantial and material change in circumstances since the entry of the dissolution decree. Douglas's allegations center around the following: that Sherry has moved several times since the dissolution, that she had remarried but is now divorcing that individual and living with another man, that she did not take appropriate steps after their daughter was sexually abused, that the children are poorly fed and clothed, that the children are not doing well in school, and that she has not presented the most stable environment for the children.

Upon our review of the record, we agree with the district court that the circumstances involved in this matter do not amount to a material and substantial change

warranting a change in the custody of the two children in this case. The most serious of Douglas's allegations is that Heather was sexually abused and that appropriate steps have not been taken for her treatment of this abuse.

Sherry maintains that Heather received immediate counseling through the family therapist, Don Keiswelter, who was working with the family. Tom Carpenter, of the Department of Human Services, referred Sherry and Heather to Eva Christiansen, of the Jasper County Mental Health Center. Mr. Carpenter referred Sherry and Heather to Ms. Christiansen after Sherry expressed concern about Heather's behavior following the sexual abuse incident. Ms. Christiansen testified that Sherry did not follow up on the prescribed treatment. Sherry states that she did follow up on the treatment, but that she ceased the treatment at Jasper County Mental Health because of Ms. Christiansen leaving that agency.

The district court stated:

The Court does not and cannot find from all of the circumstances in this matter that the change of circumstances is material and substantial such that the custody must be changed and that it is not in the children's best interest and expedient that the requested change take place. This does not mean to say that there are not problems with the care and the relationship between the petitioner and the respondent. I have some criticism of the follow-up of the sexual abuse treatment that the petitioner has given. I think she should have followed up more diligently with the treatment that was recommended. And I encourage her now to seek that treatment that she said she was going to get from Des Moines Child Guidance.

We agree with the analysis of the district court and strongly urge Sherry to diligently seek counseling services.

Having reviewed the record in this case, we find that the best interests of the children will be served by leaving their physical custody with Sherry. Douglas noted that he had remarried and that a family services report indicated that his home would probably be a more stable one for the children. The record contains nothing that would permit a finding that Douglas and his new wife would be able to minister more effectively to the children. The district court found:

The testimony also shows that the children have lived with . . . [Sherry] all of their lives; that the children are receiving care that is appropriate, that is, that their hygiene is adequate; that they are give[n] appropriate supervision; and that they appear to be happy children and living in what is now a more stable environment, perhaps than at the time the Petition for Modification was filed.

We note that Douglas would provide a stable home for the children as well. However, we find Douglas has failed to establish by a preponderance of the evidence that conditions have materially and substantially changed; that the children's best interests make it imperative to make a modification. We find that there was no evidence at the time of the hearing in this matter there had been any substantial change in circumstances that would justify a modification of the custody provisions of the decree.

We find no error on the part of the district court in denying Douglas's request to modify the physical placement of the parties' two children. Consequently, we do not address his next contention requesting an award of child support. We affirm the district court's decision leaving the children's physical custody with Sherry and awarding joint legal custody in both parents.

AFFIRMED.