FILED
DEC 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JON LORIN SANFORD AND LAURA LOU SANFORD

Upon the Petition of)

JON LORIN SANFORD,)

Petitioner-Appellee/)
Cross-Appellant,)

And Concerning)

LAURA LOU SANFORD, n/k/a)
LAURA GARZA,)

Respondent-Appellant/)
Cross-Appellee,)

VERNE TAYLOR and)
MARILYN TAYLOR,)

Intervenors-Appellants.)

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Filed December 23, 1986

6-311
85-1097

Appeal from the Iowa District Court for Polk County (No. 041-24281) - Luther T. Glanton, Senior Judge.

Parties appeal and cross-appeal from the district court's amended and substituted ruling granting mother's modification petition on limited remand from the supreme court. **INTERVENORS' APPEAL DISMISSED; AFFIRMED ON RESPONDENT'S APPEAL.**

Leslie Babich of Babich, Bennett & Nickerson, Des Moines, for respondent-appellant/cross-appellee.

Emil Trott, Jr. of Barrett & Trott, Des Moines, and Robert Clauss, West Des Moines, for petitioner-appellee/cross-appellant.

No appearance for the intervenors-appellants.

Heard by Oxberger, C.J., and Snell and Schlegel, JJ.

PER CURIAM 227

On March 22, 1984, Laura and Jon Sanford were granted a dissolution of their marriage by the District Court for Polk County. The district court, in the dissolution decree, awarded custody of the parties' three children, Christopher, Bryan, and Amy, to Jon. Subsequently, Laura remarried, and we refer to her hereinafter by her present married name, Garza. Garza filed a petition for modification of the decree on June 27, 1984, seeking, inter alia, custody of the children and asking the district court to grant visitation rights to the maternal grandparents. On July 24, 1984, the maternal grandparents, Verne and Marilyn Taylor, filed a petition for intervention in order to seek custody of the children. On August 10, 1984, the district court appointed a child custody investigator.

Sanford's plans to move the children with him to Arizona were barred by an injunction issued on January 28, 1985. The case proceeded to trial on February 19 and 20, 1985. On February 20, following the hearing, the injunction was lifted allowing Sanford to move with the children to Arizona. Pursuant to stipulation of the parties, the case was kept under advisement so that a psychiatric or psychological evaluation of the children could be completed in Arizona to determine the effects of the move on the children. Upon completion, this evaluation was to be included in a child custody investigation report and submitted to the trial court for its consideration. On May 1, 1985, the district court dismissed the Taylors' intervention petition as well as Garza's petition for modification, without having considered the child custody investigation report and the Arizona evaluations.

Following unsuccessful motions for new trial and for enlarged or amended findings, conclusions, and modified decree, Garza and the Taylors filed their notice of appeal. On August 20, 1985, Garza and the Taylors filed an application

for remand which was sustained on September 4, 1985, permitting the district court to consider the Arizona evaluation and "make such revised findings as may be appropriate . . . ."

The remand hearing was held on January 6, 1986. Following the hearing, the district court entered amended and substituted findings, conclusions, and ruling providing for joint legal custody of the children in Garza and Sanford and changing physical custody from Sanford to Garza. Sanford's subsequent motion for new trial was overruled by the district court and, on February 15, 1986, Sanford filed his notice of appeal. An order of the Iowa Supreme Court, entered May 16, 1986, found that Sanford's separate appeal was unnecessary in light of Garza's appeal which was still pending in the supreme court and that any issues raised by him will be treated as being raised by cross-appeal.

We deal first with Sanford's contention that the Taylors' appeal should be dismissed because they failed either to file a brief or, if we consider Garza's brief to be Taylors' brief also, to present any argument in favor of their position in the trial court. While any number of appellants may join in a single brief, Iowa R. App. P. 14(j), failure of a party to argue an issue on appeal will amount to a waiver or abandonment of that issue, Iowa R. App. P. 14(a)(3); Hubby v. State, 331 N.W.2d 690, 694 (Iowa 1983). An appellant who fails to file a brief and argument will be presumed to have abandoned the appeal. Aetna State Bank v. Fremmer, 213 Iowa 339, 340, 239 N.W. 234 (1931). Such an appeal will be dismissed. Yetley v. Irons, 238 Iowa 23, 24, 25 N.W.2d 677, 678 (1947). This result does not change merely because we engage in de novo review of this equity case. In equity cases of this type, it is our duty in a de novo review to examine the whole record and adjudicate rights anew on those propositions properly presented where issue has been raised and error preserved. In re Marriage of Williams, 199 N.W.2d 339, 346 (Iowa 1972) (emphasis added).

In the present case, we do not think the Taylors joined in Garza's brief. That brief was labeled in the singular: "Brief and Argument of Appellant." This cause was styled with Garza denominated "Respondent-Appellant" and the Taylors "Intervenors-Appellants." The brief identifies itself as "an appeal taken by Respondent/Appellant Laura Garza . . . ." Moreover, no argument is made in appellant's brief alleging error by the district court in denying the Taylors' request for custody. Appellant's reply brief merely states that the Taylors concur with the amended ruling which found that Garza should be granted custody. The Taylors present us with no issue on this appeal and have not joined in Garza's brief. Accordingly, we dismiss their appeal. Cf. Board of Directors of Linden Consolidated School District v. Board of Education in and for Dallas County, 251 Iowa 929, 937, 103 N.W.2d 696, 701 (1960) (intervenor must have legally-recognized interest to participate in appeal); McCann v. Clark, 166 Iowa 705, 714, 148 N.W. 1025, 1028 (1914) (plaintiff's dismissal as to one of appellees did not require a dismissal as to other appellees).

Sanford next argues that the original ruling of the district court which denied Garza's modification petition should be affirmed because Garza has failed to state any argument in her brief regarding that ruling, and has consequently waived the issue. The district court, however, in its amended and substituted ruling declared that the original ruling was "null and void and of no further force or effect." We think that, if the district court operated within its jurisdiction in revising its original ruling upon remand, Garza was under no obligation to argue that the earlier, now void, ruling should be reversed. We therefore proceed to a consideration of the district court's authority and jurisdiction on remand.

When the supreme court remands for a special purpose the district court, upon the remand, is limited to do the special thing authorized by the supreme

court and nothing else. Kuhlman v. Persinger, 261 Iowa 461, 468, 154 N.W.2d 860, 864 (1967). The district court in these situations has no power or jurisdiction to do anything except to proceed in accordance with the mandate. Iowa-Illinois Gas and Electric Company v. Gaffney, 256 Iowa 1029, 1040, 129 N.W.2d 832, 838 (1964). When, however, additional facts are presented on remand which were not originally before the trial or appellate court and bear on the proper judgment to be entered, the trial court should enter judgment in accordance with the additional facts. Schnebly v. Baker, 221 N.W.2d 739, 740 (Iowa 1974).

The supreme court's remand order sent this case back to the district court "to permit the trial court to consider the Arizona report and make such revised findings as may be appropriate, providing the completed record" to the supreme court. On remand, the district court had the benefit of a complete psychological assessment of the children which was not before the court prior to its original denial of modification. In light of the information contained in that report, the district court felt constrained to void its earlier ruling. We think that, consistent with Schnebly, the district court was not in error in doing so. The original ruling was properly declared void and Garza was under no obligation to contest it. Moreover, we think that regardless of whether Garza denominates her appeal as an attack of the district court's original ruling or a defense of its substituted ruling, her contentions would remain the same: that she met the burdens of proof that our law of child custody modifications places on her.

We therefore proceed to the merits of this appeal and consider whether Garza has met her burden regarding her modification petition. Our review is de novo. In re Marriage of Brown, 247 N.W.2d 2, 3 (Iowa 1976). In In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983), the Iowa Supreme Court set forth the controlling law on this issue as follows:

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of 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. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the cogent reasons.

In addition, the criteria used for making initial child custody decisions apply also to proceedings to modify a child custody decree. In re Marriage of Hubbard, 315 N.W.2d 75, 80 (Iowa 1982). Although we are not bound by the fact findings of the district court we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). The rationale behind this proposition is that the district court has the opportunity to observe the demeanor of the witnesses as they testify and to formulate an appropriate impression of the witnesses' credibility based upon that demeanor. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984).

Substantial difficulties in the enforcement of Garza's visitation rights are among the changes found by the district court to have occurred since the dissolution decree. Visitation rights are granted by our courts with an eye to the best interests of the child. In re Marriage of Hubbard, 315 N.W.2d at 82. Implicit in the granting of visitation rights is a court's determination that it is in the child's best interests to have continued association with the non-custodial parent. Id.; Iowa Code § 598.41 (1985). In determining the proper custodial arrangement, we consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor. Iowa Code § 598.41 (1985).

The supplemental child custody investigation report available to the district court on remand contains references to a number of difficulties which have confronted Garza in her attempts at visitation. The court-appointed child custody investigator testified that Sanford's present wife told her that if Garza "didn't back off, that she would cut off all visitation," and that Garza should not have visitation more than once a month. The custody investigator also testified that she had been told by Sanford and his wife that at one point they had obtained an unlisted phone number which they would not give to Garza. In addition, substantial delays in Garza's visitation occurred during summer and at Christmas, 1985.

The supplemental record also contains evidence of the detrimental psychological effect on the children resulting from the move to Arizona. There is evidence that all three children manifested adjustment disorders associated with the move which could lead to on-going emotional and behavioral problems. These manifestations include nightmares, bed wetting, and feelings of insecurity. In addition, there is evidence that the Sanfords have attempted to alienate the children from their mother by making denigrating remarks about Garza in the children's presence and have practiced excessive discipline by, for example, beating two-year-old Amy with a belt for wetting her pants. The relevance of these factors has been noted in past custody cases. See In re Marriage of Leyda, 355 N.W.2d 862, 865-66 (Iowa 1984) (mother's attempt to destroy child's relationship with father); In re Marriage of Corbin, 320 N.W.2d 539, 543 (Iowa 1982) (father's grossly excessive attempts at discipline).

We feel that Garza has met her burden to show material and substantial changes in circumstances since the decree not contemplated by the dissolution court. We must now determine whether she has demonstrated an ability to

minister more effectively than Sanford to the children's well being. We think that she has so shown.

Critical to child custody determinations is an evaluation of the respective environments to which the children may be exposed following a custody award. In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1972). Laura Garza is currently a housewife and homemaker who earns approximately $80 per week by providing child care services. Her husband, David, has finished his schooling, obtained employment, and earns approximately $500 per week. The Garza's have purchased a home in the school district in which the oldest children had begun school prior to the move to Arizona. Although Sanford's present wife is gainfully employed in Phoenix, the children have already moved twice while in Arizona. This is in addition to the fourteen moves Sanford and his family made in the eight years prior to the move to Arizona. In addition, the record contains evidence of fifteen jobs held by Sanford since his marriage to Garza in 1976 and of his inability to provide for his family during that marriage. Garza has matured rapidly following the divorce, has an excellent relationship with her children, and, contrary to the Sanfords, is able and willing to deal with the children in recognition of their individual needs. We also note that the supplemental child custody investigation report recommended that Garza be given custody of the children. This is a proper subject of our consideration. Winter, 223 N.W.2d at 166-67. Also appropriate for our consideration is the preferences of the children. Id. Although understandably ambivalent and confused during parts of the psychological evaluation, both Christopher, age eight, and Bryan, age seven, exhibited a "strong desire to remain with their mother" during two sessions with one of the Arizona psychologists. Also instructive on this issue in the Sanfords' inability or refusal to cooperate in the enforcement of Garza's visitation rights. See Leyda, 355 N.W.2d at 866, and cases cited therein.

Our de novo review of the record persuades us that the district court was correct when, in its amended and substituted ruling, it awarded custody of the children involved here to Garza.

Finally, both Garza and Sanford request attorney's fees for the modification trial and subsequent appeal. Pursuant to Iowa Code section 598.36 (1985), the prevailing party in a modification proceeding may be awarded reasonable attorney's fees. The district court in its original ruling assessed Sanford's attorney's fees to both Garza and the Taylors. In the amended and substituted ruling, the district court ordered Sanford to refund those funds and further ordered that each party would be held responsible for its own attorney's fees. We find that this determination by the district court is reasonable and affirm. As to Garza's claim for attorney's fees on appeal, we conclude her request is justified under the circumstances of this case and award her $500 for that purpose. Costs are assessed one-half to each party.

INTERVENORS' APPEAL DISMISSED; AFFIRMED ON RESPONDENT'S APPEAL.