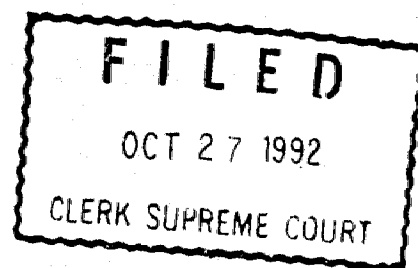


IN THE COURT OF APPEALS OF IOWA

No. 2-368 / 92-30



TERESA M. LIFORD,

Appellee,

vs.

JAMES F. GOODMAN,

Appellant.

Appeal from the Iowa District Court for Montgomery County, Leo F. Connolly, Judge.

Goodman appeals a district court order awarding custody of the parties' children to Liford. **AFFIRMED IN PART, MODIFIED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Richard O. McConville of Scalise, Scism, Sandre, McConville & Holliday, Des Moines, for appellant.

Bruce E. Swanson of Swanson & Boeye, Red Oak, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

FACTS

Teresa Liford and James Goodman lived together for a number of years but never married. They are the natural parents of two children: Aryon Goodman, born May 2, 1986; and Stevie Goodman, born October 11, 1987. Until May 1990, Teresa, James, and the children lived together in James's house in Indiana and both parties cared for the children. However, on May 23, 1990, Teresa moved to Red Oak, Iowa, with the children, and James remained in Indiana. The relationship between the parties deteriorated.

On June 4, 1990, James filed a petition in Delaware County, Indiana, seeking to establish paternity and obtain custody of the two children. The Indiana statutes regarding custody are Uniform Child Custody Jurisdiction Statutes similar to and corresponding to Iowa Code chapter 598A. See Ind. Code Ann. chapter 31-1-11.6 (Burns 1987).

Teresa was served with notice of this action and was represented by counsel. However, she failed to appear at the final hearing in person or by legal counsel. The Indiana court established paternity and ruled, after reviewing all of the evidence presented, it was in the children's best interests that custody be awarded to James.

On August 6, 1990, Teresa filed a motion to correct errors. She alleged she did not know the purpose of the July 6, 1990, hearing was to establish paternity and claimed the hearing was only scheduled for the purpose of

making certain preliminary determinations. She further alleged she did not receive notice that the hearing was to be upon all issues and was deprived of the opportunity to litigate the issues of custody, paternity, visitation and support. After a hearing on the motion, the Indiana court found the following: Teresa had notice; she was aware of the hearing and its purpose; she had an opportunity to appear; she had requested and received a continuance so she could appear and obtain legal counsel; evidence was presented where the court made a factual determination of the merits; and the hearing was not a default. This final order was not appealed.

In July 1991, Teresa filed a petition in Iowa to establish and determine child custody. She alleged the Indiana order was entered without notice to her. She requested the court hold a hearing and then enter an order modifying the Indiana Court order. She ultimately requested the court award her custody of the minor children.

James filed an answer and counterclaim. In his answer, he denied the assertion that Teresa had not received proper notice. In addition, he denied the Indiana decree that awarded him custody of the children was a default judgment. However, he admitted "that the petitioner herein [Teresa] and the minor children named herein have resided continuously in the State of Iowa in Montgomery County in excess of one year."

The trial court determined the Indiana order awarding James custody of Aryon and Stevie was a default judgment and should be set aside. Following trial, the court established paternity, awarded Teresa custody of the children, ordered James to pay \$300 per month child support, established visitation, and set aside the Indiana decree. James appealed. We affirm in part, modify in part, reverse in part, and remand with directions.

SCOPE OF REVIEW

Our standard of review on the issues of custody and modification and on the jurisdictional issues under Iowa Code chapter 598A is de novo. Iowa R. App. P. 4.; In re Marriage of Leyda, 398 N.W.2d 815 (Iowa 1987); In re Marriage of Olive, 340 N.W.2d 792 (Iowa App. 1983).

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.

ANALYSIS

The first issue we must address is whether Iowa has subject matter jurisdiction. The jurisdictional issue in this case is governed by the Uniform Child Custody Jurisdiction Act (UCCJA), Iowa Code chapter 598A. This act is recognized in both Iowa and Indiana. See Ind. Code Ann. chapter 31-1-11.6 (Burns 1987).

The majority in In re Marriage of Ross, 471 N.W.2d 889 (Iowa App. 1991), stated:

We conclude from reading of the leading Iowa cases, a two-track analysis must be made. First, the court must determine if the state which issued the original custody decree (Arkansas) still has jurisdiction. Second, the court must determine if the state in which the modification petition is filed has jurisdiction. Finally, if both have jurisdiction, the court must determine which is the proper state to assume jurisdiction under section 598A.3.

We turn to the question of whether Iowa, the state in which the modification petition is filed, has jurisdiction. In this respect, section 598A.3 provides:

1. 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 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; or

b. It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

c. The child is physically present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

d. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraph "a", "b", or "c", or another state has declined to exercise jurisdiction on the ground that this state is the

more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction.

2. Except under paragraphs "c" and "d" of subsection 1, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a custody determination.

3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine custody.

Iowa Code § 598A.3 (1991).

It is beyond dispute that the Montgomery, Iowa District Court is competent to decide child custody matters. With this finding, we must then decide whether it has jurisdiction to make a custody determination by a modification decree under any of the requisites listed in section 598A.3.

We have reviewed those requisites and conclude that Iowa has jurisdiction under subsections (a) and (b) of paragraph (1). Turning first to section 598A.3(1)(a), James in his answer admitted that Teresa and the children have resided "continuously in the State of Iowa in Montgomery County in excess of one year." When James admitted this in his answer, further evidence relating thereto became unnecessary.

Subsection (a) of paragraph (1) speaks in terms of "home state." In this respect, section 598A.2(5) provides:

5. "Home state" means 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, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons

mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.

Turning next to section 598A.3(1)(b), we also believe that it is in the best interest of the children that the Montgomery County District Court assume jurisdiction. The children and their mother have a significant connection in Iowa, and there is available in this state substantial evidence concerning the children's present or future care, protection, training, and personal relationship.

Having determined that Iowa is the "home state" of the children, it follows that Indiana does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter [598A]. But even if we were to assume that Indiana also has jurisdiction following our pronouncement in In re Marriage of Ross where both courts have jurisdiction, we believe it is proper for Iowa to assume jurisdiction under section 598A.3.

We must next determine whether the Indiana decree should be modified. As previously pointed out, our review is de novo. We conclude the decree should be modified and, in doing so, we adopt as our own the following findings of the trial court:

[A]t the time Petitioner filed her Petition to establish and determine child custody the children had resided with her continuously in excess of fourteen months in the State of Iowa. It is undisputed that the children are in excellent health and that Petitioner has seen to it that their needs regarding health, education and welfare have been provided for. Petitioner

has done an excellent job of caring for her children on her limited income.

5. Petitioner's mother, Sandra Gray testified that the Respondent had told her on at least one occasion that if he (Respondent) "gets the kids she'll never see them again." Mrs. Gray testified that this comment was made in reference to her daughter, Teresa Liford, Petitioner herein. Mrs. Gray also testified that the Respondent made the statement that he was "tired of messing with her" which was directly related to the Petitioner. Respondent denied making these comments but the Court is convinced that said statements were made and that if the Respondent was granted custody of the children herein by the Iowa Court that they may very well indeed never see their mother again.

CONCLUSION

We conclude as follows:

1. We affirm the part of the trial court's decree that awarded custody of the children jointly in both parties with the physical custody of the children to Teresa and modify the Indiana decree accordingly.
2. We affirm the part of the trial court's decree that dissolved the temporary writ of injunction.
3. We modify the trial court's decree as it relates to visitation privileges to the appellant in the following respects: James shall have the children for a two-month period of time in summer, one week at Christmas vacation, one week at spring vacation, on alternating birthdays of the children, and such other reasonable times as can be agreed upon by the parties. The parties should share the

expenses of visitation since the distance is the result of Teresa's actions in moving from the parties' home.

4. We delete the part of the trial court's decree which "set aside" the proceedings in the Indiana court and substitute in lieu thereof the word "modify."

5. We find nothing in the record to support the allowance of child support, thus we remand this cause with directions to take further evidence as to child support and to enter an amount consistent with the child support guidelines reserving the amount of child support in the event a child attends college until that time.

6. We affirm the part of the decree that directs each party to pay his or her own attorney fees with an equal division of the court costs.

7. We also affirm the part of the decree that does not restrict James from taking the children back to Indiana. Insofar as transportation is concerned, that has been provided for under the visitation modification set forth above. There is no dispute that James is the natural father of the children, and to the extent necessary, we affirm that part of the trial court's ruling.

Costs of this appeal shall be divided evenly between the parties.

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Donielson, P.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

When James filed a petition in the Indiana court to establish custody in June 1990, it was the only home state of the children and no court had jurisdiction. Teresa was served with notice and appeared with counsel. Teresa kept the children in Iowa, contrary to the Indiana decree. She recognized the Indiana decree because she sought to modify it.

The Iowa court has used as a basis to modify, Teresa's holding the child in Iowa contrary to the Indiana decree. The majority appears to affirm on this basis.

I cannot agree. Iowa should enforce, not modify, the Indiana decision.