

IN THE COURT OF APPEALS OF IOWA

FILED

FEB 14 1977

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF WANDA SUE ROBERTS AND RONALD WAYNE ROBERTS

Upon the Petition of)

WANDA SUE ROBERTS, now)
WANDA SUE ROBERTS STOVER,)

Appellee,)

And Concerning)

RONALD WAYNE ROBERTS,)

Appellant.)

Filed February 12, 1977

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No. 3-59615

Appeal from Washington District Court -- Ira Morrison, Judge

The appellant appeals a court order granting the custody of a child to the mother, and an order of subsequent modification that denied him custody of the child.

AFFIRMED

Life, Davis & Life, of Oskaloosa, Patrick J. Life, counsel for appellant.

Griffiths, Anderson & Buffer, of Kalona, Tracy Anderson, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Wanda Sue Roberts (Stover) was married in Canton, Missouri, at the age of 15 to Ronald Wayne Roberts, age 19, on December 31, 1971. Some seven months later, a child, Beverly Sue Roberts, was born on July 9, 1972. The marriage was dissolved on February 1, 1974, with an almost continuous litigation from that time until now regarding child support, visitation rights, and parental custody composing of two modification hearings and an adoption proceeding, and now appeals.

We are constrained to observe that neither parent has exhibited any particular exemplary conduct as it relates to being the best and most satisfactory parent for custody. In 1975, the trial court ordered that the custody of the child be supervised by the Washington County Department of Social Services for the best interests of the child.

The child has been with the mother who is now in her third marriage at the age of 23 having lead what opposing counsel referred to as a nomadic life with the child living in the states of Indiana, Colorado and Oklahoma, who during the interim period when married to her second husband, a convicted felon, informed the social worker that if the appellant tried to visit his daughter, that her second husband would physically assault him. During this time, she had lived on ADC, worked as a go-go dancer, had some marijuana experiences, and had some sexual activities that were perhaps not as proper as they might be. She failed to obey the orders of the court and at times to submit to its jurisdiction.

The respondent-appellant has been no model of parenthood either. He was unemployed at the time of hearing, subject to becoming extremely angry, was found by the trial court to be immature, failed in his child support obligation until as the trial judge found, it would assist him in his legal actions. He

"child-napped" his daughter from the former wife and has not in general displayed what might be called good conduct.

The record reflects that the court considered the criteria set forth in *In Re Marriage of Winter*, 223 N.W.2d 165, 166, 167 (Iowa 1974), and these criteria were well considered in the various legal actions as it related to the custody of the child, Beverly Sue Roberts, who was 3 1/2 at the time of the district court hearing.

Pursuant to rule 344, Rules of Civil Procedure, our review is de novo, and we are not bound by it but give weight to the findings of the trial court. Rule 344(f)(7). More importantly, we are bound by rule 344(15), R.C.P.: *"In child custody cases the first and governing consideration of the courts must be the best interest of the child."*

We understand the trauma of such a youthful marriage and the birth of a child so quickly which places such great strain on the prospects of domestic tranquillity. Perhaps Wanda's "nomadic" life as opposing counsel calls it, was a mistake, and perhaps she made other mistakes, but who is to decide since it appears that these mistakes, if they are, are not extraordinary serious in nature. Few are possessed with the legendary wisdom of Solomon to make good decisions when decisions have to be made, and even if we view these as mistakes in this early life, we see no better conduct and similar mistakes by the appellant here as well. We see by the record and by the statements of counsel improvement by the parties.

Of this, we can be sure that the trial court had the opportunity to observe the parties, listen to them and watch them in person, and while we are not bound by the trial court's findings, we give them weight as required by law. We are further guided by

the legal principles that this status of children should be quickly fixed and thereafter little disturbed. See *Jacobs vs. Jacobs*, 216 N.W.2d 312, 314 (Iowa 1974). The Supreme Court has construed the power to make subsequent changes in a divorce or dissolution of a marriage decree exist only when there has been a material and substantial change in circumstances since the date of the original decree to alleviate the possibility of endless litigation and continued uncertainty. *Dworak vs. Dworak*, 195 N.W.2d 740, 742 (Iowa 1972). The best long range interest of the child is to be given paramount importance. *Baker vs. Baker*, 243 N.W.2d 234, 235 (Iowa 1976). Custody once fixed should seldom be disturbed and then only for the most cogent reasons. In *Re Marriage of McFarland*, 239 N.W.2d 175 (Iowa 1976). The record in this case perhaps best be resolved by *In Re Marriage of Gutermuth*, 246 N.W.2d 272, at 274 (Iowa 1976) where it states:

"The parent seeking to take actual custody from the other has the burden to show some superior claim based on his ability to minister, not equally, but more effectively to the children's well being. In *Re Marriage of Powers*, 226 N.W.2d 810, 812 (Iowa 1975); *Spotts vs. Spotts*, 197 N.W.2d 370, 371 (Iowa 1972). This principle is but a corollary to our rule that custody of children, once fixed, should seldom be disturbed and then only for the most cogent reasons. *Schoonover vs. Schoonover*, 228 N.W.2d 31, 34 (Iowa 1975); *Stouwie vs. Stouwie*, 222 N.W.2d 435, 438 (Iowa 1974)."

See also *In Re Marriage of Brown*, 247 N.W.2d 2 (Iowa 1976) where it states:

"Modification of a dissolution decree is allowed only when there has been a material and substantial change in circumstances since the date of the original decree or since the date of a prior modification concerning the same issue being then raised. *Dworak vs. Dworak*, supra. When the relief sought affects custody, support, or visitation, the change of circumstances must relate to the welfare of the child.

"The applicant has the burden of showing by a preponderance of the evidence substantial and material changes in circumstances which make the modification expedient or necessary. It must appear a new custodial arrangement will better serve the child's well being. Davis vs. Davis, 237 N.W.2d 455, 457 (Iowa 1976); Mears vs. Mears, 213 N.W.2d 511, 514-515 (Iowa 1973); Crary vs. Curtis, 199 N.W.2d 319, 320 (Iowa 1972)."

In the present case, the evidence falls far short of supporting any custodial change, and those allegations of her second husband being a felon, the occasional use of marijuana and sexual activities do not present sufficient grounds to change custody. Although immorality, may be a factor in determining custody, it may go only to the extent that it establishes that the parent is a poor custodian of the child. That is not the case in this record. In *Re Marriage of Roff*, 228 N.W.2d 98, 100 (Iowa 1975). See also *Hagen vs. Hagen*, 226 N.W.2d 13 (Iowa 1975) and *Jacobs vs. Jacobs*, 216 N.W.2d 312, 314 (Iowa 1974). And even then, a modification of a custody decree cannot rest solely on the grounds of a former spouse's moral misconduct. In *Re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976).

Even if we were to attach more importance to these areas than the trial court, there would have still been a failure in the record to show either that the mother was a poor custodian of the child or that the appellant would have been a superior custodian of the child. The appellant has failed to show that the mother's questionable activities in any adversely way affected the best interests of the child. There was testimony in the record that the child was taken care of, fed, kept clean and that Wanda appeared to love the child.

The fact that Wanda is receiving ADC payments at the time of the second modification hearing cannot be considered a material

and substantial change of circumstances since her receiving welfare was substantially the same at the time of the divorce. In any event, we fail to see little distinction between her receiving the ADC and the appellant receiving unemployment compensation as it affects any change of circumstances.

The fact that the appellant is going to be remarried and have a new home, has paid his debts and has gotten along well with the child and that he has in general improved in his maturity, does not constitute a superior claim justifying the change in custody. *Spotts vs. Spotts*, 197 N.W.2d 370, 371 (Iowa 1972). One proposed parent's remarriage may only add uncertainty as to the type of home he would provide. In *Re Marriage of McFarland*, 239 N.W.2d 175, 178 (Iowa 1976).

With the best interests of the child in mind, we agree with the trial court in finding the environment in which the child would live and the ability to provide for material, social, moral, emotional needs are such in this case that would not justify a custody modification.

Arguments provided this court with assertion on behalf of both counsel that both parties have matured and are living up to their responsibilities as parents and as members of society. The record reflects that to be true as well, although that record goes only until May of 1975. That causes and gives to this court, a degree of satisfaction as I am sure it does to the trial court, the attorneys and the parties themselves, but that in no way develops into a material change of circumstances as required before this court can act.

Appellant's counsel at argument invites us to make a change in the custodial or visitation aspects of the decree so that

further litigation would not be necessary. We decline the invitation. We are satisfied by the assertions in the appellant's brief and counsels' themselves with the increase in maturity of the parents and their genuine love and consideration for the child that these matters will be worked out to everyone's satisfaction without extensive litigation. Good judgment, maturity and love for Beverly will no doubt generate a renewed desire on behalf of these parents to do what is in the best interests of the child without further litigation and acrimony.

Counsel for the appellee has filed an Application for Attorney's Fees in this matter, and we find no authority for granting them in Chapter 598, The Code, and, therefore, pursuant to Arnold vs. Arnold, 258 Iowa 850, 860, 140 N.W.2d 874, 880 (1966); Hensen vs. Hensen, 212 Iowa 1226, 1227, 238 N.W. 83 (1931); and In Re Marriage of Havener, 240 N.W.2d 670 (Iowa 1976), the application is denied.

AFFIRMED.