

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 29 1985

CLERK SUPREME COURT

IN THE INTEREST OF J.S., A Child,
R.D.S., Natural Father,

356

Appellant.

Filed August 29, 1985

IN RE THE MARRIAGE OF K.J.S. and R.D.S.)

5-403
84-1996

UPON PETITION OF
K.J.S.,

Petitioner-Appellee,

AND CONCERNING
R.D.S.,

Respondent-Appellant.

Appeal from the Iowa District Court for Floyd County - Ralph McCartney,
Judge.

R.D.S. appeals from trial court order refusing to modify his decree of
dissolution. AFFIRMED.

Roger L. Sutton, Charles City, for appellant.

John Stuart Scoles, of DeVries & Scoles, Mason City, for appellee.

Normand Klemesrud, Charles City, for the child.

Ronald Noah, Floyd County Attorney, Charles City, for the State.

Considered by Oxberger, C.J., and Snell, and Sackett, JJ.

Kathleen and Richard were married in 1972. In May of 1980, they adopted a child named Jenny. In 1982, the parties' marriage was dissolved and sole custody of Jenny was awarded to Kathleen. In 1983, on joint application, the decree was amended to provide that Richard and Kathleen have joint custody of Jenny. Jenny was to reside with Kathleen during the school year and with Richard in the summertime. In 1984, Richard filed for a modification of the decree seeking to have physical custody of Jenny.

A reading of the record clearly supports the decision of the trial court when it said:

As is often the case in these very unhappy matters, the stipulation and decree of dissolution only provided a bench mark as to when other and further serious problems developed between the parties. . . . Suffice it to say that the parties have not been able to treat the matter of Jenny's custody with the degree of maturity that one would hope would occur.

How two people could adopt a child of another and subsequently subject the child to the turmoil that Jenny has been forced to suffer by her adoptive parents indicates a failure to handle her custody with any maturity and is difficult to comprehend. A recital of all of those problems in this opinion will serve no useful purpose.

The trial court on the modification hearing failed to find sufficient change to justify modification of the decree. The modification had been tried with a child in need of assistance petition. The trial court did find the child to be a child in need of assistance and ordered counseling for Jenny and Kathleen. A review was scheduled in six months.

Richard has appealed contending that the trial court erred in imposing on him the burden of a noncustodial parent and that the best interests of Jenny require her to be placed with him.

Our review is de novo. Iowa R. App. P. 4. We are not bound by any rule applied by the trial court as to the burden of proof. We weigh the evidence, properly allocate the burden of proof in accordance with the dictates of the Iowa Supreme Court, and arrive at a result that will be best for Jenny. In Re Marriage of Leyda, 355 N.W.2d 862, 864 (Iowa 1984).

A parent who is a joint custodian is benefited when seeking sole custody by inference that he or she has met the joint custody tests of In Re Marriage of Burnham, 283 N.W.2d 269, 274 (Iowa 1979). However, a parent who seeks to disturb a child's physical care arrangement carries a burden similar to that imposed on a parent seeking a change of custody. In Re Marriage of Leyda, 355 N.W.2d 862, 864-65 (Iowa 1984). In Leyda, the petitioning parent sought to change sole physical care arrangement. Id. at 864. While the phrase "sole care" was not utilized in the joint custody decree here, the fact is that Kathleen was given the majority of care. The burden applied to the petitioning parent in Leyda can be applied to Richard here. We fail to find Richard has met his burden.

We affirm the trial court in ordering the parties to seek counseling to help them gain the maturity to resolve these problems for Jenny's sake.

AFFIRMED.