IN THE COURT OF APPEALS OF IOWA

No. 2-567 / 92-575

FILED
DEC 29 1992
CLERK SUPREME COURT

IN RE THE MARRIAGE OF KELLY ANN WELBES AND KENT RICHARD WELBES

Upon the Petition of
KELLY ANN WELBES, n/k/a KELLY ANN VOGT,

Appellant,

And Concerning
KENT RICHARD WELBES,

Appellee.

Appeal from the Iowa District Court for Benton County, William R. Eads, Judge.

Kelly appeals the district court's ruling which refused to modify the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Allison M. Heffern of White & Johnson, P.C., Cedar Rapids, for appellant.

Morris L. Eckhart of Milroy & Eckhart, Vinton, for appellee.

Heard by Oxberger, C.J., Hayden, J., and Perkins, S.J.* Schlegel, J., takes no part.

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

HAYDEN, J.

On October 8, 1981, the district court dissolved the marriage of Kelly and Kent Welbes. Pursuant to that decree, Kent received physical custody of the parties' minor daughter, Holly, who was then age three. Following Kelly's appeal and application for further review, the Iowa Supreme Court modified the visitation schedule and affirmed the district court's decision on the award of physical custody.

Holly has remained in the physical custody of Kent, who has since remarried. Kelly has likewise remarried. Because Holly expressed a desire to live with her mother, Kelly filed an application seeking to modify the prior dissolution decree on June 13, 1991. Kent responded by requesting additional child support, medical and secondary educational expenses, and a finding that Kelly was in contempt.

Following a trial, the district court concluded Kelly was not in contempt and her application which sought physical custody of Holly should be denied. The court found, despite Holly's expressed preference to spend more time with her mother, there had not been a substantial change in circumstance which would warrant a change in the physical care of Holly. However, the district court modified the original decree by (1) awarding the parties joint custody of Holly; (2) increasing Kelly's visitation to include one-half of Christmas and Easter school

vacations and six weeks in the summer; (3) ordering Kelly to pay child support of $254.14 per month; and (4) ordering Kelly to pay one-half of Holly's medical and dental expenses not paid by Kent's health insurance.

Kelly has appealed and seeks physical custody of Holly.

Our standard of review in modification actions regarding child custody is de novo. In re Marriage of Gutermuth, 246 N.W.2d 272, 274 (Iowa 1976) (citations omitted); Iowa R. App. P. 4. The applicant bears the burden of establishing by a preponderance of the evidence that circumstances since the original decree was entered have materially and substantially changed so as to justify modification. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). This party must also prove an ability to minister more effectively to the child's well being. Id. Our primary concern is the best interests of the child. In re Marriage of Woodward, 228 N.W.2d 74, 75 (Iowa 1975).

Holly has stated a preference to live with Kelly. She claims she wants to live with her mother because she wants to spend more time with Kelly and can converse better with her. Holly was approximately thirteen years and five months old at the time of the modification proceeding.

"[W]hen a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining child custody rights." Jones v. Jones, 175 N.W.2d 389, 391 (Iowa

1970) (citations omitted). In determining custody various factors must be considered such as the age of the minor, the length of time the minor has lived in the home for which preference is stated, the nature of the associations therein, the contacts with the one seeking a change of custody, the relationships and past associations, the natural and legal rights of the contending parties, and any other matters which assist in resolving the custody issue. Lursen v. Henrichs, 239 Iowa 1009, 1015, 33 N.W.2d 383, 386 (1948). "When we speak of what is best for the child, we do not mean that which the child wants." State ex rel. Bruner v. Sanders, 129 N.W.2d 602, 606 (Iowa 1964).

Holly was approximately thirteen years and five months old at the time trial. She had lived with her mother for the first three years of her life. Since the dissolution Holly has only resided with her mother during visitation periods. Kelly has a significant amount of contact with Holly and has not turned down her visitation times. She has lived with her father for the past ten years. There is evidence of a somewhat strained relationship between Holly and her stepmother. Holly has a good relationship with her half sister Joy, who lives in Holly's custodial home. Holly also has a good relationship with the children of her stepfather; however, those children do not reside in Kelly's home.

Our courts have held the custody of a child who has received proper care from a parent for a substantial time

should not be changed or disturbed in the absence of cogent or compelling reasons. Davis v. Davis, 237 N.W.2d 455, 458 (Iowa 1976); Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970); In re Marriage of Deck, 342 N.W.2d 892, 895 (Iowa App. 1983). Evidence shows Holly's father has provided a good home and proper care for his daughter. Holly testified she loves her father and has not been mistreated in his home. Iowa has not statutorily mandated any age at which a child's preference be given greater weight in a custody proceeding. In re Marriage of Ellerbroek, 377 N.W.2d 257, 258 n.1 (Iowa App. 1985). The Iowa Supreme Court has stated, however, a child's preference is not entitled to as much weight in a modification action, as is the case here, than would be given in an original custody proceeding. Smith v. Smith, 257 Iowa 584, 591, 133 N.W.2d 677, 681 (1965).

In resolving this issue we emphasize our focus is on the best interests of the child. We find Kelly has failed to show by a preponderance of the evidence a material and substantial change in circumstances which relates to the welfare of Holly. Kelly has not shown she has a superior ability to minister Holly's needs more effectively than Kent. The long-term best interests are served by Holly's continued physical placement with her father.

By placing Holly with Kelly, we would be splitting up Holly and her half sister Joy. The general rule is siblings should only be separated for compelling reasons.

In re Marriage of Gonzales, 373 N.W.2d 152, 155 (Iowa App. 1985). Evidence shows the girls have a very close relationship. The Iowa Supreme Court has held the general principles governing the separation of siblings in custody actions should govern half siblings as well. In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986). Circumstances may arise which indicate a separation of siblings would better promote the long-term best interests of the child. In re Marriage of Hunt, 476 N.W.2d 99, 102 (Iowa App. 1991). However, Kelly has failed to show any such circumstances. We find no compelling reason to separate Holly and Joy.

We affirm the district court decision in all respects.

AFFIRMED.