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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DONNA L. BROUWER AND DENNIS A. BROUWER

Upon the Petition of)
DONNA L. BROUWER,)
Petitioner-Appellee,) Filed March 23, 1988
And Concerning)
DENNIS A. BROUWER,) 7-523 / 87-615
Respondent-Appellant.)

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Appeal from the Iowa District Court for Jasper County (No. DD7-155), Thomas Bown, Judge.

Respondent-husband appeals from the decision of the district court denying his application for modification of the parties' decree of dissolution. **AFFIRMED.**

Ken J. Smith of Selby, Updegraff & Smith, Newton, for respondent-appellant

Dennis F. Chalupa of Brierly, McCall, Girdner, Chalupa, McCall & Otto, Newton, for petitioner-appellee.

Gilbert R. Caldwell III of Caldwell, Caldwell & Caldwell, Newton, as guardian ad litem for the children.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J.

The respondent seeks a modification of the decree dissolving the marriage of the parties. The trial court denied modification. Respondent appeals. The guardian ad litem and attorney for the children filed his brief and argument. We affirm.

A decree of dissolution between respondent Dennis A. Brouwer and petitioner Donna L. Brouwer, n/k/a Donna Leu, was filed on June 11, 1984. The trial court provided that the parties were to have joint custody of the two minor children, Heather, born April 25, 1974, and Jacklyn, born October 9, 1977. The physical care was vested with Donna, and visitation rights were granted to Dennis. The dissolution decree awarded the marital domicile to Donna, subject to a 60% equity interest retained by Dennis. Dennis was to receive payment of his share of the equity upon Donna's remarriage or moving from the home, or when the youngest child graduated from high school. The decree set child support payments at $250 per month.

Respondent husband feels the relationship between the petitioner wife and the children has deteriorated and filed a petition for modification. Respondent claims there has been a substantial change of circumstances since the decree of dissolution on the basis that since Donna's remarriage and new baby she has less time for Heather and Jacklyn. Respondent alleges that the children have not adjusted well to petitioner's new husband and that petitioner and her new husband engaged in moral misconduct before they were married. In addition, respondent claims the children have expressed preference to reside with him. Based on these facts, respondent seeks physical custody of the children.

The standards we apply in a modification proceeding are well established.

> [T]he 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. . . . 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 most cogent reasons.

In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986) (quoting In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983)); Iowa Code § 598.21(8) (1987).

In a proceeding to modify a dissolution decree concerning custody of parties' minor children, the court reviews the record de novo but because the trial court was present to listen and observe the witnesses, this court will give weight to the trial court's findings. In re Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). We, however, are not bound by those findings. Id. at 398. In addition, we consider whether the evidence shows changes affecting the factors in section 598.41(3) in deciding whether to modify a custody arrangement. In re Marriage of Bolin, 336 N.W.2d 441, 443 (Iowa 1983); Iowa Code § 598.21(8) (1987).

As stated above, to show a material and substantial change in circumstances warranting modification of an initial award of child custody, the parent seeking to take actual custody from the other has the burden to show a superior claim based on his ability to minister, not equally, but more effectively to the children's well being. In re Marriage of Dethrow, 357 N.W.2d 44, 45 (Iowa App. 1984) (emphasis added). The trial court found that the best interests of the children could be served in either home. This finding is substantiated by the guardian ad litem's report to the court.

In response to the respondent's claims, the petitioner admits that the child by her present husband was conceived out of wedlock, but for the most part denies his accusations. The record is clear that the petitioner does allocate considerable amount of her time to the two girls. Heather maintains an A-B

grade average; Jacklyn is enrolled in the school program for talented and gifted children.

The two girls have formed an attachment to their half-brother. They look forward to those occasions when they can spend time with him. Petitioner has in all respects encouraged the girls to develop this sibling relationship.

The petitioner denies the acts of moral misconduct advanced by the respondent. She denies that her present husband ever stayed overnight at her home prior to marriage.

A parent's moral misconduct is a serious consideration in custody determinations. Hagen v. Hagen, 226 N.W.2d 13, 16 (Iowa 1975). This misconduct, however, is only one of several factors to be considered. It alone, if indeed it ever existed in this case, is insufficient to justify modification of a custody determination. In re Marriage of Mikelson, 229 N.W.2d 670, 673 (Iowa 1980).

The petitioner concedes that the girls have expressed a preference to reside with their father. However, a great deal of the disagreements she experiences with her daughters arises out of her necessary role as disciplinarian. There are other instances when the respondent has countermanded instructions the petitioner has given her daughters; and there are other occasions when he has belittled her authority. These acts on the part of the respondent only serve to add confusion in the daughters' minds. In addition, the petitioner has had to compete with the respondent's superior financial position in deciding the items to be purchased for the girls.

A child's preference in custody determinations is given weight, although less weight may be given in modification proceedings. Zabecki, 389 N.W.2d at 399-400. In this respect, we do look for the underlying reason behind a child's decision that expresses a parental preference and we always bear in mind the final decision rests on what is in the best interest of the child.

The guardian ad litem found, and we agree, that both parents love their children and want the best for them. He determined:

> Both parties have limitations caused by their active lives that will cut into their time with the children. Natural mother has outside home employment, a new baby and a stepfamily. Natural father has work commitments that may include out-of-town travel.
>
> I could not find one positive factor or one negative factor that would make a preference possible toward either parent. The best interest of the children will be met in either of the natural parents' homes.

It is clear to us that the best interest of the children can be served in either home. We agree with the trial court that the respondent has not carried his heavy burden to show a substantial change in circumstances that would justify a custody change, nor has he carried his burden to show a "superior claim based on his ability to minister . . . more effectively to the children's well-being." In re Marriage of Dethrow, 357 N.W.2d at 45. We affirm the trial court's decision to deny respondent residential custody of the children.

The respondent's next contention is that the trial court erred in increasing the respondent's child support obligation from $250 per month to $600 per month. He argues that his affidavit of financial status and the corresponding child support guidelines set the child support obligation at $456 per month.

At the outset, we note that the uniform support guidelines are not hard and fast rules to be mechanically applied. The amount of child support payment will vary from case to case based on the facts that are unique to each case. Unless the trial court's amount of child support payment is unreasonable, in light of the facts of the case, we will uphold the amount that it set.

In addition to the facts of each case, the trial court considers the parties' ages, present earning capacities, future prospects, amount of resources owned by each or both parties, contribution of each to the joint accumulations, the children, duration of the marriage, indebtedness of each or both, and any other

relevant factors in order to reach a just and equitable determination of child support. In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa App. 1984).

Child support should be based on the amount of earnings the noncustodial parent can actually expect to earn. In re Marriage of Heinemann, 309 N.W.2d 151, 152 (Iowa App. 1981). In 1986, the amount of tax withheld from respondent's wages far exceeded his actual tax liability. He received federal and state income tax refunds totalling almost $3,000. In addition, respondent was expected to receive a year-end bonus from his employer. The trial court properly considered this information in computing respondent's child support obligation.

In the original dissolution decree, the respondent was ordered to pay $250 a month in child support and was further ordered to pay mortgage payments against the marital domicile in lieu of additional support. Now that the house has been sold, it is no longer necessary for the respondent to make mortgage payments. Consequently, the trial court has modified the respondent's child support obligation to the amount of $600 per month.

We are convinced that the trial court considered all of the relevant factors and reached a reasonable amount of child support payment. Therefore, we affirm the trial court's modification of the child support payment.

The next issue for our consideration is whether the trial court properly exercised its discretion in excluding the testimony of the parties' minor children. The Supreme Court of Iowa has held that the admission or exclusion of testimony of a child less than fourteen years of age is primarily within the discretion of the trial court. Murphy v. City of Waterloo, 255 Iowa 557, 570, 123 N.W.2d 49, 57 (1963).

The trial court appointed Gilbert R. Caldwell III to act as guardian ad litem for the minor children. Pursuant to the trial court's instructions, he prepared and submitted an independent written report which was the result of

extensive interviews with the parties and with the minor children. The report contains numerous direct quotations of the girls regarding their thoughts and preferences. We find the report to be a thorough, exhaustive report which is not biased toward either party, thus rendering testimony by the children unnecessary.

The guardian ad litem determined that no single factor "tipped the scales" in favor of either party. This report and conclusion was duly noted and considered in the trial court's ruling.

In addition to the report, there were numerous other sources of testimony regarding the thoughts and preferences of the minor children in this modification proceeding. Because the trial court took into consideration the above-mentioned report and the other sources of testimony regarding the minor children's thoughts and preferences, we hold that the trial court did not abuse its discretion in not allowing the minor children to testify.

The respondent next contends that the trial court erred in establishing the proceeds from the sale of the property when the court deducted the real estate commission from the equity in the property and when the court failed to give the respondent credit for mortgage payments made after the acceleration date of the petitioner wife's remarriage.

The court found that the respondent was entitled to a payoff under the terms of the original decree for his equity position in the former home of the parties. He was entitled to 60% of the equity value of the home based upon its value and condition as of the date of the remarriage of the petitioner. The court went on to state that:

> To determine the equity value, each party shall select an appraiser and the two appraisers shall select a third appraiser which appraisal shall then become binding upon the parties for purposes of determining the equity of the respondent. From the appraised value shall be deducted the mortgage owed to the First Newton National Bank

> and the real estate commission actually paid in the April 1987 closing. In arriving at the appraised value, the appraiser shall be directed to determine the value that the property would have been worth at the time of the remarriage of the petitioner. The respondent shall be entitled to 10% interest on his equity, as so established from and after the date of the remarriage of the petitioner."

Respondent contends that had the petitioner paid him as of the date of her remarriage instead of waiting until the house was sold, there would have been no real estate commission fee because Donna would still have been in the house and the house would not have been for sale. Due to the petitioner wife's economic circumstances, however, sale of the house was the only option available to her regarding payment of the respondent's equity share. Upon our de novo review, we find that the fact that the sale did not occur immediately upon petitioner wife's remarriage was not her fault. We find that she made attempts to sell the house before her remarriage. In light of the facts and circumstances of this case, it was fair and equitable for the trial court to deduct the real estate fee before apportioning the home equity.

The respondent also argues that he did not receive credit in the equity computation for mortgage payments made after the petitioner's remarriage. The trial court ruled that the disputed mortgage payments were made in lieu of child support. Had the trial court given the respondent credit for the mortgage payments, it would have ordered him to pay back child support. Because the result would be the same and less complicated, we affirm the trial court's decision to not credit the respondent with mortgage payments made after the acceleration date of the petitioner's remarriage.

Finally, we award the petitioner $500 in attorney fees she incurred defending this appeal by the respondent. Costs are to be assessed to respondent.

For each of the foregoing reasons, we affirm the decisions of the trial court.

AFFIRMED.