IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF GARY KIM HOOTMAN & AMY LOUISE HOOTMAN

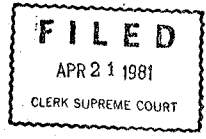
Upon the Petition of,
GARY KIM HOOTMAN,
Petitioner-Appellant,

And Concerning,

AMY LOUISE HOOTMAN,
Respondent-Appellee.

Filed April 21, 1981

0-452
3-64805




Appeal from Linn District Court. Louis W. Schultz, Judge.

Petitioner-husband appeals from trial court ruling denying his application to modify dissolution of marriage decree. AFFIRMED.

Dennis J. McMenimen and Iris E. Muehmore, of Simmons, Perrine, Albright & Ellwood, Cedar Rapids, Ia., for petitioner-appellant.

David S. Good, of Nezette, Hendrickson, Marner & Good, of Cedar Rapids, Ia., for respondent-appellee.

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

PER CURIAM

Petitioner-husband, Gary Hootman, appeals from trial court's ruling denying his application for modification of the parties' dissolution decree. He contends: 1) that custody of the parties' child should have been transferred to him; 2) that the provisions for visitation are inadequate; and 3) that the amount of child support should have been reduced. Respondent-wife, Amy Hootman, seeks attorney fees for trial and on appeal. We affirm.

The parties' six-year marriage was dissolved by decree entered April 2, 1979. Amy was granted custody of the parties' four-year-old daughter, Blake. Gary was ordered to pay $40 per week in child support and awarded "reasonable rights of visitation." At the time of the decree, Amy and Gary both lived in Cedar Rapids. During the summer of 1979, Amy changed her surname to Farland, her maiden name, and also, without informing Gary, had the child's surname changed to Farland. In the fall of 1979, Amy quit her job, sold her house, and moved to St. Paul, Minnesota to reside with her parents. Amy is unemployed.

Gary previously earned $8.24 per hour at the time of the decree but was terminated from that job and had several jobs until the time of the modification proceedings, when he was to start a job at $6.50 per hour. At the time of the modification, Gary was in arrears on his child support obligation.

After a hearing on petitioner's application for modification of the decree, trial court declined to change custody or to order a reduction in child support, but did set out specific visitation of two weeks in the summer, five days at Christmas, alternate Thanksgiving weekends, and six other weekends during the year. Gary's motion to amend the findings and conclusions of the modification decree was overruled by trial court. His notice of appeal followed.

I. Scope of Review. Our review of modification proceedings is de novo. Iowa R. App. P. 4. Where child custody, support, and visitation are at issue, the principles governing such proceedings are well established. See Iowa R. App. P. 14(f)(15); In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977); In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). The noncustodial parent has the burden of establishing by a preponderance of the evidence that there has been a material and substantial change of circumstances since entry of the original decree, not contemplated by trial court at

that time, making it expedient to change custody, Melton, 256 N.W.2d at 205. The parent seeking to take actual custody must show some superior claim based on his or her ability to minister more effectively to a child's well-being. Id. We apply these principles in light of the factors enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979).

**II. Custody.** Gary contends that trial court erred in serving his daughter's best interests by refusing to transfer her custody to him. He asserts that Amy's actions and course of conduct deprived him of visitation rights and therefore constituted a material and substantial change of circumstances. Gary cites the following actions and course of conduct by Amy: allowing him only eight visitations between April 2, 1979, and December 27, 1979; refusing to set specific regular visitations; moving out of state without prior notice; subsequently setting an inadequate visitation schedule; and changing the child's surname without notice to him.

Trial court found the evidence to be insufficient to justify changing Blake's custody from Amy to Gary. Even considering the difficulties in visitations, the out of state move, and name change, we agree with trial court that Gary has failed his burden of showing that his parenting ability is superior to Amy's. The record shows that Gary has considerable instability in employment and a loss of earnings. Even with a new job, Gary would have to leave Amy with a babysitter during the day. We also agree with trial court's consideration of the child's continuing health problems and Amy's role as primary custodian since the child's birth. We see no reason to disturb trial court's ruling on the custody issue.

**III. Visitation Schedule.** Gary next asserts that trial court's modification of the visitation provisions of the decree are inadequate. We find trial court's schedule is equitable and affirm that provision.

**IV. Child Support.** Gary contends trial court erred in refusing to reduce his child support obligation. We disagree.

Considering the $40 per week child support and the requirement to pay for medical and hospital insurance for Blake, under the facts of this case and in particular, given the child's on-going medical problems, we find the child support award to be justified and equitable.

We do not award attorney fees on trial or on appeal for modification proceedings. Costs of this appeal are assessed to petitioner.

AFFIRMED.

All judges concur except Donielson, J., who specially concurs.

DONIELSON, J. (specially concurring)

Because of the obvious custodial misconduct engaged in by the respondent wife, it is with great reservation that I concur in the outcome of this appeal. Her refusal to cooperate with visitation and her decisions to change the child's surname and move from the state, both without prior notice to the child's father even though he was in the same city, constitute examples of such irresponsible and spiteful behavior that one is led to question whether this child's best interests are served by continuing custody in the respondent. Moreover, I am hesitant to condone what appears to me to be an obvious lack of respect for the provisions decreed by the lower court. However, because I basically agree that the record does not establish superior parenting ability on the part of the petitioner, I reluctantly concur in the majority's opinion.