

IN THE COURT OF APPEALS OF IOWA

No. 1-283 / 91-96

FILED

JUL 26 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF WARREN OWEN OLMSTEAD AND
CINDY ANN OLMSTEAD

Upon the Petition of
WARREN OWEN OLMSTEAD,

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Appellant,

And Concerning
CINDY ANN OLMSTEAD, n/k/a CINDY ANN HENDERSON

Appellee.

Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

Petitioner appeals trial court's denial of modification
of visitation rights and the change in the custodial
provisions of dissolution decree. **MODIFIED.**

Robert D. Hall, Ankeny, for appellant.

Cindy Ann Henderson, Box 353, Thayne, Wyoming, appellee
pro se.

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

HAYDEN, J.

Pursuant to a 1980 Wyoming dissolution decree, petitioner Warren Olmstead was granted sole custody of his son, Zachary Olmstead. Respondent Cindy Olmstead was awarded visitation rights which included sixty days during the summer with Zachary.

In 1984 Warren, his new wife, and Zachary moved to Iowa. Cindy still resides in Wyoming.

The summer visitation in Wyoming is the cause of the dispute between the parties. Zachary has expressed his fear of physical abuse by Cindy's former second husband, Kenneth Henderson, and her subsequent live-in friend, Mitchell Batten. Zachary also reported Mitchell used and sold drugs in his presence. In addition, following Zachary's summer visit with his mother in 1985, Cindy refused to return the child to Warren until she was ordered to do so by the Wyoming court.

Warren filed the present action in the Iowa district court seeking a modification of the Wyoming dissolution decree. He asked that visitation in Wyoming be eliminated and Cindy be restricted to supervised visits in Iowa.

The district court denied the requested modification and confirmed Zachary's physical placement with Warren. Although neither party requested a change in custody, the trial court modified the custodial arrangement from Warren having sole custody to "joint legal custody."

Warren claims the trial court erred in two respects. First, the trial court should have modified the Wyoming decree to provide for supervised visitation in Iowa. Second, changing the custodial arrangement to joint legal custody, in the absence of either party requesting the trial court to do so, was error.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

In determining visitation rights, our governing consideration is always the best interest of the child. Petition of Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988). Liberal visitation rights are in the best interest of the child. Iowa Code § 598.1(c)(1989); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). To justify a modification of visitation rights, the party seeking a modification must demonstrate a change of circumstances since the entry of the decree, but such change may be less extensive than would be necessary to change custody. In re Marriage of Glass, 213 N.W.2d 668, 670 (Iowa 1973).

This record reveals no change of circumstances warranting supervised visitation in Iowa. The trial court

noted Zachary has visited his mother in Wyoming on two occasions since her refusal to return the child without a repeat refusal. Additionally, requiring supervised visitation in Iowa would effectively deprive Cindy of visitation. She has five other children living with her in Wyoming. It is also unlikely Cindy could be absent from her present employment to accommodate a sixty-day visit with Zachary in Iowa. Therefore, we affirm the trial court's denial of supervised visitation in Iowa.

We do not, however, condone the activities Zachary has been exposed to during his visits in Wyoming. There has been a showing of Mitchell's use of drugs in Zachary's presence and his use of physical abuse. Because such conduct is not in Zachary's best interests, we order Mitchell and any others disposed to such conduct shall not be present in the home during Zachary's visits with his mother in Wyoming.

A more troubling aspect of the trial court's ruling was its change in the custodial relationship from Warren having sole legal custody of Zachary to "joint legal custody." To support the custodial change, the trial court quoted Iowa Code section 598.41(2) which provides:

If the court does not grant joint custody under this section, the court shall cite clear and convincing evidence . . . that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and the parent should be severed.

Because no such evidence was presented, the trial court

changed the custodial provisions of the Wyoming decree to comport with Iowa law.

Iowa Code section 598.41(2) also provides, however, "[o]n the application of either parent, the court shall consider granting joint custody in cases where the parents do not agree to joint custody. In the present case, it cannot be said either parent agreed or disagreed to joint custody because the issue was not raised by the parties. Nothing in section 598.41(2) mandates the trial court to consider a change in the custodial arrangement in the absence of a request to do so. Accordingly, we reinstate the Wyoming custody order granting Warren sole custody of Zachary.

The district court shall prepare an order to conform with this appeal.

Costs of appeal are taxed to Warren.

MODIFIED.