IN THE COURT OF APPEALS OF IOWA

No. 0-058 / 99-1081
Filed March 15, 2000

IN RE THE MARRIAGE OF PATRICK M. VACANTI AND DEBORAH A. VACANTI

Upon the Petition of
PATRICK M. VACANTI,
Petitioner-Appellant,

And Concerning
DEBORAH A. VACANTI,
Respondent-Appellee.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Father appeals from the district court's dismissal of his cross-application for custody of the parties' three children. He contends the district court erred in failing to modify the custody provisions of the decree, especially because the children's special needs are not being met by their mother. **REVERSED AND REMANDED.**

Joseph J Hrvol, Council Bluffs, for appellant.

Keith G. Engel, Council Bluffs, for appellee.

Heard by Sackett, C.J., and Miller and Hecht, J.J.

SACKETT C.J.

This is an appeal from the denial of a petition to modify the physical care provisions of a dissolution decree. The parties Petitioner-Appellant Patrick M. Vacanti and Respondent-Appellee Deborah Vacanti have three children Jared born in 1989 and twins Janelle Mae and Jason born in 1991. Their marriage was dissolved in 1994. At the time of the dissolution they agreed on joint physical care but primary physical care was an issue and it ultimately was awarded to Deborah. Patrick was given liberal visitation rights, which he has exercised. Deborah first sought modification to increase her child support. Patrick subsequently petitioned for primary physical care contending that Deborah was not adequately caring for the children. A guardian ad litem was appointed to make an investigation and a recommendation. The guardian ad litem filed a written report detailing her investigation and her recommendation that Patrick should be the primary care parent. The district court refused to modify the custodial care provisions and this appeal follows. Patrick on appeal contends he has shown he should be the primary care parent. We agree and modify the decree accordingly. We remand for the purpose of fixing Deborah's child support award.

Our review of this proceeding in equity is de novo. Iowa R. App. P. 4. We give weight to the findings of fact of the trial court, especially where the credibility of witnesses is concerned; however, we are not bound by them. Iowa R. App. P. 14(f)(7).

This is not an original custody determination. The question, therefore, is not which home is better, but whether Patrick has demonstrated he can offer the

children superior care. *See In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). Patrick must show an ability to minister to the child's needs superior to Deborah's. *See In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa App.1985). If both parents are found to be equally competent to minister to the children, custody should not be changed. *See In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App.1992). The burden for a party petitioning for a change in a dissolution is heavy. *See In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App.1988). This is because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. Custody once fixed should be disturbed only for the most cogent reasons. *See Downing,* 432 N.W.2d at 693. Patrick has the burden to show by the preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award custody to him. *See In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App.1985). Patrick must show that any changed circumstances were permanent and continuous in nature and not contemplated by the court when the dissolution decree was entered. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

With these principles in mind we examine the facts of this case. Deborah lives in Council Bluffs with these three children and her two older children from a prior marriage. Patrick lives in Omaha.

Patrick's primary criterion for modification is that Deborah is not attentive enough to the children's medical needs. He contends he is better able to provide for these needs.

The twins were born prematurely. The twin Janelle Mae has blindness secondary to retinopathy of prematures. The twin Jason has acute asthma. He has had at least two if not more severe attacks serious enough to threaten his life. He is at high risk for future problems and a possible death from asthma. He is allergic to dog and cat hair. He also has serious problems with cigarette smoke. Jason's condition is life threatening. He requires a high level of medication.

Patrick's petition for modification of the custody award was filed on April 7, 1997. It came after Jason on March 27, 1997, was hospitalized for his asthma condition. At the time Jason was in Deborah's care and she admitted she had not been using his nebulizer because she did not have all its parts. During this hospitalization Jason was diagnosed with asthmatic bronchitis and hypoxia. He also had right middle lobe pneumonia. At his discharge it was stated his diagnosis included "mild hypoxia due to under-treated asthma and not good therapy compliance."

Jason had another incident on September 4, 1997, while in Deborah's care. He stopped breathing. When the ambulance came he was lying on a couch with dogs running around the house. He was resuscitated, hospitalized and responded to treatment. Jason had either run out of or quit taking prescribed medication three or four days before the incident. He was admitted to the

intensive care unit and his doctor cited problems with medications and compliance.

Russell Hopp, D.O., director of Pediatric Allergy-Immonology-Rheumatology at the Creighton University School of Medicine at the Children's Hospital, wrote a letter describing Jason's condition and stating there has been a strong concern about smoking exposure in the home from Jason's mother as well as concern for his medical care. Patrick contends Deborah fails to provide Janelle with adequate stimulation to see that she excels despite her blindness.

Deborah contends the district court should be affirmed. She advances that she has cared for the children their entire life and they are doing well. She further alleges that to place them in their father's physical care would separate them from their half-siblings with whom they are close. She contends that any problems she had with pets and cigarette smoking have been resolved.

She argues Jason's condition was under control at the time of the hearing. She says she is doing better seeing that he takes his medication. She says though she smokes she does not do it in the house and they no longer have pets.

Patrick does not trust that she will be attentive to Jason's needs in the future. Deborah attempts to justify the fact drugs Jason needed did not show on prescription purchase records by saying she got samples from Jason's doctors. A note from Dr. Meyer denies this.

The guardian ad litem found both parents to be loving and caring parents and able to provide for the children's needs. She further found they each had accounted for Janelle's special need and had taken steps to see that she

receives Braille instruction. She notes the close relationship the children have with their two older half siblings. However, she was concerned about Deborah leaving her oldest child who was twelve years old in charge of the other four children. She also found that Deborah confused the children by having a man to whom she was not married living with her in the home. She was of the opinion that Patrick appeared to be able to devote more time and energy to the children as his work schedule is not as strict and he does not have two other children in his care. She said he had an adequate home in a safe neighborhood where he lives alone and has made necessary arrangements for child care and school should he be granted primary physical care. She also found him to exhibit more of a willingness to help Janelle learn Braille than did Deborah.

The district court denied the modification. The court determined that Patrick had not met his necessary burden and that Jason's condition had improved in the last twelve months in his mother's care.

We find that Patrick has met the necessary burden for modification. We note the very complete report by the guardian ad litem finding that he is the better parent. We recognize being the better parent is not sufficient for him to succeed on the modification issue. He must show he can render superior care.

Deborah has a history since the dissolution of not following orders for Jason's care despite his life threatening condition. She smokes cigarettes and has smoked in the home. There is evidence her smoking triggered an asthma attack despite her being told by doctors not to smoke in the home. We recognize she contends she no longer does smoke in the home, but the trustworthiness of these statements is challenged by her prior conduct. She kept pets in the home

despite being told not to do so. On more than one occasion there is evidence she did not see that Jason had his medication and it was a reason for triggering his illness. While she contends she is now seeing that he is properly medicated and advances that prescription purchase records do not show all his medications because she gets samples from his doctors, the record contradicts her statement that the doctors give her samples.

Jason and Janelle have special needs that will be better served in Patrick's home. We modify to award him primary physical care of the three children. Deborah shall have the visitation that Patrick had. She shall not smoke when the children visit nor shall she keep pets there. During her visitation she shall follow instructions for medication provided her by Patrick and the doctors.

The record is not sufficient for us to establish Deborah's responsibility for child support. We remand for that purpose.

REVERSED AMD REMANDED.