FILED
JUN 28 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KAREN J. BLAKE AND CARL E. BLAKE

Upon the Petition of)
KAREN J. BLAKE,) Filed June 28, 1979
Appellee,)
And Concerning) 175
CARL E. BLAKE,) 3-62759
Appellant.)

Appeal from Butler District Court - John F. Stone, Judge.

Father appeals denial of his application to modify child custody provision and grant of mother's application to move from Iowa with the children. - Affirmed, modified, and remanded.

Terry Diane Parsons, of Redfern, McKinley, Olsen & Mason, Cedar Falls, for Appellant.

David J. Mansheim, of Klinkenborg & Lawler, Parkersburg, for Appellee.

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

OXBERGER, C. J.

Respondent Carl Blake appeals trial court's order denying his application to modify the child custody provision of his dissolution decree and granting petitioner Karen Blake's application for permission to move the children from Iowa. We affirm and modify.

Our review is de novo. Iowa R. App. P. 4. Child custody provisions of a dissolution decree will be modified only when the applicant proves by a preponderance of evidence that subsequent conditions have so changed that the child's welfare requires, or at least makes expedient, such modification. Alex v. Alex, 161 N.W.2d 192, 194 (Iowa 1968). The noncustodial parent seeking custody of the child has the burden of showing some superior claim based upon his or her ability to minister to the child's well being, not only sufficiently, but more effectively than the custodial parent. In re Marriage of Welton, 256 N.W.2d 200, 205 (Iowa 1977). Carl has not shown that in the few months since the decree was entered conditions have changed to such an extent as to require a transfer of custody.

Carl has also appealed trial court's order granting Karen permisison to move with the children to Arkansas. The following statement from In re Marriage of Lower, 269 N.W.2d 822 at 826 (Iowa 1978) is applicable hereto: "While there is much to be said for maintenance of visitation rights by the noncustodial parent (citations) the interests of the custodial parent and the child may be overriding." In view of Carl's conduct since the date of the decree, we conclude the best interests of Karen and the children will be served by permitting the move. The original decree authorized Karen to remove the children from New Hartford with court approval, and therefore, the subsequent granting of such permission did not require a modification of the decree. In its decision on modification, trial court concluded that "no attempt should be made at this time to determine visitation rights if the children are removed from the New Hartford area". Upon remand, trial court shall conduct a hearing on Carl's request for a revision of visitation rights in light of Karen's contemplated relocation in Arkansas.

Carl further challenges trial court's action in privately interviewing the parties' children out of the presence of counsel. "We are inclined to think, . . . that ordinarily

counsel should be present. Otherwise the judge may have important information about the case of which counsel are unaware at trial." Tschappat v. Kluver, 193 N.W.2d 79 at 80 (Iowa 1971). On our de novo review we have not considered the children's testimony.

Next, Carl asserts trial court erred by refusing to modify his child support obligation and by finding him in contempt for his failure to pay child support ordered in the original decree. The amount of child support in that decree was based on Carl's net income of $215 per week from his employment at Viking Pump. Trial court apparently did not consider Carl's income from a second job, nor do we. Four days after receiving a copy of the original decree, Carl quit work at Viking Pump for a lesser paying job. We find Carl's reasons for making this job change inadequate to justify reduction of his child support payments. We modify the order, however, by striking that portion of the court's contempt citation which requires Carl to find other employment.

In her application to cite Carl for contempt, Karen also asked "that additional orders be made herein as to the court shall seem necessary and proper." Section 598.24, The Code 1979, provides that attorney fees in an amount deemed reasonable by the court may be awarded to the party who initiated contempt proceedings. We find the award of $100 attorney fees to Karen was made pursuant to the above cited statute and was well within trial court's discretion.

Carl shall pay the trial court costs as well as the costs on appeal.

AFFIRMED, MODIFIED, AND REMANDED.

All judges concur, except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I would modify the dissolution decree to allow Karen to move with the children from the New Hartford area, but not from the state of Iowa. Karen had an excellent job as a dispatcher at the Cedar Falls police department earning a gross income of $629 per month with a net of $458. The prospects of similar employment in Arkansas are tenuous at best. Cf. In re Marriage of Lower, 269 N.W.2d 822 (Iowa 1978) (spouse relocating to Minnesota because of job promotion not available in Iowa). With the present support payments of $350 per month on a current salary of $3.50 per hour (approximately $600 per month), a move from the state will in effect cut off Carl's visitation rights. I am not opposed to a certain amount of "punishment" under this record for Carl's lack of good faith, but enough is enough, and I would not in effect permit the move which will terminate parental visitation by the father. True, on remand, extensive visitation rights might well alleviate some of the problems but this is not as satisfactory as a continual association with both parents. Particularly so when the attorney for the children recommends the children be placed in respondent's custody and two of the children expressed a desire to be with their father.