IN THE COURT OF APPEALS OF IOWA

No. 0-355 / 99-1727
Filed June 28, 2000

IN RE THE MARRIAGE OF SUZANN MARY WADE AND DALE GENE WADE

Upon the Petition of
SUZANN MARY WADE,
Petitioner-Appellant,

FILED
JUN 28 2000
CLERK SUPREME COURT

And Concerning
DALE GENE WADE,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, David S. Good, Judge.

The petitioner appeals a district court ruling denying her petition to modify the child custody provisions of the parties' dissolution decree. **AFFIRMED.**

Michael L. Mollman of Mollman Law Office, Cedar Rapids, for appellant.

Jon M. Kinnamon and J. Dean Keegan of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

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MAHAN, J.

The petitioner, Suzann Wade, appeals a district court ruling denying her petition to modify the child custody provisions of the parties' dissolution decree. Suzann maintains she has demonstrated a substantial change in circumstances justifying a transfer of the two youngest children to her physical care. We affirm.

Dale and Suzann Wade were married on June 28, 1980. They have three children: Robyn, born April 5, 1984; Rachel, born August 9, 1985; and Ann, born July 25, 1990. On December 18, 1992, a stipulation and dissolution decree were filed. In the stipulation and decree, the parties shared joint custody of the children with primary physical care being placed with Suzann.

On July 13, 1994 Dale filed an application to modify the dissolution decree. He also filed an application for temporary and permanent injunction and a motion for emergency hearing on temporary matters based upon Suzann's plan to move to Arizona. Dale's application for modification was denied. Suzann moved with the children to Arizona.

On January 2, 1997, Dale filed a second application for modification seeking primary physical care of the children. The court modified the dissolution decree and placed primary physical care of the children with Dale.

The children moved from Arizona back to Iowa to live with Dale and his wife, Laurie. In September 1998, Suzann became aware of some problems Rachel was having when she got a message from Rachel that said, "They went through my . . . things. They found the phone card and everything. I love you. I just want to come home." Rachel was unhappy and hurt because she felt Laurie was accusing her of breaking up her marriage with Dale.

Dale took Rachel for counseling with Joan Thaler. Thaler told Suzann Rachel was depressed with her living situation. When the children were visiting Suzann over Christmas and New Year's, she took Rachel to a psychologist for an evaluation. This psychologist also found Rachel to be very unhappy living in Iowa and recommended an in-depth evaluation into the possibility of Rachel returning to Arizona to live with her mother.

Approximately two weeks after the children returned to Iowa from their visitation with Suzann, Rachel called Suzann and said she thought it would be better if she were not here. When Suzann asked Rachel what she meant, she said, "I just don't want to be anywhere." Suzann interpreted these statements to be suicidal thoughts and returned to Iowa.

Rachel continued to be unhappy and depressed. She was cutting herself with a razor and had to be hospitalized in July 1999. When Rachel was admitted to the hospital, she reported being depressed. Her appetite had increased and she gained forty to fifty pounds. The doctor found Rachel to have low self-esteem. Rachel was also examined by Dr. Alan Brinkmann, and she participated in various therapy sessions. She also received medication including Prozac.

On January 26, 1999, Suzann filed a petition for modification requesting primary physical care of the children be placed with her based on her move back to Iowa and her concerns over the children's physical and emotional well being. A trial was held on October 6, 1999, and on October 15, 1999. The district court denied Suzann's petition for modification. Suzann appeals.[1]

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[1] It should be noted this appeal only involves the two youngest children, Rachel and Ann. Robyn expressed a strong desire to live with Dale, and Suzann is in agreement.

I. Standard of Review. Our review of child custody modifications is de novo. Iowa R. App. P.4; *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N.W.2d at 28.

To change the custodial provision of a dissolution decree, the party seeking the modification must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the child's welfare supports the requested change. See *In re Marriage of Clifton*, 526 N.W.2d 574, 577 (Iowa App. 1994) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)). The change must be more or less permanent and relate to the welfare of the children but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons justifies placing a heavy burden upon a party seeking to modify custody. *Clifton*, 526 N.W.2d at 577.

In addition to the burden of showing a material and substantial change in circumstances, Suzann must also show she has the ability superior to that of Dale to minister to the children's needs. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Therefore, the question is not which is the better home but whether Suzann has demonstrated she can offer the children superior care. *Id.* Custody should not be changed if both parents are found to be equally competent to minister to the needs of the child. *Id.*

II. Modification. Suzann contends the children's current living situation, including Rachel's problems, establishes proof of a material and substantial change in circumstances. We disagree. In addition, we find the record fails to establish Suzann can provide superior care to the children.

Dale has stable employment and has resided at his present residence with his daughters since July 1998. He has established a family routine that works well and has a strong family support system. He has never left the children unattended at night. The children are doing well in school, and Rachel is improving while on medications. He has separated from Laurie, and she no longer lives in the residence nor does she have significant contact with the children.

Suzann is employed at her second job since her return to Iowa.[2] She admits to being in arrears on child support payments and it has been necessary to garnish her paycheck. Suzann admits she has left the children unattended at night. Most disturbing is her admission she provided Rachel with cigarettes when the child was only thirteen years old.[3] In addition, Robyn informed the district court Suzann offered her marijuana which she accepted. Suzann denies this occurred but Robyn's statement appears credible. Also credible is the evidence Suzann and her relatives took steps to distance themselves from Robyn after she stated her strong desire to remain with Dale.

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[2] She was employed at nine different jobs while living in Arizona.

[3] She also admitted smoking with Rachel.

We do take note Rachel has expressed a strong preference to live with Suzann. Ann has also expressed a preference to live with Suzann.[4] When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling may be considered by the court, with other relevant factors, in determining child custody rights. *In re Marriage of Pundt*, 547 N.W.2d 243, 246 (Iowa App. 1996). However, a child's preference is entitled to less weight in a modification action than would be given in an original custody proceeding. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa App. 1991). Furthermore, the analysis involved in deciding custody is far more complicated than asking children with which parent they want to live. *Id.* at 101-02. We do not find the children's preference in his case to be controlling in our decision.

We have thoroughly reviewed the record in this case and conclude Suzann has failed in her burden of showing by a preponderance of evidence a material and substantial change in circumstances and she could provide superior care to the children. This is a difficult case as both parents love their children very much. We urge Dale and Suzann to cooperate and work together for the best interests of these children.

AFFIRMED.

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[4] We note Ann's preference was more directed to living close to her friends in Arizona. That is not possible following Suzann's move back to Iowa. In addition, Ann acknowledges she gets along better with Robyn than Rachel.