IN THE COURT OF APPEALS OF IOWA

No. 1999-496 (9-753) / 99-0284
Filed December 27, 1999

FILED
DEC 27 1999
CLERK SUPREME COURT

IN RE THE MARRIAGE OF CYNTHIA CLARK AND JAMES CLARK, JR.

Upon the Petition of
CYNTHIA CLARK,
Petitioner-Appellee,

And Concerning
JAMES CLARK, JR.,
Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

The respondent appeals a district court ruling granting the petitioner's application to modify the custody and visitation provisions of their dissolution decree. Respondent argues the district court erred in modifying the residential schedule of the minor children because it will cut back on the time he has available to spend with the children. **REVERSED.**

Bradford F. Kollars, Sioux City, for appellant.

Dennis R. Ringgenberg of Crary, Huff, **Inkster, Hecht & Sheehan**, P.C., Sioux City, for appellee.

Heard by Sackett, C. J., and Zimmer and Miller, JJ Hecht, J. takes no part.

SACKETT, C.J.

Respondent-Appellant James Clark appeals from an order modifying the custodial provisions of this dissolution decree. He contends the decree should not have been modified. We reverse the modification.

James and Petitioner-Appellee Cynthia Clark were divorced on March 4, 1996. The district court in dissolving the marriage approved the party's agreement that they have joint custody of their daughters Katelyn, born in October of 1988, and Jaclyn, born in September of 1990. The agreement contained general provisions concerning the shared custodial care and a pledge by the parties "to be flexible and cooperative with each other in effecting such shared physical care arrangement."

On May 20, 1997, a little more than a year after the decree was entered, Cynthia filed a petition for modification of the custody alleging a change of circumstance and requesting the decree be modified to award her (1) physical care of the children; (2) child support; and (3) attorney fees. James answered the petition contending there was no change of circumstances but if there were, he, not Cynthia, should have physical care and attorney fees.

In June of 1997 following her filing of the petition, Cynthia took the girls to a counselor. The counselor also met with James. The counselor had seventeen sessions with the children through December of 1997. In November of 1997 she reported:

> [A]s therapy progressed, both girls began to talk more and more about being gravely troubled by their parents' on-going conflicts especially

related to these children, such as visitation schedules, athletic shoes, winter coats, etc.

* * *

Jaclyn and Katelyn are still being very negatively affected by their parents' on-going verbal battles. Katelyn has also gotten to the point of saying that since I can't make her parents quit fighting she sees no point in continuing to see a therapist, which I can definitely understand.

Additionally, neither girl has ever indicated wanting to live with one parent or the other. In fact, both Jaclyn and Katelyn tell me, repeatedly, that they love both parents and wish to spend time both with mom and dad. I also assess both parents deeply love and care for their children and are, in fact, excellent parents.

The counselor then stated:

My main recommendation related to the emotional health of these girls is that their parents find a way to formulate a working, business-like relationship with regards to making co-parenting decisions that impact these children. The on-going anger and conflicts are, in my opinion, extremely mentally and emotionally traumatizing to these young girls.

By the time the matter came on for hearing on December 3, 1998, the only issue Cynthia asked the district court to consider was whether the parties' agreement as to handling a division of the time the girls spent with each parent should be modified. Cynthia contended the decree should be modified so the children would be with one parent for a week at a time.

The district court agreed with Cynthia that there had been a change of circumstances in that the parties did not foresee the chaotic climate surrounding the agreed arrangement. The district court went on to modify the decree to provide if the parties cannot agree upon a schedule, they should follow a schedule set forth by the

court. This schedule basically resulted in the children changing homes every week. James contends the district court should not have modified the decree.

Our review of the district court's modification of the custodial provisions of a dissolution decree is de novo. Iowa R. App. P. 4. We give weight to the findings by the district court, especially those concerning credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Good reasons exist for us to give close consideration to the district court's assessment of the credibility of witnesses. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). The district court "'is greatly helped in making a wise decision about the parties by listening to them and watching them in person.'" *Id.* (quoting *In re Marriage of Callahan*, 214 N.W.2d 133, 136 (Iowa 1974)).

The provisions in the dissolution decree for shared physical care did not follow the regularly accepted pattern. The district court's dissolution decree incorporated the provisions James and Cynthia h d agreed to prior to the decree being entered. In presenting their agreement to the court for approval the couple pledged flexibility and cooperation to make their agreement work.

The agreement has been jeopardized because neither party honored this pledge. The counselor testified when it came to matters of the children James and Cynthia became angry and unable to settle even the smallest area of conflict. A review of the record reveals that the children are not suffering because they change houses. The counselor related the fact they were at one home two days and at another the other two days is not the problem. They suffer because neither James nor Cynthia is willing to

set aside selfish interests and feelings of hostility toward the other for their children's benefit. The children related to their counselor they just wanted peaceful co-existence with both parents.

While the change made by the district court modified the number of times the children change residences, it in no way eliminated the parties' inability to cooperate in their daughters' interests. The counselor who recommended that the children change residences less often so the parents will be in contact less often recognized the parents will still continue to fight.

The district court and this court do not have the ability to force cooperation. Both James and Cynthia have sought to focus the reasons for the lack of cooperation on the other. Yet the record shows it is a joint problem and requires a joint solution. It is distressing these parents who specifically pledged cooperation are so unreasonable with each other.

The question for us, as it was for the trial court, is did Cynthia show by a preponderance of the evidence that there has been a substantial change in circumstances since the date of the dissolution decree materially affecting the children's welfare. And further, did she show the 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). Cynthia's burden is heavy because once a custody provision is fixed it should be disturbed only for the most compelling reasons. *See In re Marriage*

of Melton, 256 N.W.2d 200, 205 (Iowa 1977). James contends Cynthia has failed to meet her burden.

The district court found under the agreement made by the parents the children changed residences three to five times a week and there were arguments between James and Cynthia attendant to the changes that adversely affected the children. The court went on to find these problems had not been anticipated at the time the decree was entered.

James is a fire fighter who has a twenty-four-hour shift every third day. The parties agreed and represented to the district court judge dissolving their marriage they would review James' work schedule no less than sixty days in advance. They agreed on days that James worked the children would be with Cynthia. They next agreed, if practical, to share physical care in a way that accommodated James' work schedule and so each party has the children fifty percent of the time. The agreement further provided they each would attempt to accommodate the other's vacation schedule so the children could vacation with the parent recognizing that the time the children can vacation with one parent may not be equal to the other parent. There were a number of other provisions defining the responsibilities and duties of each as outlined in *In re Marriage of Fortelka*, 425 N.W.2d 671, 673 (Iowa App. 1988).

James and Cynthia are both good parents interested in their children's welfare. Yet they have not honored their agreement to be fair and flexible. Each blames the other for the failure of their agreement. The children manifested more concern with their parents' fighting than they did the problem of frequently changing places of

residence. The change of custodial care followed the agreement the parties made and pledged to support. The change Cynthia claims is detrimental to the children is the arrangement that she pledged to support.

Cynthia relies on *Marriage of Swenka*, 576 N.W.2d 615, 617 (Iowa App. 1998) to support her position the children should not be moved during the week. What Cynthia's argument misses is that the arrangement she contends is not working was approved by the district court only after she agreed to it and pledged her cooperation. It was an agreement that maximized the time the children would be in the care of a parent and not a non-parent or a child care provider.

We recognize the problems that occur if parents are unable to cooperate in exchanging custodial care. Our review of the record convinces us both James and Cynthia have contributed to the problem with communications and they both continue to do so focusing their briefs on the alleged deficiencies of the other. We are convinced the children have been hurt by this childish behavior.

James and Cynthia live in the same area and have the same basic work schedules they did at the time of the dissolution. James' work schedule continues to be predictable. While James has remarried there is no evidence that has changed the dynamics of the child care arrangement. The district court modification will result in the children being in James' custody for twenty-four-hour periods when he is totally unavailable to them. The district court addressed this issue in recognizing that most parents work and that necessitates spending time away from their children. Generally we agree with this assessment. However, being at work for a seven or eight-hour

period is not the same as being totally unavailable for a twenty-four hour period. To place the girls in Cynthia's care during the time James is at the firehouse allows the children access to a parent and provides for the children to be in James' care more often when he is totally available to the children. It put the children with James on his one free weekend each month. The parties obviously recognized the benefit of such an arrangement in their agreement.

Parents must recognize that in agreeing to a custodial care arrangement they have an obligation to make it work. Parents agreeing to an award of shared time custody accept a responsibility to communicate with each other and to support the other parent's relationship with the child. *See Fortelka*, 425 N.W.2d at 672. Parents must put away their personal animosities toward each other and work together to meet the children's needs. *Id.*

Unlike the trial court we do not find the children's interests sufficiently jeopardized by the arrangement provided for in the decree. Cynthia has failed to show the required change of circumstances. We reverse the modification. We award no attorney fees. Costs on appeal are taxed to Cynthia.

REVERSED.