

FILED

AUG 26 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF VICTORIA ANN BRAUN AND LEONARD M. BRAUN, JR.

Upon the Petition of)

VICTORIA ANN WISE, formerly)
VICTORIA ANN BRAUN,)

Petitioner-Appellant,)

And Concerning)

LEONARD M. BRAUN, JR.,)

Respondent-Appellee.)

Filed August 26, 1980

0-213

3-64224

Appeal from Woodbury District Court - D. M. Pendleton, Judge.

Petitioner appeals trial court's order granting respondent's motion for summary judgment in child custody modification action. REVERSED AND REMANDED.

Donald H. Molstad of Shuminsky & Shuminsky, Sioux City, for petitioner-appellant.

Robert W. Green of Jacobs, Gaul, Nymann & Green, Sioux City, for respondent-appellee.

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

Petitioner, Victoria Ann Braun, appeals trial court order granting motion for summary judgment in favor of respondent, Leonard M. Braun, Jr. On appeal, petitioner contends respondent is not entitled to summary judgment because he has not proven the absence of any genuine issue of a material fact or that he is entitled to judgment as a matter of law. We reverse the judgment of the trial court and remand this action for a full trial on the merits.

I.

The marriage of Leonard and Victoria Braun was dissolved on August 1, 1974. Under the dissolution decree, Victoria received custody of the parties' two minor sons. On August 26, 1976, an order was entered transferring custody of the children to Leonard pursuant to a stipulation of the parties. Victoria was granted visitation rights.

On April 2, 1979, Victoria applied to modify the custody provisions of the decree to transfer custody back to her. The application generally alleged Victoria was more capable of providing the children a good home and suitable and proper surroundings due to certain changes in her circumstances. Leonard answered denying any material change in circumstances.

On June 11, 1979, Leonard filed a motion for summary judgment on the grounds there had been no material change in circumstances that would permit modification of the custody. In an affidavit attached to the motion, Leonard asserted the children had received proper care, clothing, food, and parental guidance during the time he had cared for them.

Victoria filed a resistance to the summary judgment motion. In an attached affidavit, she asserted the changed circumstances in her life included her remarriage, her recovery from serious medical problems, and her ability to provide better physical accommodations for the children. Victoria also alleged as changed circumstances Leonard's failure to provide proper medical care, his harrassment and withholding of her visitation privileges, his excessively harsh discipline with the children, his failure to provide the children with religious training, and his instances of intoxication.

A hearing on the motion for summary judgment was held on October 31, 1979. Leonard testified about his care of the children, their school and Sunday school attendance, medical care for the children, problems with visitation, his employment, and possible job transfer. Victoria testified about her prior medical problems and

recovery, her remarriage, problems with visitation, alleged lack of medical care for the children, her present husband's employment, and Leonard's alleged intoxication on May 13, 1979. Leonard stated he did not recall being intoxicated on this date.

On October 4, 1979, the trial court granted Leonard's motion for summary judgment and dismissed Victoria's modification application. The trial court found:

[Leonard] has done all of those things which a parent with custody would ordinarily do in providing for the needs of his children. [Victoria's] resistance and testimony do not raise any material issues of fact which would permit a modification to award her custody of the children. [Victoria's] evidence taken in the light most favorable to her does not indicate that she could better administer [to] the children's needs. As there is no evidence indicating she could better administer to the children's needs, there is no material issue of fact remaining for determination.

II.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we give weight to the findings of the trial court, we are not bound by them and will determine anew those questions properly preserved and presented. Iowa R. App. P. 14(f)(7).

The issue here on review is whether Leonard is entitled as a matter of law to a summary judgment dismissing Victoria's modification application. Victoria contends Leonard failed to prove the absence of any genuine issue of material fact or his entitlement to a judgment as a matter of law. We agree and reverse the trial court's contrary decision.

Summary judgment is appropriate when the moving party shows no genuine issues of material facts exist and entitlement to judgment as a matter of law. In re Eickman Estate, 291 N.W.2d 308, 311 (Iowa 1980); Anita Valley, Inc. v. Bingley, 279 N.W.2d 37, 40 (Iowa 1979); City of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 640 (Iowa 1978). If reasonable persons could draw different inferences and conclusions from the undisputed facts, summary judgment is not proper. In re Eickman Estate, 291 N.W.2d at 311-12; Daboll v. Hoden, 222 N.W.2d 727, 733-34 (Iowa 1974). In ruling on a motion for summary judgment, the trial court and this court on review must examine, in the light most favorable to the nonmoving party, the entire record before it, including pleadings, admissions, depositions, answers to interrogatories, affidavits, and testimony. Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979) (quoting Frohwein v. Haesemeyer, 264 N.W.2d 792, 795-96 (Iowa 1978)); Drainage District No. 119 v. Incorporated City of Spencer, 268

N.W.2d 493, 499 (Iowa 1978); Brody v. Ruby, 267 N.W.2d 902, 904 (Iowa 1978); see Iowa R. Civ. P. 237. If, under these principles, an examination of the record discloses any allegation of ultimate fact, which if found true would be a basis for relief, a summary judgment motion must be overruled. Schulte v. Mauer, 219 N.W.2d 496, 500 (Iowa 1974).

A problem presented at the outset by this issue is whether a summary judgment is ever appropriate in a case dealing with child custody. Determination of custody is essentially a factual question of who can best minister to the best interests of the child involved. In discussing the appropriateness of a summary judgment in a tort action, the supreme court stated its view that:

[T]he general rule that issues of negligence, contributory negligence and proximate cause, the resolution of which requires determination of the reasonableness of acts and conduct of the parties under all the facts and circumstances of the case, are ordinarily not susceptible of summary adjudication either for or against the claimant but should be resolved by trial is the proper one to be followed in this jurisdiction.

Daboll v. Hoden, 222 N.W.2d 727, 734 (Iowa 1974). It would seem this rule would also apply to child custody cases where the decision is likewise based on a critical examination of the facts. This is not to suggest summary judgment is never available in a child custody determination. Neither Iowa R. Civ. P. 237 nor case law precludes its use in such a case. We note only the circumstances in which it is proper are rare. See Daboll, 222 N.W.2d at 733. See generally In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977); Nagle v. Cunningham, 61 A.D.2d 739, 739, 401 N.Y.S.2d 796, 797 (1978). The question remains whether this case is one where summary judgment is appropriate.

Child custody provisions of a dissolution decree are final as to circumstances existing at the time of the original decree. They should be modified only when subsequent circumstances have so changed the child's welfare requires modification and the party seeking custody can more effectively minister to the child's well-being than the current custodial parent. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976). The paramount concern is the child's best interests. Iowa R. App. P. 14(f)(15).

With these principles in mind, our examination of the records reveals certain factual disputes as well as undisputed facts from which reasonable persons could reach different conclusions. Some of the facts in dispute include Victoria's superior child-rearing abilities, visitation problems, and the incident regarding Leonard's alleged incident of intoxication. We hold Leonard is not entitled to summary judgment and the trial court erred in granting it. Our ruling is in no way intended to address the merits of

this issue or to imply a result. We merely note the existence of a material issue of fact unresolved by the pleadings and evidence in the record. See In re Eickman Estate, 291 N.W.2d at 313.

Although the parties testified at the hearing on the summary judgment, we conclude remanding this case to the trial court for a complete trial is appropriate to insure all relevant facts are presented and subjected to the court's scrutiny. Accordingly, we reverse the order of the trial court granting Leonard's motion for a summary judgment and remand it to the trial court for a full and complete hearing.

REVERSED AND REMANDED.