IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 5-179 / 94-1229

IN RE THE MARRIAGE OF LORRETTA J. STANTON AND RICKY LAWRENCE STANTON

Upon the Petition of
LORRETTA J. STANTON,

Appellee,

And Concerning
RICKY LAWRENCE STANTON,

Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Ricky Stanton appeals the district court order which modified the child custody and support provisions of the parties' dissolution decree. **AFFIRMED.**

Marc S. Harding, Des Moines, for appellant.

Thomas P. Schlapkohl, Des Moines, for appellee.

Heard by Donielson, C.J., and Hayden and Sackett, JJ.

DONIELSON, C.J.

This is an appeal from an action to modify custody. Our review of this matter is de novo. *In re Marriage of Montgomery*, 521 N.W.2d 471, 473 (Iowa App. 1994). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties before us. *Montgomery*, 521 N.W.2d at 473. Upon our de novo review of the record, we affirm.

I. MODIFICATION OF CUSTODY.

The legal principles governing modification actions are well established.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed for only the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)).

Loretta and Ricky Stanton were married June 4, 1983. Their son Adam was born December 5, 1983, and their daughter Kristina was born October 7, 1984.

Due to Ricky's abusive behavior and drug dealing, Loretta left Ricky in 1986 and moved to California. While she was in California looking for housing, Loretta left the children in the care of her mother in Iowa. Ricky subsequently obtained court orders giving him temporary custody of the children and preventing Loretta from taking them out of the state.

Loretta and Ricky were divorced on November 25, 1987. At the time of the dissolution trial Loretta was residing in California and did not receive adequate notice from her attorney to enable her to return to Iowa for the trial. Ricky was awarded the primary physical care of the parties' children. During Loretta's visits to Iowa Ricky interfered with her attempts to exercise visitation with the children.

Upon the completion of her education in California, Loretta moved back to Iowa in August 1988. Ricky again interfered with Loretta's visitation with the children. An attempted reconciliation between the parties failed, in part, due to Ricky's continued use of drugs.

Loretta had accrued a substantial child support arrearage while she was in school in California. A mandatory wage assignment was invoked and since 1989 she has regularly made child support payments.

Loretta filed an action to modify custody in 1991. On the advice of counsel on the day of trial, she agreed to forego modification of custody and agreed to an

expansion of her visitation rights. The November 14, 1991, order also directed the parties not to harass one another with telephone calls and to refrain from speaking ill of one another in the presence of the children.

Despite the November 1991 order, Ricky continued to interfere with Loretta's visitation and engage in harassing and demeaning conduct. Loretta filed an application for contempt in 1992. An order was entered in September 1992 continuing the contempt action and ordering the parties to "quit harassing and swearing at each other." In August 1993 Loretta again filed an application to modify custody. In July 1994 the district court modified custody and placed the children in Loretta's primary care. It is from this last modification action which Ricky appeals.

In custody and physical care determinations the court must consider the denial of one parent of the child's opportunity to have meaningful contact with the other parent as a significant factor. *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). A custodial parent's lack of cooperation with the noncustodial parent's efforts to maintain satisfactory visitation and communication with the children may constitute a substantial change in circumstances warranting modification of custody. *In re Marriage of Downing*, 432 N.W.2d 692, 694 (Iowa App. 1988).

We have carefully reviewed the record presented to the district court and its detailed findings regarding each party's credibility and parenting abilities. We agree Loretta carried her burden to prove a material and substantial change in circumstances. The record reveals Ricky has repeatedly denied Loretta visitation with

the children. Loretta's testimony and written log reflect a long standing pattern of interference by Ricky. Despite Loretta's legal right to visitation, Ricky's behavior is such that Loretta is compelled to contact his mother to determine if Ricky arbitrarily will or will not allow Loretta to visit the children as otherwise regularly scheduled.

Loretta has been denied midweek, weekend and summer visitation to which she was entitled. Police intervention has frequently been necessary to facilitate visitation transfers. In his brief Ricky tries to excuse the missed visitation by claiming it was merely due to his difficulties with transportation or Adam's baseball games. This explanation is not credible given the long history of visitation interference and Ricky's other efforts to harm Loretta's relationship with the children.

Loretta testified as to Ricky's failure to consult and inform her about the children's education and activities. Ricky's conduct has not been consistent with the objectives of joint custody.

We have listened to taped phone messages Ricky left Loretta and find them to be extremely hateful, hostile, vulgar, and profane. In one of the messages Ricky specifically threatened to deprive Loretta of some of her eight weeks of summer visitation with the children. It is quite disturbing that Ricky would leave these messages in the presence of his children and that he even involved the children in making some of them. For example, in one message he goads one of the children to ask Loretta why she abandoned them when the parties' marriage ended and she moved

to California. Many of these messages were left after court orders had been entered specifically ordering Ricky not to use the phone to harass Loretta.

Since entry of the dissolution decree Loretta has improved her life considerably. She has a good job in which she has a high level of responsibility. She is involved in a long-term relationship and does not partake of drugs as she did when she lived with Ricky. She has a demonstrated ability to provide a secure and stable home for the children.

Ricky has a great deal of turnover in his jobs and has had periods of unemployment. Ricky associates with "biker types," and has allowed his friends to reside in his home. Three men with whom he and the children have shared their home have criminal records. Ricky does not seem to grasp the seriousness of these criminal records and the potential impact the presence of those individuals could have on his children.

Ricky smokes marijuana in his home and was arrested in 1993 for the possession of marijuana. Ricky has fathered a child for whom he does not provide support. The mother of that child testified she would not want Ricky to have contact with the child other than in the context of supervised visitation.

In contrast with Ricky's quite relaxed philosophy of parenting, Loretta provides the children with a structured and nurturing home environment. She is considerably more supportive of the children's relationship with their father than he is of their relationship with Loretta.

The record indicates Ricky has done everything in his power to undermine Loretta's relationship with the children. We find his interference with Loretta's visitation, his disregard for the principles of joint custody, and his continued harassment of Loretta constitute a material and substantial change in circumstances. Loretta has demonstrated a superior ability to care for the children and to foster their relationships with both of their parents. We affirm the district court's modification of custody.

II. ASSESSMENT OF CUSTODY INVESTIGATION COSTS.

Ricky argues the trial court erred in assessing the costs of the action, including the custody investigation costs, to him. Most of the custody investigation costs were paid for by Loretta or were covered by her insurance. The district court ordered Ricky to pay only the outstanding amounts which would not be covered by Loretta's insurance.

A district court has the discretion to tax the costs of a modification proceeding against a party who is in default of a dissolution decree. Iowa Code § 598.24. We find it was equitable to assess these court costs to Ricky.

III. APPELLATE ATTORNEY FEES.

Both Ricky and Loretta seek an award of appellate attorney fees. In awarding appellate attorney fees we consider the needs of the party making the request, the

ability of the other party to pay and whether the party making the request was obligated to defend the trial court's decision on appeal. *Marriage of Hoffman*, 493 N.W.2d 84, 90 (Iowa App. 1992). Given the parties' respective financial positions, equity does not require an award of appellate attorney fees to either party.

AFFIRMED.