IN THE COURT OF APPEALS OF IOWA

FILED
FEB 28 1996
CLERK SUPREME COURT

No. 5-628 / 95-0529

IN RE THE MARRIAGE OF ELIZABETH A. COSTELLO AND JOSEPH P. COSTELLO

Upon the Petition of
ELIZABETH A. COSTELLO n/k/a ELIZABETH A. McNAIR,

Appellee,

And Concerning
JOSEPH P. COSTELLO,

Appellant.

Appeal from the Iowa District Court for Jones County, L. Vern Robinson, Judge.

Elizabeth appeals the district court's order modifying the primary care and child support provisions of the parties' dissolution decree. **AFFIRMED.**

Karla M. Wolff, Cedar Rapids, for appellant.

James G. Thomas, Anamosa, and Webb L. Wassmer of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Elizabeth and Joseph Costello were previously married to each other. They had one child, Amanda, born in 1984. A dissolution decree was entered for the parties on September 22, 1989. The decree granted the parties joint legal custody of Amanda, with Elizabeth having primary physical care. Joseph was in an automobile accident in 1989 which left him confined to a wheelchair, and he did not contest custody.

Each of the parties got remarried in 1990. Elizabeth married Michael McNair, and Joseph married Theresa Costello. Elizabeth and Michael had a child, Devon, born in 1991.

In the summer of 1992 Amanda told Elizabeth she had been sexually abused by Michael. Elizabeth reported the matter to the police and took Amanda to a local hospital for a physical examination. Michael was subsequently convicted of two counts of lascivious acts with a child and is in prison. A dissolution decree was entered for Elizabeth and Michael in February 1993.

In the meantime, the Iowa Department of Human Services (DHS) had become involved in the matter. DHS social worker Ann Loper testified she became concerned about Elizabeth's care of Amanda in October 1992 when she took Amanda with her to visit Michael in prison. Also, Elizabeth did not take the initiative to get Amanda involved in counseling. Furthermore, although Elizabeth participated in individual

counseling, she did not follow through on Loper's recommendation to attend a group for battered wives.

In November 1992 on the recommendation of DHS, the juvenile court placed Amanda in the temporary custody of Joseph. In March 1993 the juvenile court found there had been a substantial change in circumstances since the dissolution decree due to the charges of sexual abuse. The court determined it would be in Amanda's best interest to be placed in the physical care of Joseph. Elizabeth filed an application to modify the juvenile court decision, and on July 27, 1993, her application was denied by the juvenile court.

On June 6, 1994, Joseph filed an application in district court seeking to modify the terms of the dissolution decree to place Amanda in his physical care. He claimed the award of physical care to him through the juvenile court constituted a significant and material change in circumstances warranting a modification of the dissolution decree. The juvenile court granted the district court concurrent jurisdiction to determine the modification application.

The district court found Amanda was doing very well in Joseph's care. The court recognized Amanda had expressed a preference to live with Elizabeth, but found other factors outweighed Amanda's wishes. The court determined Joseph had custody of Amanda for over two years and this arrangement should be disturbed for only the most cogent reasons. The court determined it was in her best interests not to disturb

the status quo and placed Amanda in the physical care of Joseph. Elizabeth was granted visitation rights and ordered to pay child support of $264 per month. Elizabeth has appealed the modification order

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992)

Elizabeth contends the district court should not have modified the parties' dissolution decree to award physical care of Amanda to Joseph. She states there was not a permanent substantial change in circumstances because she has ended her relationship with Michael. She also states Joseph has failed to meet his heavy burden to show he can minister more effectively to Amanda's well-being. Moreover, she believes the court should have given more weight to Amanda's preference.

The issue we address on appeal is whether the facts of this case warrant modification of the parties' original dissolution decree. *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa App. 1992). In child custody cases, the governing consideration is the best interest of the child. *In re Marriage of Moore*, 526 N.W.2d 335, 337 (Iowa App. 1994). To change custody set by a dissolution decree, the party seeking modification must establish by a preponderance of the evidence conditions have so materially and substantially changed since the decree the child's best interests

make the requested change expedient. *In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa App. 1993).

The parent seeking to change custody must prove an ability to minister more effectively to the child's well-being. *Moore*, 526 N.W.2d at 337. This heavy burden comes from the principle once custody has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213-14 (Iowa App. 1994).

We find there has been a substantial change in circumstances since the entry of the dissolution decree. The fact Amanda has lived with Joseph for more than two years is a substantial change in circumstances, because such a change may be considered more or less permanent, and not temporary in nature. *See In re Marriage of Scott*, 457 N.W.2d 29, 31 (Iowa App. 1990). Furthermore, this change is sufficient to warrant a modification in physical care. Modification of the child custody provisions in this case preserves, rather than disrupts, the stability and continuity established in the child's life. *See id.* at 32.

We also find Joseph has shown he can minister more effectively to Amanda's well-being. The evidence shows Amanda has done well in Joseph's care. Loper testified Amanda did not seem to have continuing emotional problems from the sexual abuse. Loper also stated Joseph had followed all recommendations made by DHS.

On the other hand, Elizabeth did not follow all recommendations made by DHS. More importantly, however, Elizabeth's actions following the report of sexual abuse show she did not recognize the probability of emotional harm to Amanda from the abuse. Elizabeth took Amanda with her on one visit to Michael in prison, causing Amanda to confront her abuser. Additionally, Elizabeth enrolled herself in counseling to deal with issues of physical abuse by Michael, but did not enroll Amanda in counseling to deal with the issues of sexual abuse. In these instances Elizabeth failed to meet Amanda's emotional needs.

We note Amanda has stated a preference to live with Elizabeth. We weigh this factor along with the other factors present in this case. We conclude it would be in Amanda's best interests to be placed in the physical care of Joseph.

We affirm the decision of the district court granting primary physical care of Amanda to Joseph. Costs of this appeal are assessed to Elizabeth.

AFFIRMED.