

FILED

APR 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**IN RE THE MARRIAGE OF VIRGINIA)
ANGELITA GREGORI FREDERICI AND)
CECIL CARLETON FREDERICI)**

Filed April 26, 1983

**UPON THE PETITION OF)
VIRGINIA ANGELITA GREGORI FREDERICI,)**

2-436
3-68656

Petitioner-Appellee,)

**AND CONCERNING)
CECIL CARLETON FREDERICI,)**

Respondent-Appellant.)

Appeal from Polk District Court, James W. Brown, Judge.

Respondent-father appeals from the trial court's modification of the parties' dissolution decree. The court granted petitioner's request that the visitation schedule be changed to accommodate her intended move from the jurisdiction, and denied respondent's request that the decree awarding joint custody to the parties be modified to provide that the children would reside with respondent if the intended move transpired. REVERSED AND REMANDED.

Dennis D. Jerde and Patricia A. Shoff of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, for respondent-appellee.

Henry A. Harmon and Patrick J. McNulty of Grefe & Sidney, Des Moines, for petitioner-appellee.

Heard en banc.

SNELL, J.

Virginia Frederici and Cecil Carleton Frederici, parties to this action, were married in 1961. They have two children—Gloria, born November 15, 1969, and Carleton, born August 27, 1971. The 1979 dissolution decree provided that the parties would have joint custody of both children and that the children's primary residence would be with Virginia, subject to liberal visitation with C. Carleton. The decree set forth a minimum visitation schedule to be utilized in the event that difficulties with regard to visitation arose. At the time of the decree, both parties lived and worked in Des Moines. The joint custody arrangement operated smoothly; C. Carleton was closely involved in the children's lives and saw them far more frequently than required by the decree's minimum visitation schedule.

In early 1982 Virginia became dissatisfied with her job in Des Moines and accepted a higher-paying job in her specialty, teleconferencing, which required her to move to the Denver area. She applied for a modification of the 1979 dissolution decree, asking that the minimum visitation schedule be changed to accommodate the greater distance between the parties' homes. C. Carleton responded with a counterclaim asking that the decree be modified to provide that the children would reside with him in Des Moines subject to liberal visitation with Virginia in the event that Virginia chose to move from Des Moines.

After a hearing, the trial court granted Virginia's request for a change in the minimum visitation schedule and denied C. Carleton's request that the children reside with him. The court concluded C. Carleton had not met his burden to prove that the proposed move to Colorado was a sufficient change of circumstances to justify placing the children in his home. C. Carleton then instituted this appeal.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law and determine anew those rights properly

presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). We give weight to the findings of the trial court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

L In addressing C. Carleton's sole contention on appeal, that the trial court erred in refusing to transfer the residence of the children to him in view of Virginia's decision to move to Colorado, we first consider whether he has demonstrated the requisite change of circumstances warranting modification. The requisite showing was discussed in detail in Hobson v. Hobson, 248 N.W.2d 137 (Iowa 1976).

The changed circumstances must be such as were not within the contemplation of the court when the former decree was entered. The change must be substantial and material, not trivial. The change must be more or less permanent or continuous, not temporary. Finally, the change must relate to the welfare of the children.

Id. at 139-40 (citations omitted), cited with approval in In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

The change of circumstances alleged by both parties, although with ultimately conflicting goals, was Virginia's move to Colorado. Clearly, the move was a change which was not within the contemplation of the court when it entered the original decree, as required by Hobson. See 248 N.W.2d at 139. In fact, it is doubtful whether the trial court would have ordered joint custody had the move been contemplated. Second, the change is substantial and material in terms of its effect on the parties and the children, and the frequency of their contact. Id. at 139-40. Third, Virginia's move was intended to be permanent, not merely temporary. Id. at 140. Finally, by potentially affecting their residence, schools, contacts with relatives and friends, and futures, the changed circumstances relate to the welfare of the children. Id.

In her brief filed on appeal, Virginia argues, citing In re Marriage of Lower, 269 N.W.2d 822, 827 (Iowa 1978), that her move to Colorado constitutes a

sufficient change of circumstances to warrant a modification of the original decree, although only with respect to C. Carleton's visitation rights. We conclude that while the change may have been sufficient to consider modifying the decree with respect to visitation rights, it was also sufficient to consider modifying it with respect to the children's residence. We therefore agree with the trial court's conclusions that modification was warranted and that "either visitation must be modified or the primary residence of the children changed to their father."

II. In our resolution of this issue we are guided by the general principal that in child custody cases the paramount consideration is the best interests of the children involved. Iowa R. App. P. 14(f)(15). It is apparent from the evidence presented at trial that both Virginia and C. Carleton are highly capable of ministering to those interests in terms of their willingness and ability to provide love, affection, companionship, and material needs for their children. The record indicates that Virginia is a good mother who has cared for the children since birth. She testified that she takes the children to plays and dances, reads to them at night, attends school activities, provides discipline, schedules medical appointments for them, and confers openly with them. Since the entry of the original decree Virginia has remarried, and she and her new husband have accepted the children into their lives and provided a home for them. Testimony was presented by Dr. Charles Burr, the children's pediatrician, that the children are well adjusted and that their mother and father had been equally responsible for their good care. Dr. Burr further testified that if a choice had to be made and the children were not part of that decision-making process, they should be encouraged to go with their mother, but added that the move would require emotional adjustments and that the children undoubtedly would miss their father.

Counterbalancing this testimony regarding Virginia's virtues as a parent is equally persuasive evidence concerning C. Carleton's involvement in the

emotional, educational, physical, religious, and cultural aspects of the children's lives. The parties' mutual priest, Father Elfvin, testified that "the support group for these children is found best in this community," and that if a choice had to be made between keeping the children in Des Moines with their father or moving them to Colorado with their mother, he would opt for Des Moines. Further, in response to a hypothetical question based in part on his review of the depositions, Dr. Dewdney, a noted child psychiatrist, testified that in his opinion, it would be in the best interests of the children to remain with their father. In support of this conclusion, Dr. Dewdney stated:

I'm making the assumption, which I think has been seems to have been confirmed in the depositions that I reviewed, that both parents are equally capable of parenting the two children, and that the most stressful factor is not an issue of parenting but currently an issue of a move. I'm of the strong opinion, as a child psychiatrist, that when moves are not necessary for children, that they can continue to receive parenting from a 'joint custody parent' that those moves shouldn't take place. These children are, as far as I'm aware, grown up, lived in the Des Moines area. Their friends are from this area. There is a support system apart from their mother and father, their grandparents and other friends, all remain in this area; and if I were an advocate of the children I would be of the opinion that a move would be not necessary and potentially harmful.

Virginia agrees that C. Carleton is "a good father," and at the first trial testified that it was in the best interests of the children that she be awarded the family home so that they would not be uprooted from the community, school district, friends, and neighbors they were familiar with. Yet that is precisely what she now proposes to do, not under the auspices of the children's best interests, but because of alleged career advancement opportunities. Her position in Colorado is higher paying than the one she had in Des Moines, but the future of the specialty, teleconferencing, and hence of the Denver position, was somewhat speculative at the time she accepted it. Furthermore, Virginia was supporting her second husband on that salary, who was unemployed and in arrears on his own child support payments.

In contrast, C. Carleton is well settled and established in his employment and in the community in Des Moines. At trial he testified that he had been employed at the same law firm for thirteen years, and is now a partner there. His income has increased each year, while the hours he works have become more flexible. He has a three-bedroom house where the children each have their own rooms, and this arrangement has been thoroughly "tested" in terms of the amount and regularity of time the children have spent with him. The evidence suggests that the children were against their mother's move to Colorado and that neither child wanted to leave Des Moines. Although the preferences of children this age are not determinative, they are entitled to consideration, particularly where, as here, the children are of sufficient maturity. See Iowa Code § 598.41(3)(f).

We agree with the language cited in appellee's brief from the case of In re Marriage of Bavel, 603 S.W. 2d 108, 109 (Mo. Ct. App. 1980), "in our highly mobile society it would be unrealistic to inflexibly confine a custodial parent to a fixed geographical area if removal to another jurisdiction was consistent with the best interests of the minor child." However, we find the language to be inapplicable in this case because we do not think that removal is in the children's best interests. We are guided by the following language from Jensen v. Jensen, 237 Iowa 1323, 25 N.W.2d 316 (1946): "It is against the policy of the law to permit the removal of the child from the jurisdiction unless its welfare would be better subserved thereby. . . ." Id. at 1330, 25 N.W.2d at 320 (quoting 27 C.J.S. Divorce § 313, The court also cautioned: "The desired modification . . . would mean a change from known conditions that have proven conducive to the child's welfare to surroundings of which we know little and that may well prove not for her best interests. It would be in the nature of an experiment which should not be made." Id. at 1327, 25 N.W.2d at 318. This language was reaffirmed in Brown v. Brown, 261 Iowa 591, 155 N.W.2d 426 (1968), in which the Iowa Supreme Court reversed the trial court's order authorizing the mother's removal of the parties' children to Oregon and

concurrently modifying the father's visitation rights, where the changed circumstances relied on by the mother related to herself rather than to the best interests of the children, and where the father objected to modification because it eliminated his opportunity for regular visitation. Id. at 592-95, 155 N.W.2d at 427-28. We now hold that the burden of proof is on the custodial parent wishing to remove the child from the jurisdiction to establish, by a preponderance of evidence, that removal is in the child's best interests. We believe this holding to be consistent with and in furtherance of the principles established in our earlier cases.

We further hold that the joint custodial parent must meet an even higher threshold of proof than would be required in an ordinary custody case, because of the inherent fact that no prior adjudication has been made regarding the relative fitness of the joint custodial parents. This absence of a prior adjudication of fitness is what distinguishes the case before us from cases such as In re Marriage of Lower, 269 N.W.2d 822 (Iowa 1978), and several other cases cited by appellee, which we do not find dispositive of the issue before us. For the reasons contained herein, we conclude that Virginia has failed to sustain her burden of demonstrating that the removal of the parties' children from the jurisdiction is in their best interests. Because of the lack of geographical proximity of the parents and their consequent inability to confer regularly regarding the children's welfare, we do not think that the joint custody arrangement will remain a workable solution. See Iowa Code § 598.41(3)(h). We therefore transfer the custody of the parties' minor children to C. Carleton, and remand to the district court for a determination of the visitation rights to be granted to Virginia and the amount of child support, if any, to be paid by her.

REVERSED AND REMANDED.