

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SHERRY LOUISE HUNTER
AND RICHARD DEAN HUNTER

FILED

JAN 28 1987

CLERK SUPREME COURT

Upon the Petition of)

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SHERRY LOUISE HUNTER,)

Petitioner-Appellant,)

Filed January 28, 1987

And Concerning)

RICHARD DEAN HUNTER,)

6-406

86-256

Respondent-Appellee.)

Appeal from the Iowa District Court for Scott County (No. 32609) - Max

R Werling, Judge

Petitioner appeals from a decree modifying the decree dissolving the parties' marriage **AFFIRMED.**

James L Tappa of Spector, Tappa, Kopp & Nathan, Rock Island, Illinois,
for petitioner-appellant.

Edward N Wehr of Wehr & De Lange, Davenport, for respondent-appellee.

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

DONIELSON, P.J.

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The petitioner, Sherry Louise Hunter, appeals from a decree modifying the original dissolution decree dissolving the parties' marriage, asserting that an increase in child support should have been awarded and that joint custody should not have been ordered. The respondent, Richard Dean Hunter, asserts inter alia that Sherry waived the custody issue by filing a certificate stating that the appeal does not include a child custody issue. We affirm.

The 1982 decree dissolving the parties' marriage awarded Sherry custody of their child, Shawna, now age ten. Richard was ordered to pay child support of \$50 per week plus an additional \$15 per week through September 1982 for expenses of pre-school facilities. It was further provided that in lieu of additional child support he would either undertake care and custody of the child at times when the mother was unable to do so due to requirements of her employment or provide and pay for services of a licensed child care facility. In a 1983 modification decree, the court found that the child care arrangement had not worked out and ordered Richard to pay child care expenses necessitated by Sherry's job in an amount not to exceed \$30 per week.

In 1985, Sherry filed an application to modify requesting additional child support. By cross-application, Richard sought joint custody. At the time the dissolution decree was entered Richard had a gross income of \$40,000 for the year from employment with the amount of compensation based on sales commissions. His rate of compensation has not changed, and his gross income was \$35,800 for the year 1985. Since 1981 Sherry's annual gross income has increased from \$22,077 to \$31,200.

The necessity for payment of child care expenses ceased in June 1985. Sherry testified concerning increases in costs relating to the child's food, shelter, and outside activities. In 1985, two sons from a previous marriage, one an adult,

moved in with Sherry and her third husband. At the time of trial, neither paid rent. The trial court denied the request for an increase in child support and ordered a change to joint custody with physical custody remaining in the mother.

Our scope of review in an equitable proceeding is de novo. Iowa R. App. P. 4. It is therefore our responsibility to review the facts and the law and to determine anew the rights of the parties where the issues have been properly presented and preserved. In re Marriage of Phipps, 379 N.W.2d 26, 27 (Iowa Ct. App. 1985). Although we give weight to the trial court's findings, particularly where the credibility of witnesses is concerned, we are not bound by them. Iowa R. App. P. 14(f)(7).

Sherry first contends that the trial court erred in denying her application to modify the dissolution decree to increase child support. She contends that the original agreement as to child support provided that Richard's liability to pay \$50 per week in child support was conditioned on Richard providing such child care as would have been provided by a private baby-sitter. Sherry points out that because this arrangement did not work, the district court later modified the decree, ordering Richard to pay the extra costs of child care and pre-school, amounting to between \$80 and \$95 per week. Sherry claims that because Shawna is now older, it costs \$200 per week to support Shawna. Therefore, Sherry contends that because Shawna's needs have greatly increased and, because Richard's income has decreased only slightly, the district court should have granted her motion to modify due to a change in circumstances. We disagree.

Under Iowa law, in order to justify a modification of child support, some material change must be shown in the circumstances, financial or otherwise, which has occurred since the date of the original decree or any subsequent intervening proceeding which considered the situation and rights of the parties upon an application for the same relief. In re Marriage of Jensen, 251 N.W.2d 252,

253-54 (Iowa 1978). Such change in circumstances must be substantial, and such a change must not have been within the contemplation of the trial court when the earlier decree was entered. State Dep't of Social Services, Cedar County ex rel. Brecht v. Brecht, 255 N.W.2d 342, 346 (Iowa 1977). Such change must also be permanent and continuous, not temporary. In re Marriage of Meyer, 347 N.W.2d 681, 683 (Iowa Ct. App. 1984).

Applying the above-cited principles to the present case, we believe the district court was correct in denying Sherry's motion for an increase in child support payments. First, we note that while Richard's income has fluctuated between the time of the decree and the present appeal, Richard's income dropped from \$40,000 to \$35,858. On the other hand, Sherry's income has increased dramatically from \$22,000 to \$31,200. We also take note that of Sherry's present husband's \$40,000 per year salary, \$28,000 is available to improve Sherry's overall financial condition. State ex rel. Mohr v. Mohr, 377 N.W.2d 247, 249 (Iowa Ct. App. 1985). Additionally, Sherry's two sons from a previous marriage are currently living in her home, one of whom is 19 and is gainfully employed, but pays nothing towards food, rent, or utilities.

Sherry argues that because Richard had earlier paid support in amounts of \$80 to \$95 pursuant to the original decree and subsequent modification, Richard should now be ordered to pay similar amounts. The original decree provided that Richard was to pay \$50 per week in child support and, in lieu of additional child support, was to provide supervisory care during those times Sherry would have had to hire a baby-sitter. This arrangement, however, did not work, and Richard was subsequently ordered to pay an additional \$45 per week for pre-school facilities and child care until June of 1985. Sherry claims that it costs \$200 per week to support Shawna and that given the amount of past payments made by Richard, he should now pay half that amount.

We agree with the conclusion of the district court that for whatever reason, the parties agreed to limit Richard's support payments to \$50 per week absent a substantial change in circumstances. At the time the original decree was entered, there was ample evidence to support a finding that Richard could afford to pay more. The fact that the costs of supporting Shawna would increase through the years was certainly within the contemplation of the trial court at the time the additional decree was entered. The fact that Richard was obligated to pay \$220 per month for two children of a prior marriage may have also been a factor in limiting Richard's present obligation to \$50 per week. While the record reveals that both parties are financially secure, the most substantial increase in overall financial condition has been in favor of Sherry. Upon consideration of all the testimony and evidence offered by both parties, we do not believe that Sherry has shown a substantial and permanent change in circumstances so as to require a modification of child support, and we therefore hold that the district court was correct in denying Sherry's application for modification.

Sherry also contends that the trial court erred in granting Richard's application to modify the decree of dissolution to grant joint custody. At trial Sherry testified that she did not believe that Richard actually wanted joint custody since he would leave Shawna with a baby-sitter or parents on the weekends he had visitation. Sherry contends that Richard's application for joint custody was retaliatory in nature, rather than a showing of any interest in obtaining joint custody. We disagree.

In child custody cases, the best interest of the child is of paramount consideration. Iowa R. App. P. 14(f)(15). Because our basic objective is to make an award that will assure a child the maximum opportunity for contact with both parents, we favor joint custody whenever reasonable and in the child's best interests. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa Ct. App.

1985). The opposition of one party to joint custody will not preclude a joint custodial arrangement. Id. Furthermore, parties need not be in agreement at all times in order to justify joint custody. In re Marriage of Short, 373 N.W.2d 158, 160 (Iowa Ct. App. 1985).

Iowa Code section 598.21(8) (1985) provides that if a petition for modification of an order pertaining to child custody asks for joint custody, the modification shall be made pursuant to section 598.41. Section 598.41(3) provides:

3. In considering what custody arrangement under subsection 2 is in the best interests of the minor child, the court shall consider the following factors:

a. Whether each parent would be a suitable custodian for the child.

b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.

c. Whether the parents can communicate with each other regarding the child's needs.

d. Whether both parents have actively cared for the child before and since the separation.

e. Whether each parent can support the other parent's relationship with the child.

f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.

g. Whether one or both the parents agree or are opposed to joint custody.

h. The geographic proximity of the parents.

No single factor listed in section 598.41(3) is a condition precedent to allowing joint custody, nor is there a certain number of factors which, when satisfied, will either mandate or prohibit joint custody. Short, 373 N.W.2d at 160. All

that is required that each party can communicate regarding the child's needs and support each other's relationship with that child. Id.

In the present case, we believe that the district court was correct in granting joint custody. It is apparent that both parties have been able to communicate regarding Shawna's welfare, though, as Sherry testified, they do not always agree. However, tension between parties resulting from the usual acrimony following a divorce will not alone be sufficient to demonstrate that joint custody will not work. In re Marriage of Ertmann, 376 N.W.2d 918, 920 (Iowa Ct. App. 1985). We are also aware that Richard in the past has not always been able to provide personal supervisory care. However, we have recognized that the focus of custody determination should be on the long range best interest of the child and not solely on past parenting behavior. Ertmann, 376 N.W.2d at 921.

We therefore cannot agree that sole custody in Sherry is warranted. As stated in Iowa Code section 598.41(5) (1985), "[j]oint legal custody does not require physical care." We thus see no valid reason why Richard should not have equal rights and responsibilities in making decisions affecting the child's legal status, medical care, education, or extracurricular activities. Accordingly, we affirm the district court order awarding joint legal custody to both parties with the physical care in Sherry.

AFFIRMED.