

IN THE COURT OF APPEALS OF IOWA

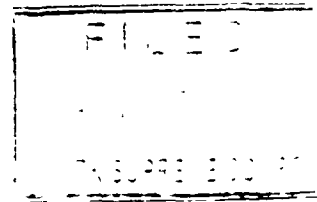
No. 1999-184 (9-408) / 98-1281

Filed August 27, 1999

**IN RE THE MARRIAGE OF VICTORIA A. DODGE
AND BRADLEY K. DODGE**

**Upon the Petition of
VICTORIA A. DODGE,**
Petitioner-Appellee,

**And Concerning
BRADLEY K. DODGE,**
Respondent-Appellant.



Appeal from the Iowa District Court for Woodbury County, James D. Scott,
Judge.

The respondent appeals the district court's denial of his petition to modify the
parties' dissolution decree. **AFFIRMED.**

Shelley A. Horak, Sioux City, for appellant.

Steven C. Kohl of Nymann & Kohl, Sioux City, for appellee.

Considered by Sackett, C.J., and Huitink and Vogel, JJ.

000056

SACKETT, C.J.

Respondent-appellant Bradley K. Dodge appeals from the district court's dismissal of his petition to modify the custodial provision of his dissolution decree. He contends (1) he met the burden necessary to have custodial care awarded to him and (2) the district court should have listened to an audio tape it admitted in evidence before ruling. He also contends the district court abused its discretion in fixing attorney fees. We affirm.

Bradley petitioned seeking custody of the two children born to his marriage to petitioner-appellee Victoria A. Dodge. The children, Toney, born in 1988, and Ryan, born in 1992, were placed in Victoria's physical care under the terms of the parties' March 22, 1993 dissolution decree. Victoria asked for an increase in child support and attorney fees.

Trial was set and Bradley presented evidence that Victoria (1) did not properly supervise the children; (2) established a live-in relationship with several men who had been the subject of domestic violence complaints; (3) moved frequently; (4) lacked ambition; and (5) failed to include Bradley's name on the children's school records. Bradley had attended the "Children Cope With Divorce Seminar" and Victoria had not. Bradley also introduced, and the district court admitted, an audio tape which Bradley represented as conversations he had with the children while they were in their mother's home. Bradley then rested and Victoria made a motion to dismiss the

petition. The district court, without listening to the audio tape it had admitted, sustained the motion as to Bradley's claim custody should be changed.

The district court, in ruling on the motion, said:

The burden of proof required to modify a divorce decree is very high. To change custody is higher than most other issues. It's higher than the change of child support, for instance. There are dozens, probably hundreds, of cases in Iowa that have gone to the appellate courts on this issue. It's been held time and again custody, once established, should be seldom disturbed. To overcome that burden, I will cite the cases in my ruling and try to be instructive on what the law in Iowa is.

While the court has some concern over the care that Tony and Ryan have received, it does not rise to the level necessary to change custody. Viewing the evidence in the light most favorable to the respondent, the court finds it's not necessary to hear anymore evidence from the petitioner. The motion to change -- the petition to change the custody must be denied.

Our scope of review in modification of custody cases is well established. We review de novo. Iowa R. App. P. 4, *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991).

The criteria for changing the custodial parent is equally well established. Bradley was made a joint custodian in the dissolution decree. He, consequently, is benefitted in seeking physical care by the inference he has met the joint custody tests set forth in *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979). See *In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984). However, in seeking a change in physical care, he carries a burden similar to that imposed on a parent seeking a change of custody. *Id.* The question is not which home is better, but

whether Bradley has demonstrated he can offer the children superior care. *See In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). Bradley must show an ability to minister to the children's needs superior to Victoria. *See In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa App. 1985) (Hayden, J., dissenting). If both parents are found to be equally competent to minister to the children, custody should not be changed. *In re Marriage of Smith*, 491 N.W.2d 538, 541 (Iowa App. 1992). The burden on Bradley is heavy. *See In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa App. 1988). Children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa App. 1994). Custody, once fixed, should be disturbed only for the most cogent reasons. *See Downing*, 432 N.W.2d at 693. Bradley has the burden to show by the preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that the children's best interests make it expedient to award custody to Bradley. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997); *see also In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App. 1985).

The district court's ruling sustaining the motion to dismiss does not delineate the law governing change of custody in a dissolution. The district court, while finding

problems with Victoria's care of the children, determined it does not rise to the level to change custody.

The district court has determined there are deficiencies in Victoria's care of the children. Our de novo review of the evidence results in our reaching the same conclusion. However, our inquiry does not end there, as did the district court's. Rather, we need to see if the evidence shows Bradley is able to render superior care.

In our review, we weigh the respective parenting adequacies and inadequacies of both parents. Victoria in her brief advances she had a number of witnesses ready to testify and had a number of exhibits. In seeking to dismiss the case at the end of Bradley's case, she elected to forego having us consider her witnesses and exhibits.

The district court should not have sustained Victoria's motion to dismiss. Trial judges should ordinarily reserve ruling on objections in equity cases. Answers are received subject to objection. This procedure facilitates de novo review of the record by this court. See *In re Marriage of Ralston*, 242 N.W.2d 269, 271 (Iowa 1976); *Leo v. Leo*, 213 N.W.2d 495, 497-98 (Iowa 1973). In equity cases, the trial court should ordinarily not rule on objections to testimony, but receive all answers subject to the objection. This procedure permits de novo review of the record in the appellate courts. *Hughes A. Bagley, Inc. v. Bagley*, 463 N.W.2d 423, 426 (Iowa App. 1990). The rule of evidence in equity cases is the trial judge, while noting objections, may not exclude offered evidence. *O'Dell v. O'Dell*, 238 Iowa 434, 465, 26 N.W.2d 401, 417 (1947); *Keith v. Community Sch. Dist.*, 262 N.W.2d 249, 255 (Iowa 1978). The

purpose of this practice is to preserve a complete record for the trial and appellate courts, leaving to them the rejection of inadmissible evidence when deciding an issue, *O'Dell*, 238 Iowa at 465-66, 26 N.W.2d at 417; *United Properties, Inc. v. Walsmith*, 312 N.W.2d 66, 74 (Iowa App. 1981), and, upon the appellate court's review de novo, it thus may decide the case without remand. *United Properties*, 312 N.W.2d at 74.

In ruling on the motion, the district court excluded Victoria's evidence. We recognized Victoria asked it happen. Yet, this is a matter involving the care of children imposing on the court's a need to consider their welfare. The record made is sufficient for us applying the proper standard to do so.

Bradley next contends the district court should have considered the audio tape the court admitted into evidence. Victoria argues the tape was inadmissible. The tape was available to us and in accord with our responsibility on de novo review, we have listened to the tape. It is a series of difficult-to-understand telephone conversations between Toney and his father. The quality of the tape is so poor, we do not consider it in our review. Having so decided, we need not decide whether it was error for the district court to admit it.

Our review of the evidence causes us to find there is evidence Victoria has not put the children first in her life. She has failed to adequately supervise them on a number of occasions. She has failed to provide the school with Bradley's name. Bradley pays substantial child support and has been current in his support at all times. He is interested in the children. Bradley exercises his visitations and is available to

the children by telephone and at least Toney calls him frequently. When Victoria canceled telephone service, he purchased a cellular telephone programed with his telephone number so the children could call him. Victoria was to use the telephone for her own purpose resulting in long distance charges to Bradley's account.

While the issue is close, Bradley has failed to show how he will care for the children and, if he is granted physical care, he will be a superior custodian. Consequently, we affirm the decision not to transfer physical care to him. Victoria needs to be certain Bradley's name is included on school records. We trust Victoria has attended as the district court decreed the Children Cope With Divorce Seminar. If not, she shall certify she has done so within thirty days of when prescindo issues.

The district court originally allowed Victoria \$1500 in attorney fees and then increased it to \$2000 after the filing. Bradley contends that is an abuse of discretion. Victoria's attorney, two days after trial, filed a bill showing charges of \$12,364 for services rendered Victoria. The district court said of Victoria's representation, "Victoria's attorney had little prior experience in family law and no experience in the defense of actions to modify the custody provisions of a dissolution decree." The district court further found the amount Victoria's attorney requested for attorney fees not reasonable and first found a reasonable fee to be \$1500. We review for an abuse of discretion. *See In re Marriage of Dahl*, 418 N.W.2d 358, 361 (Iowa App. 1987). Considerable discretion is assigned to the trial court in the allowance of attorney fees.

Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978). We affirm the trial court on this issue.

Victoria requests attorney fees on appeal. Attorney fees are not recoverable as a matter of right but rest within the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. *In re Marriage of Orgren*, 375 N.W.2d 710, 714 (Iowa App. 1985); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). An award of attorney fees depends on the financial circumstances and earnings of each party. *Burham*, 283 N.W.2d at 278. Bradley shall pay \$300 toward Victoria's attorney fees. Costs on appeal are charged to Bradley.

AFFIRMED.