IN THE COURT OF APPEALS OF IOWA

No. 3-206 / 92-1635

FILED
NOV 29 1993
CLERK SUPREME COURT

IN RE THE MARRIAGE OF PATRICIA L. TONEY AND BRETT E. TONEY

Upon the Petition of

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PATRICIA L. TONEY,

Appellant,

And Concerning

BRETT E. TONEY,

Appellee.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

The wife appeals the district court decision refusing to modify the visitation provision of the parties' dissolution decee. **AFFIRMED.**

Gregory C. McConville of Bertroche Law Offices, Des Moines, for appellant.

Patrick H. Payton of Patrick H. Payton & Assoc., P.C., Des Moines, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ. Donielson, J., takes no part.

HABHAB, J.

Patricia and Brett Toney were formerly married to each other. They have two children: Jessica, born on June 6, 1985; and Alexis, born on March 5, 1989.

A decree of dissolution was entered on November 21, 1991. The parties were granted joint legal custody of the children, with Patricia having primary physical care. Brett was awarded "such reasonable rights of visitation with minor children so as not to interfere with their health, education and welfare." Specifically, he was awarded visitation on alternating weekends and some holidays. Brett was ordered to pay child support of $650 per month.

Patricia filed a petition for modification on February 25, 1992. She alleged:

> That Respondent only recently received his Iowa Driver's license back from the Iowa DOT after getting SR-22 Insurance, yet Respondent still insists on exercising visitation with the parties' minor children which puts the minor children in extreme danger; wherefore, modification of decree is necessary to require screened and monitored visitation by a responsible person approved by the Court in order to protect the minor children from the danger of being forced to ride in a vehicle with an impaired person.

Beginning in June 1992, Patricia would not allow Brett to take the children for visitation. She stated this was due to her concerns for their safety. She would only agree to Brett visiting the children in her home.

A hearing was held on September 9, 1992. Brett admitted that on two occasions he had the children sit in

the back of the pickup truck while he was driving. He testified that he agreed not to do this in the future. Patricia also alleged that Brett had driven after drinking and that he had left the children unsupervised near a body of water while he was fishing. Brett denied these allegations.

The district court entered its decision on the same day as the hearing. The court determined there was no substantial change in circumstances to merit a modification of the dissolution decree. The court found there was insufficient evidence to support Patricia's allegations. Patricia was ordered to pay $500 for Brett's attorney fees. Patricia has appealed.

Our scope of review in 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).

Patricia claims there has been a substantial change in circumstances since the dissolution decree. She states that Brett's actions have affected the safety and welfare of the children and that it is in the best interests of the children for visitation to be modified. She asks that Brett be allowed only screened and monitored visitation.

A party seeking a modification of a dissolution decree must establish that there has been a substantial change in

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circumstances from the time the decree was entered making it equitable and just that different terms be fixed. In re Marriage of Dawson, 467 N.W.2d 271, 274 (Iowa 1991). A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of changed circumstances. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). The change in circumstances must not have been within the contemplation of the trial court when the original decree was entered. In re Marriage of Eyerly, 462 N.W.2d 681, 682 (Iowa 1990). The burden is on the party seeking modification to prove a substantial change in circumstances by a preponderance of the evidence. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991).

Patricia failed to meet her burden to show a substantial change of circumstances which occurred after the dissolution decree was filed. She admits that some of the incidents she complains about may have occurred prior to the dissolution. We agree that it was extremely unwise for Brett to place the children in the back of the pickup while he was driving. However, he has agreed not to commit such an act again. We affirm the trial court on this issue.

Brett asks for attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103

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(Iowa App. 1991). Under the circumstances here, we deny Brett's request for appellate attorney fees.

We affirm the district court's order concluding that there had been no change of circumstances to merit a modification of the visitation provisions of the parties' dissolution decree. Costs of this appeal are assessed to Patricia Toney.

AFFIRMED.