FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LEONE C. BURNS,)
Appellant,) Filed February 22, 1979
v.)
DAVID A. BURNS,) 42 / 3-62426
Appellee.)

Appeal from Delaware District Court - L. John Degnan, Judge.

Petitioner appeals from the denial of her application for modification of an order modifying an original divorce decree, alleging the lower court erred in refusing to transfer custody or, in the alternative, in refusing to grant increased visitation rights. - Affirmed as modified.

Dennis L. Ruben & Michael J. Green, of Scalise,Scism, Gentry, Brick & Brick, Des Moines, for Appellant.

James R. Moore, of Mote, Wilson & Welp, Marshalltown, for Appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

The petitioner, Leone C. Burns, now Leone C. Shephard, appeals from the trial court's denial of her application for modification of an order modifying an original divorce decree. Petitioner, through her application, sought to regain custody of her six-year-old daughter, Dawn, from her former husband, David Burns. In the alternative, she asked that greater visitation rights be granted to her. We affirm with modification.

Our review in this case is de novo. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977); Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976); In re Marriage of Brown, 247 N.W.2d 2, 3 (Iowa 1976); rule 4, Rules of Appellate Procedure. We give weight to the fact findings of the trial court, but we are not bound by them. Melton, supra; Hobson, supra; rule 14 (f)(7), R. App. P.

Modification of a divorce decree is possible only when there has been a material and substantial change in circumstances since the date of the original decree or since the date of a prior modification concerning the same issue presented in the application for modification. Brown, supra at 4. Petitioner maintains that the findings of the trial court in the modification hearing in which she was found in default and in which custody of Dawn was transferred to respondent should be disregarded for purposes of this court's review of the petitioner's application for modification. She claims she failed to appear at the earlier proceeding because she had been misadvised by her attorney. We find this contention to be without merit. Petitioner received notice of the hearing in which respondent sought custody of Dawn. When she failed to appear, the court contacted her by phone. She was made fully aware of the proceedings, was familiar with the procedures of the divorce court, and knew of the nature and impact of the respondent's request for change of custody. She had an opportunity to appear but failed to pursue it. Therefore, the findings of the trial court which granted custody of Dawn to respondent will be considered in determining whether petitioner has met the heavy burden of showing a change in circumstances which would warrant transferring custody to her.

In seeking modification of a child custody order, the noncustodial parent must

establish by a preponderance of evidence that conditions since the court's order have so materially and substantially changed that the child's best interests require the awarding of custody to that parent. Hobson, supra at 139-40; Crary v. Curtis, 199 N.W.2d 319, 320 (Iowa 1972). The change in circumstances must be more or less permanent, Hobson, supra at 140; Black v. Black, 203 N.W.2d 121, 124 (Iowa 1972), must not have been within the contemplation of the parties or the court at the time of the order, In re Marriage of Wagner, 272 N.W.2d 418, 421, (Iowa 1978), Hobson, supra at 139, and must relate to the welfare of the child. Wagner, supra; Brown, supra at 4. In transferring custody, the first and governing consideration is the best interests of the child. Melton, supra at 205; rule 14(f)(15), R. App. P.

In this case, petitioner has failed to sustain her burden of showing a substantial change in circumstances since the court's order granting custody of Dawn to the respondent. Furthermore, she has not shown a superior claim to the respondent based upon her ability to minister, not equally, but more effectively to the well-being of Dawn. Melton, supra; In re Marriage of Outermuth, 246 N.W.2d 272, 274 (1976). Finally, an examination of the record and a reading of the trial court's order indicate that the respondent is caring properly for Dawn and is concerned about her welfare. The trial court did not err in finding that respondent is capable of serving the long range best interests of Dawn, see In re Marriage of Abild, 243 N.W.2d 541, 542 (Iowa 1976), and in refusing to transfer custody to the petitioner.

We find, though, that petitioner's visitation privileges with Dawn should be increased. To justify a modification of visitation rights, a change of circumstances must be demonstrated, but such change may be less extensive than would be necessary to justify a change in custody. In re Marriage of Glass, 213 N.W.2d 668, 670 (Iowa 1973); Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973). Again, the welfare of the child is the controlling consideration in determining the extent of visitation privileges. Huffman v. Huffman, 176 N.W.2d 859, 863 (Iowa 1970).

In this case, while petitioner's basic ability to minister to the needs of Dawn as a custodial parent has not changed substantially, she evidences a greater ability to establish a stable mother-daughter relationship without denigrating the child's

relationship with her father. Also, petitioner and her other children seem anxious to include Dawn as a member of their family. A child's best interests require a continuing association with the non-custodial parent unless the contrary is clearly shown. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976); Anthony v. Anthony, 204 N.W.2d 829, 833 (Iowa 1973). Here it has not been clearly shown that it would not be in Dawn's best interests to have a steady, on-going relationship with her mother. Therefore, we modify the trial court's order by increasing petitioner's visitation privileges from two weeks in the summer to three weeks. Furthermore, petitioner shall be entitled to visitation privileges one week-end each month, starting at 5:00 p.m. on Friday and ending at 7:00 p.m. on Sunday. We affirm the trial court's order in all other respects regarding visitation rights.

AFFIRMED AS MODIFIED.