FILED
JUN 28 1979
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

SHARON M. MAASSEN,
(Formerly Sharon M. McGuire),

Petitioner-Appellee,

vs.

JAMES P. MC GUIRE,

Respondent-Appellant.

Filed June 28, 1979

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2-62151

Appeal from Cerro Gordo District Court - R. K. Richardson, Judge.

Father appeals trial court's denial of his application to modify visitation provisions of dissolution decree alleging trial court erred in failing to find material and substantial change of circumstances. REVERSED WITH ORDER TO MODIFY.

Philip L. Garland of Mason City, Iowa, for appellant.

R. L. Stephenson of Beck, Pappajohn, Shriver & Stephenson, Mason City, Iowa; and Earl W. Hill of Buck & Hill, Britt, Iowa; for appellee.

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

Respondent-father appeals from trial court's denial of his Application for Modification of a dissolution decree contending that trial court erred in failing to find a material and substantial change of circumstances sufficient to warrant such modification as to visitation arrangements concerning the parties' two minor children who are in the custody of petitioner-mother. We reverse with an order to modify the decree of dissolution in accordance with this opinion.

I. The marriage of James and Sharon McGuire was dissolved on August 22, 1975. Custody of the parties' two children, Timothy James, born May 7, 1969, and Molly Ann, born April 3, 1973 was awarded to petitioner with the right of "reasonable visitation at reasonable times and places" throughout the year, in addition to a two-week vacation period in the summer, to respondent.[1]

On September 15, 1975, after receiving a letter from petitioner and her fiance Mick Maassen, restricting visits from 5 p.m. until 8 p.m. on Wednesdays and from noon Saturday until noon Sunday,[2] respondent filed an Application for Modification asking that specific visitation rights be granted. Respondent's application was granted on November 18, 1975.[3] Upon petitioner's Motion to Reconsider, the trial court found no cause to modify the November 18th Decree and further stated that "the specific visitation times . . . are to be considered a minimum and the court encourages the parties to agree upon short visitation periods which are convenient and in the best interests of said minor children."[4] Petitioner refused to allow any additional visits and respondent filed a second Application for Modification on March 19, 1976, requesting specific provisions for such additional visits. On May 24, 1976, the court modified its previous order.[5]

This background brings us to respondent's third Application for Modification, filed May 15, 1978, which is the subject of this appeal. Respondent's request for additional

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[1] Per Stipulation entered into by the parties and incorporated into the Decree of Dissolution.

[2] See App. Vol. II - Respondent's Exhibit A, p. 1.

[3] Pursuant to the modified decree respondent was to have the children the first and third weekend of each month from 9 a.m. Saturday until 8 p.m. Sunday. Summer visitation was not considered or changed.

[4] Ruling of the Cerro Gordo County District Court, December 19, 1975.

[5] Respondent was permitted to have the children the first weekend each month, from 6 p.m. Friday until 6 p.m. Sunday, and the third weekend of each month, from 9 a.m. Saturday until 8 p.m. Sunday. Again, the summer vacation period was not considered or changed.

summer visitation and a change in weekend visitation to alternate weekends was denied by trial court on June 14, 1978. Respondent contends that trial court erred in failing to find that there had been a material and substantial change of circumstances since the last modification. We agree.

II. Our review in this matter is de novo, Iowa R. App. 4; Behrle v. Behrle, 228 N.W.2d 25, 27 (Iowa 1975) and, although weight is given to the findings of the trial court, we are not bound by them. In re Marriage of Murray, 213 N.W.2d 657, 659 (Iowa 1973). The standard for any modification of a decree of dissolution is that the moving party must show by a preponderance of the evidence that there has been a material and substantial change of circumstance since entry of the decree. In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976). Modification as to visitation, however, requires a much less extensive change of circumstances than those required to warrant a change of 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). The welfare of the child is the controlling consideration, superior to the claim of convenience of either parent. Huffman v. Huffman, 176 N.W.2d 859, 863 (Iowa 1970).

The record in this case shows a continued unwillingness on the part of petitioner to follow the trial court's directions that visitations be reasonably arranged, that the specific times be considered only a minimum arrangement, and that additional visits arranged by the parties would be in the best interests of the children. Beginning with the letter sent to respondent on September 15, 1975,[6] petitioner's actions (and those of her present husband) can only be interpreted to be contrary to those directions. Examples include refusal of additional visits, arguments as to what constitutes the "first weekend of the month" when the 30th or 31st of the preceding month falls on a Friday, a tightly planned summer schedule for the children allowing petitioner to maintain that there can be no additional days or weeks for visitation during the children's summer vacation, and several business trips taken with her present husband where she has either refused respondent's request to keep the children or failed even to inform him of her travel plans which did not include the children.[7] We find that petitioner's failure to

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[6] See n. 2, supra.

[7] Respondent testified that without any communication to him, petitioner had taken Molly to the Mayo Clinic in Rochester, Minnesota because a local doctor had detected a heart murmur.

cooperate, contrary to court's direction, when combined with the fact that the children are now two years older than at the time of the last modification, that respondent has remarried and lives in a 4-bedroom home only 5 miles from petitioner's home, constitute such material and substantial change of circumstances as to warrant modification. Donovan v. Donovan, 212 N.W.2d at 453.

Accordingly, we find that respondent should be permitted to have his minor children with him on alternate weekends, beginning June 30, 1979, from 6 p.m. on Fridays and continuing until 7 p.m. on Sundays. These weekends are not to be varied unless the parties can reach a satisfactory agreement as to any variance. In addition, beginning in the summer of 1979, respondent shall be permitted to have his children with him for four weeks during the summer, to be arranged at respondent's option, which are to include, at respondent's option, at least two consecutive weeks. Respondent shall give petitioner a minimum of two weeks' notice regarding summer visitation for the year 1979 and a minimum of one month's notice thereafter. Petitioner is encouraged to advise respondent of travel plans with her husband which do not include the children to allow respondent the opportunity to keep the children during those periods.

There was testimony at the hearing on the Application to the effect that two homes (and by implication, two sets of loving parents), would be confusing to the children and also that their attendance at church with their father twice a month was not a wise arrangement. The witness testified he had visited with petitioner for only one hour prior to testifying, that he had not visited with either child, with respondent, or with petitioner's present husband, Mick Maassen. We find the testimony to be an abstract opinion only, with little relevance to the specific facts of this case, and accord such opinion the appropriate weight.

Further, we find no evidence in the record to indicate that the religion-question is a problem for anyone other than petitioner. The parties should be expected to act as mature adults without having to resort to the court to spell-out church attendance. However, if in the future there is evidence that respondent is refusing to cooperate with prior scheduled events at petitioner's church, or that the arrangement has demonstrable detrimental effects upon either of the minor children, petitioner can come before the court with such evidence at that time.

III. On this appeal, respondent urges the court to adopt a rule whereby modification of the visitation provisions of a decree of dissolution could be made when it is deemed to be in the best interests of the child without the necessity of showing that there has been change of circumstances. We have no authority to depart from that established standard set by the Supreme Court of Iowa. Glass, 213 N.W.2d at 670; Donovan v. Donovan, 212 N.W.2d at 453.

Judgment of trial court is reversed with order to modify the decree of dissolution in accordance with this opinion.

REVERSED WITH ORDER TO MODIFY.