

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

MARK WILLIAM SPERIDON,)

Plaintiff-Appellee,)

vs.)

JANE ELLEN FAIRLEY,)

Defendant-Appellant.)

Filed November 20, 1984

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4-375
84-207

Appeal from the Iowa District Court for Polk County - Harry Perkins, Judge.

Defendant ex-wife appeals from a modification of the decree dissolving the parties' marriage. She asserts that the trial court should not have modified the decree by setting up a joint custody arrangement with plaintiff ex-husband having physical care of the parties' child. AFFIRMED.

Robert N. Siddens of Stennes & Siddens, Des Moines, for defendant-appellant.

Donald W. Baird of Baird, Bowers, Holliday & Wilson, Des Moines, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

Defendant ex-wife appeals from a modification of the decree dissolving the parties' marriage. She asserts that the facts do not support an award of joint custody with physical custody being awarded to the father. We affirm.

Mark William Speridon and Jane Ellen Fairley were married on April 24, 1973, and had one child, Zachariah, who was born in 1976. In 1979, the parties were divorced in Colorado. The decree incorporated Mark and Jane's agreement for joint custody and joint physical care of the child. Two years later, the Colorado court modified the decree to award Jane sole custody of Zachariah. The court stated that the original agreement contemplated that both parties would continue to live in Fort Collins, Colorado. The fact that Jane had moved to Denver and Mark had moved to Des Moines, Iowa, was deemed to be a substantial change in circumstances.

In 1983, Mark filed a petition for modification of the decree to transfer sole custody to him. Since the previous modification, Jane had moved to Des Moines, Iowa. Mark asserted that Zachariah lived with him and his new wife 90 percent of the time, thereby justifying the change in custody. The trial court concluded that there were substantial changes in circumstances which warranted a modification, but determined that joint custody, not sole custody was appropriate. An order was entered setting up a joint custody arrangement with Mark having physical care of Zachariah. Jane has appealed from this determination.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While the findings of the trial court are not binding upon us, we view them with considerable weight. In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979).

The party seeking modification of custodial provisions of a decree has the burden to establish (1) a substantial change of circumstances not contemplated by the court when the decree was entered, and (2) conditions making it essential and

in the child's best interests that custody be changed. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

Jane asserts on appeal that this burden has not been met and custody should not be disturbed. She further asserts that even if joint custody is justified under the circumstances, physical custody should not have been awarded to Mark. We cannot agree.

In reviewing the record before this court, we are guided by the factors set forth in Iowa Code section 598.41 (1983). The legislature recently amended section 598.41(2), which now provides in part:

If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence . . . that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and the parent should be severed.

Iowa Code § 598.41(2); 1984 Iowa Legis. Serv. No. 3 at 43 (West). This provision expresses a clear preference for joint custody over other custody arrangements. In light of this statutory preference, we believe joint custody is appropriate in this case. The record does not contain clear and convincing evidence that joint custody would be unreasonable under the circumstances.

Since the time Jane was awarded sole custody of the parties' child, she has moved to Iowa and Mark has had considerable contact with Zachariah. This move could not have been contemplated by the Colorado court. The fact that both parties now reside in Des Moines is certainly conducive to a joint custody arrangement. Furthermore, we are inclined to defer to the trial court's conclusion that Mark has matured since the previous modification and is more capable and willing to accept his responsibilities as a parent. Mark's and Jane's testimony at trial conflicts somewhat in this respect. For instance, Mark admits to having used illegal drugs in the past, yet claims that he no longer does. Jane, however, maintains that she has recently seen him under the influence of illegal drugs.

Jane also claims that Mark has failed to keep arrangements and commitments regarding sharing Zachariah on numerous occasions. Mark denies this. The factual issues such as this which are raised by the record involve a decision regarding the credibility of witnesses. We are hesitant to disturb the findings of the trial court in this respect since we do not have the opportunity to observe the demeanor of the witnesses. The fact remains that there is sufficient evidence in the record to warrant a modification. We cannot fault the court for believing one witness's testimony over another's.

We also believe the record supports the trial court's determination that Mark should be awarded physical custody of Zachariah. Zachariah spends between 50 and 90 percent of his time living with Mark and his present wife. This is partially due to the fact that Jane's current job has varying hours and requires her to be gone during some evenings. She testified that rather than leave Zachariah with a babysitter she preferred to have him stay with Mark. The record reflects that Mark and his present wife have a comfortable home and are able to provide for the necessities of the child.

In affirming the district court's award of physical custody, we do not suggest that Jane is not responsible enough to care for her child. In fact, testimony indicates that she is a very caring parent who is concerned about the welfare of her child. However, we believe that Mark can minister more effectively to the routine daily needs of Zachariah.

Jane's role in this custody arrangement should not be minimized. In fact, the legislature has specifically provided:

[P]hysical care given to one parent does not affect the other parent's rights and responsibilities as a legal custodian of the child. Rights and responsibilities as legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

Iowa Code § 598.41(5); 1984 Iowa Legis. Serv. No. 3 at 44 (West). Both parties

should make every effort to share the rights and responsibilities of raising Zachariah. This court is confident that Jane and Mark will work together to provide a suitable environment for their child.

AFFIRMED.

All judges concur except Schlegel, J., who specially concurs and dissents.

SCHLEGEL, J., (concurring in part and dissenting in part.)

I concur in the court's grant of joint custody of the minor child to both the mother and the father. On the change of physical custody, however, I respectfully, but vigorously, dissent.

It is obvious, from the record of this matter, that there is insufficient support for a finding that: (1) there has been a substantial change in circumstances, justifying the consideration of a change in physical custody, or (2) that a change granting physical custody to the father is in the best interests of the child.

The only change of circumstances is the move of the mother from Colorado to Des Moines, Iowa. Her move placed the parents in the same city so that she could engender a more constant relationship between the boy and his father. It is apparent from the record that the mother continued to work, much as she had before, necessitating child care by someone other than herself during such occasions. Since the move, she has benefitted from the father being available to have the child during working periods. This has resulted in a closer relationship between the father and the child. Such a result should be encouraged without subjecting the custodial parent to potential change in custody and thereby discouraging such conduct.

There is no competent evidence that the mother was not a caring and proper custodian. The only doubt as to the future care of the child concerned whether the father has quit using drugs or has changed habits which were found to be counter to the best interests of the child by the Colorado court. I do not share the trial court's optimism or belief that he has so thoroughly changed as to become the one who can minister best to the needs of the child.

I would leave physical custody with the mother of this child.