

FILED

JUN 24 1980

CLERK SUPREME COURT

306

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KELLEY K. WINKEL AND LARRY LEE WINKEL

Upon the Petition of	)	
KELLEY K. WINKEL,	)	Filed June 24, 1980
Petitioner-Appellant,	)	
And Concerning	)	
LARRY LEE WINKEL,	)	0-127
	)	3-63878
Respondent-Appellee.	)	

Appeal from Johnson District Court - Robert Osmundson, Judge.

Petitioner-mother appeals from modification of dissolution decree transferring custody of minor child to respondent-father. Reversed in part; modified in part; and vacated in part.

Thomas D. Hobart, of Meardon, Sueppel, Downer & Hayes, Iowa City, and Willis Hamilton, of Hamilton Law Offices, Storm Lake, for petitioner-appellant.

Patricia C. Kamath, Iowa City, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell and Johnson, JJ. Carter, J., takes no part.

PER CURIAM

Petitioner-mother, Kelley Clausen, formerly Kelley Winkel, appeals from a modification of a dissolution decree transferring custody of the parties' minor child, Lance, to respondent-father, Larry Winkel. Kelley asserts that the trial court erred in modifying the child custody provision, and should have increased her award of child support, and should have modified the visitation provisions as it did but with Kelley retaining custody. We reverse the modification of custody and visitation rights, and vacate the modification of the child support award.

Our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially regarding credibility, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Kelley and Larry were married on August 14, 1971. The only child of the marriage, Lance, was born on February 18, 1975. The marriage was dissolved on March 16, 1976. Kelley was awarded custody of Lance, and Larry was granted visitation rights and was ordered to pay \$160 per month child support with the provision that Larry's child support obligation would increase as his adjusted gross income increased. Kelley subsequently remarried, but that marriage was dissolved on January 3, 1979. Kelley is presently employed as an accountant in Kansas City. Larry owns a soft wafer enterprise in Iowa City, and had plans for remarriage at the time of the modification hearing.

The parties have been in court numerous times since the date of the dissolution decree involving assertions of Larry's failure to pay child support and Kelley's lack of cooperation regarding visitation. The decree's visitation provisions were modified on December 1, 1978. On March 5, 1979, Kelley filed a petition for modification requesting increased child support and a reduction in Larry's visitation rights. Larry counter-claimed requesting a transfer of custody. The trial court modified the decree by transferring custody to Larry, ordering Kelley to pay \$200 per month child support and providing visitation rights for Kelley that were less than those previously possessed by Larry.

I. In reviewing a trial court order modifying child custody, our primary consideration is the best interest of the child. Iowa R. App. P. 14(f)(15). The burden is on the noncustodial parent to establish by a preponderance of the evidence that conditions have so materially and substantially changed that the best interests of the

child make it expedient to transfer custody from the custodial parent. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). The noncustodial parent must show a superior claim based on an ability to minister more effectively, rather than equally, to the child's welfare. Id. Once custody is fixed, it should seldom be disturbed except for the most cogent reasons. Id. The circumstances that are alleged to have changed must not be those that were within the contemplation of the trial court at the time of the decree. Id. Changes must be more or less permanent or continuous, not merely transitory, variable, or temporary. Id.

Our de novo review of the record leads us to conclude that Larry has not met his burden of showing a material and substantial change of circumstances sufficient to warrant a change of custody. The trial court cited Kelley's lack of cooperation with visitation, Larry's pending remarriage and establishment of a better home as support for its decision to change custody. These considerations, while noteworthy, are not sufficient to justify changing custody at this time. See Spotts v. Spotts, 197 N.W.2d 370, 371 72 (Iowa 1972). Moreover, we do not believe a change of custody would resolve the problems that prompted this action. This child has become an innocent pawn in the vicious battle waged between the parents, each parent asserting the best interests of the child as a justification for asserting their petty discordances. We should not be compelled to remind the parents that this continued conduct, if proven to be detrimental to the child's best interests, could result in the intervention of the State as parens patriae, through procedures delineated in chapter 232, The Code 1979. We simply reiterate the advice given to the parents in Melton, 256 N.W.2d at 207, and suggest that if Kelley and Larry are sincerely interested in the welfare of Lance, they will put their hostilities aside and strive to provide a loving environment.

II. Since we reverse the change of custody, we also vacate the order requiring Kelley to pay child support and address her contention that her award of child support should be increased. Kelley asserts that changed financial conditions justify increasing her child support award. Justifying modification of a child support award on that ground requires that the change of financial conditions be substantial. Melton, 256 N.W.2d at 205. Kelley claims that since she was living at home at the time of the decree and incurring no expenses, her financial condition has substantially changed to the point of requiring an increase in child support. However, it must also be observed

that Kelley was attending school full-time at the time of the decree, earning no income, and now she is working full-time as an accountant. We conclude that Kelley's increased need has been offset by her increased income and that she has not shown a substantial change of financial condition sufficient to justify an increase in her child support award. Furthermore, we think her change of financial condition was well within the contemplation of the trial court at the time it issued its decree.

Kelley also claims that the transportation costs for visitation have placed an unanticipated financial burden on her. However, those costs were incurred by virtue of the requirement that children under the age of five were not allowed to fly alone on the airlines. Since Lance is now over five years old, this problem should be alleviated.

Kelley further contends that Larry's business is successful enough to increase his ability to pay child support. In light of our review of the record and in light of the already existing escalator provision in the decree, we find no merit in this contention. Consequently, we vacate the trial court's modification requiring Kelley to pay child support, and reinstate the child support provision of the original decree.

III. Our reversal of the change of custody also requires reversal of the trial court's order regarding visitation. However, since Lance will be soon attending school, we think the visitation provision as modified by the order of December 1, 1978, which awarded Larry one week of visitation per month, is impracticable. Consequently, we merely reverse the parties in the visitation provision under review in the case at bar. Accordingly, Larry will be allowed visitation for one weekend per month, one week every other Christmas, and four consecutive weeks every summer, as indicated in the trial court's order of August 3, 1979.

In addition, we add the following provisions to the decree: Commencing in the month of September 1980, and during every even-numbered year thereafter, Larry shall have visitation on Labor Day weekend from six p.m. on Friday to six p.m. on Monday; on New Year's Day, from noon the previous day until noon on the day after the holiday; and on Memorial Day weekend, from six p.m. on Friday to six p.m. on Monday. Larry shall have visitation during every odd-numbered year, on Easter weekend, from six p.m. Friday to six p.m. Sunday; on Independence Day weekend, whether or not included in his summer visitation period, provided that Larry shall not have Independence Day weekend visitation for two consecutive years, from six p.m. Friday to six p.m. on Monday; and on

310

Thanksgiving weekend, from six p.m. on Wednesday to six p.m. on Sunday. Larry's exercise of visitation rights on the holidays as provided above shall not be construed as an exercise of his regular visitation for one weekend per month.

We also vacate that part of the order regarding telephone calls and order no restrictions or limits on telephone calls between Larry and Lance. We also order, in the interest of Lance's welfare, that Kelley should deliver, with Lance's doctor's permission, copies of all of Lance's medical records to Larry that he requests, and that Kelley shall keep Larry informed of all medical care administered to Lance.

Costs are taxed equally to both parties.

REVERSED IN PART; MODIFIED IN PART; AND VACATED IN PART.