FILED
DEC 27 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-677 / 90-798

IN RE THE MARRIAGE OF RONALD N. RUDEN AND DIANA E. RUDEN

Upon the Petition of
RONALD N. RUDEN,

Appellant,

And Concerning
DIANA E. RUDEN,

Appellee.

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Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

The husband appeals the district court's refusal to modify the parties' 1987 dissolution decree. **AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.**

Gail E. Boliver, Marshalltown, for appellant.

Michael J. Moon of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ.

HAYDEN, J.

Ronald and Diana Ruden were married in 1968. They had four children. The two older children are now adults. This dispute concerns the two children who remain minors. Those children are boys born in July 1974 and April 1976.

The marriage was dissolved in 1987. The dissolution decree placed the minor children in joint legal custody and in Diana's primary physical care, subject to Ronald's reasonable visitation rights.

In 1989 Ronald filed an application to modify the dissolution decree. He requested the two minor children be transferred to his physical care. In the alternative, he asked specific visitation rights be fixed.

After a hearing, the district court denied Ronald's request to modify the 1987 decree. Ronald has appealed.

Ronald contends the children should be transferred to his physical care. As a change of circumstances, he alleges Diana has harmed the children by deliberately alienating them from him. He also complains she pays too little attention to the children's academic progress and does not make sure they have medical and dental checkups.

In the alternative, Ronald contends his visitation rights should be specified. He complains Diana has discouraged visitation.

Diana requests attorneys' fees on appeal.

Our review of this modification action is de novo. Iowa R. App. P. 4. In equity cases like modification, we

give weight to the trial court's findings of fact, especially concerning credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(7).

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

We note initially these children are fourteen and sixteen years old. They are old enough to make their wishes known. They appear adamant in their desire to have nothing to do with their father. Part of this attitude is due to Diana's influence. While we do not approve of Diana's actions in this regard, like the trial court, we cannot impose good family relations here.

Only one child testified at trial. The boy, thirteen years old at the time, was confident, candid, and thoughtful. He declared his distaste for Ronald, based upon Ronald's lack of caring for the children. He stated Ronald had beaten up the children "[w]ith his hand or a

belt or whatever he could get his hands on." Additionally, he testified Ronald repeatedly embarrassed the children when their friends were over and acted in other inappropriate ways.

The boy testified he is active in farming activities. The boy is raising cattle, from calf to market. He does all the work, including the marketing and bookkeeping, himself. He is doing well in school. He exhibits a strong interest in agriculture.

He loves his mother and enjoys being with her. He loves his stepfather, who supports and nourishes him and shares in farming activities. He goes by the stepfather's name in school and had it inscribed on his football jacket. His oldest brother changed his name legally to the stepfather's upon reaching eighteen years of age.

In a grueling session on the witness stand, the boy displayed intelligence and dignity under intense questioning. Counsel for both parties then stipulated the other children if called would testify identically. The trial court stated: "think I'll accept that stipulation to avoid traumatizing the rest of the children like this child was. . . . I feel that the risk of harm to the child is greater than the benefits that might be derived from testimony from the rest of the group."

Ronald is moving to Milwaukee, Wisconsin, for employment reasons. To change custody to him in that new location would be, as the trial court said, disastrous. We

accordingly affirm the trial court on the issue of custody. The children are to remain in the custody of their mother.

Ronald asks for specific visitation. The children are reluctant to have anything to do with their father. However, some of this is attributable to the mother's antagonism towards her former husband. The best interests of the children would be served by some sort of continuing contact with their biological father. Iowa Code § 598.41(1). Hopefully this will lead to a healing of their relationship. We therefore reverse on this issue.

Ronald shall have visitation the first full weekend of each month. Visitation shall be from 9 a.m. Saturday to 5 p.m. Sunday. Ronald is responsible for transportation. He shall be prompt in his return of the boys at 5 p.m. Sunday.

Ronald shall have visitation for alternating Thanksgiving and Christmas vacations. He shall have visitation for Thanksgiving vacation of 1991, Christmas of 1992, and so on. He shall have visitation for the first two full weeks of July. Ronald is responsible for all transportation.

We affirm on the denial of custody, reverse on the denial of visitation, and modify to grant specific visitation.

Diana is awarded $500.00 in attorney fees.

Costs of this appeal are taxed to Ronald.

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.

Donielson, J., concurs; Oxberger, C.J., specially concurs and dissents in part.

OXBERGER, C.J. (Concurring specially and dissenting in part)

I respectfully concur specially and dissent in part. I would remand this case to the trial court to enter an order directing the parents and the boys to receive counseling at Des Moines Child Guidance Center. I would change the boys' custody to the father if the mother refuses to cooperate with the counselors, to restore the father-sons' relationship. I would order the visitation prescribed by the majority, but would limit its excerise pending developments at the Child Guidance Center.

I do not disagree with the trial court's findings of fact. In my judgment the boys long term best interests would be better served by restoring the father-sons relationship.

The trial court on November 7, 1989, ordered the parents and the boys to enter counseling at the Iowa Methodist Medical Center. On February 21, 1990, Mr. Dick Matland, L.S.W., reported to the court his finding after consultation with the parties at the hospital. He said:

> I met with Mr. Ruden's former wife, Diana Tuttle and his two children, Troy and Trent on November 20, 1989. I met with each of them individually and asked each of them what they would like to accomplish by their involvement with Spectum. Each of them informed me that they had no desire to come to Spectum and, at this point in time, had no desire to develop, improve, or attain a relationship with their biological father.

He concluded:

> After the initial session, it appeared to me that it would be counter productive to continue to request the boys come in for further sessions.

In my judgment the trial court should have ordered continued counseling sessions at the Des Moines Child Guidance Center. This facility is qualified to deal with a parent who undermines the other parent's relationship with the children. However, continued court insistence is absolutely vital to achieve any progress.

If this case was merely a case where a father's rights were being trampled on, I might be tempted to throw up my hands in frustration and let the mother have her way.

However, this case involves much more than a father's rights. The boys are greatly affected by the mother's conduct. The trial court found:

> The Respondent denies any interference with visitation rights of the Petitioner with his children, but the record reflects differently. She has abrogated her responsibility as physical caretaker of the children to ensure that they have continuing contact with their father. She has inappropriately transferred that responsibility to the children, who obviously respond to her subtle, but effective, implication that rejecting their biological father is acceptable. The counselors identify an attitude that she also exhibits in the courtroom reflecting that any conduct of the biological father is construed to be a negative act.

The trial court continued in its findings to find:

> The court has seldom seen such reaction among children to their biological parent. The extent of the antagonism of the children toward their father is not justified by the information provided to the court in this record. The vehemence of their negative reaction to their father has been a source of concern to counselors, as well as the court. The children identify certain reasons for the negative reaction to the father, but they fall far short of the type of activity that one would ordinarily expect to create the kind of reaction exhibited by the children.

The trial court found further evidence of harm to the boys due to the mother's conduct. The court found:

> A midterm progress report in the fall of 1989 reported both of the children do not pay attention in class adequately. The Respondent does not attend school conferences. Her explanation is that she does not need to attend as long as the children are doing well. The school records reflect that conferences were recommended by the teacher because of concerns for the children.

In earlier years, Trent was identified as a gifted child and was advanced a year in school.

The school records show that in the 1988-89 year Trent received a semester grade of D- in English and the teacher reported more effort was needed. The teacher noted that in physical education Trent had a disruptive behavior. In social science Trent received a D-.

Troy's report card indicated he received a D+ in industrial arts, an F in social science, an F in English and a D- in reading.

Both Trent and Troy received failing notice on December 4, 1989, for incomplete work.

Dr. Carroll D. Roland, psychologist, reported in a letter of January 29, 1990, his concern for the emotional health of Trent.

I too am concerned for both boys' emotional health. In my judgment the court must help these boys.