FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARY LINDA DOUGLAS
AND WILLIAM CHARLES DOUGLAS

Upon the Petition of)

MARY LINDA DOUGLAS,)

Petitioner-Appellee,)

And Concerning)

WILLIAM CHARLES DOUGLAS,)

Respondent-Appellant.)

67

Filed August 27, 1986

6-216
85-46

Appeal from the Iowa District Court for Johnson County (No. 1652) - L. Vern Robinson, Judge.

Respondent husband appeals from a modification of the decree dissolving the parties' marriage. He asserts (1) that the trial court should not have increased his child support obligation, and (2) that the trial court should have provided him with a procedure to enforce his visitation rights. **AFFIRMED.**

Lowell H. Forte of Maher & Forte, Cedar Rapids, for appellant.

Emmit J. George, Jr. and Jeannette M. Keller of Emmit J. George, Jr. Law Office, Iowa City, for appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM 68

The parties to this appeal, William and Mary Douglas, were granted a dissolution of their marriage by the District Court for Johnson County on September 16, 1974. At the time of that decree their son, Bill Jr., was five years old. Under the original decree, William was obligated to pay $165 per month in child support and was granted certain visitation rights. On August 13, 1980, the Johnson County District Court approved a stipulation entered into by the parties modifying the original decree. This stipulation increased William's child support obligation to $240 per month and set out more definite terms regarding William's visitation rights.

Mary informed William by letter dated February 23, 1983, of her move to West Germany in order to assume employment there. At this time, William began depositing his child support payments into a trust account in a local bank rather than forwarding them through the Clerk of Court of Johnson County to Mary.

On August 5, 1983, William filed an application to modify the prior decrees requesting temporary termination of his child support obligation and, upon Bill Jr.'s return to the United States, asking the court to establish a joint custody relationship and determine the level of support. Mary responded to this application by letter dated September 21, 1983, requesting the district court to allow her to complete her move back to the United States and to secure counsel prior to the court ruling on William's application.

On October 12, 1983, William filed an application for a contempt order which was issued the following day. On November 7, 1983, Mary filed a three-part pleading requesting the court to increase child support, responding to William's application to modify, and responding to William's contempt action.

William obtained court approval to pay the escrowed child support payments into the Clerk of Court, pending court orders. On November 23, 1983, the State of Iowa filed an application to hold William in contempt for withholding child support payments, which order issued the same day.

On December 12, 1983, Judge L. Vern Robinson held, following a hearing conducted by conference call, that neither William nor Mary were in contempt of court. On July 2, 1984, hearing was set for September 27, 1984, on Mary's motion for modification of the child support provisions of the prior decrees. A crowded docket resulted in the date of the hearing being moved to November 8, 1984.

Confusion arose at the hearing as to what was being heard, both applications for modification or only Mary's. The district court, on December 5, issued its decree stating that it had ample evidence to decide all issues which had been raised. The decree ordered joint custody of the parties for Bill Jr., with Mary retaining physical custody, and increased William's child support obligation from $240 to $300.

William then filed, on December 12, a motion for enlargement of findings, which was overruled on January 7, 1985. William then filed his notice of appeal with the supreme court.

William asserts that the district court erred in refusing to institute an enforcement procedure to secure his visitation rights and in increasing his child support obligations. Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 14(f)(7).

William asserts first of all that the district court erred in not providing for an enforcement procedure to ensure visitation contact between the appellant and his son and asks that we do so. Specifically, William urges that we mandate

a mechanism whereby he submits to the clerk of court, sometime prior to the commencing date of the visit, tickets for visitation indicating the inclusive dates. The tickets would then be sent to Mary, who is required to keep the clerk informed of her address. If the child does not show up for the visit, his support payments are escrowed with the clerk until such time as he arrives for the visit. In short, appellant urges us to construct a system under which support payments made for the sole benefit of his son are made contingent on the exercise of appellant's visitation rights.

Appellant directs our attention to two cases for support of his proposition. In the first of these, Gannon v. Gannon, 102 N.W.2d 677 (Minn. 1960), the Supreme Court of Minnesota held that it was within the discretion of the district courts of that state to suspend support payments accrued during the period when the other party has violated the dissolution decree's visitation provisions, so long as the welfare of the child does not require continuation of the payments. Id., at 680.

We believe that the law of Minnesota, as applied in Gannon, is at least partially at odds with the law and policy of this state. Our supreme court dealt with the relationship between child support payments and visitation rights in the context of an action to terminate a father's parental rights due to his failure to make child support payments in Klobnock v. Abbott, 303 N.W.2d 149 (Iowa 1981). The father argued that the child support payments were not made because the child's mother, the custodial parent, had refused to allow him to exercise his visitation rights. The court, in rejecting the father's argument, stated that

> [w]e decline to find that this [alleged refusals by the mother to allow visitation] is good cause for failure to provide support. [The father's] remedy if he felt he was not being allowed to exercise his visitation rights is not to unilaterally withhold support payments.

Id. at 152-53.

To the extent that they conflict, and we think that given the particular facts of this case the Minnesota court's recognition that the interests of the child are controlling may reconcile these cases, we find the reasoning in Klobnock to be controlling in the present context as a matter both of precedent and of logic. Our polestar in matters of child custody and visitation is the best interests of the child. See Iowa Code section 598.41 (1985). We do not believe that Bill Jr.'s best interests will be served by making William's support obligation contingent upon the exercise of his father's visitation rights. To hold otherwise would be to make the child's best interests subservient to those of the father. This is a step that we are statutorily prohibited from taking.

Nor do we believe that the second case relied upon by the appellant, Schnieder v. Schnieder, 207 Iowa 189, 222 N.W. 400 (1928), changes our outcome on this issue. In Schnieder, custody of the parties' two children had been given to the mother who, subsequent to the dissolution decree, moved from the family home in Council Bluffs, Iowa, to St. Louis, Missouri. The father argued that he had no obligation to pay alimony unless and until the mother and children returned to Council Bluffs, where he could more easily exercise his visitation rights. The Iowa Supreme Court held that the district court, which rejected the father's argument, had not abused its discretion. The supreme court did, however, allow the father to make his alimony payments to the clerk of court and agreed that the payments need not be made available to the mother until she filed a sworn statement with the district court listing the complete address where the children could be visited.

In the present case, unlike Schnieder, we are not dealing with a custodial parent who has kept the whereabouts of the parties' child hidden from the non-custodial parent. That is the only situation in which Schnieder lends credence

to the proposition that support payments may be withheld pending the exercise of visitation rights.

William suggests that the procedure he urges us to establish, and the potential suspension of support payments thereunder, do not violate Bill Jr.'s best interests because it allows him to "decide where the priorities lay." We are not persuaded by this claim. In addition, our decision today does not leave William remediless in situations where he is not allowed to exercise his visitation rights. As William ably points out in his brief, his remedies in such a situation include proceeding through a contempt order under Iowa Code section 598.23 (1985) and through criminal sanctions under Iowa Code section 710.6 (1985) for violation of a custodial order.

In summary, we decline to adopt, either as a general proposition or as a holding in this particular case, that the obligation to provide for maintenance and support of the child depends upon the exercise of a parent's right of visitation. See Gannon, 102 N.W. at 680. The non-custodial parent's responsibility for the support of his or her child is not conditioned upon the right of visitation, even though we recognize the importance of that right both to the non-custodial parent and the child. Id. Consequently, we refuse to mandate the procedure urged by William.

We hasten to add, and emphasize, that the parties to this action should bear in mind at all times that visitation rights are granted by our courts with an eye to the best interests of the child. In re Marriage of Hubbard, 315 N.W.2d 75, 82 (Iowa 1982). Implicit in the granting of visitation rights is a court's determination that it is in the child's best interests to have continued association with the non-custodial parent. Id. Cooperation between the child's parents is obviously essential in the efficient functioning of visitation awards, and we look unfavorably upon any parental action which results in this cooperation

being the exception rather than the rule. Once visitation rights are settled by a court, the non-custodial parent should not be forced into an endless series of court appearances in order to ensure that the child's best interests, through visitation, are preserved. Cooperation is the requirement, not the option.

William next argues that the trial court erred when it increased his child support obligations based upon a finding that Bill Jr.'s outstanding academic and athletic development constituted a substantial change in circumstances.

To justify the modification of child support provisions, some material change must be shown in the circumstances of the parties, financial or otherwise, making it equitable that other or different terms be imposed. In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977). This required material and substantial change must have occurred since the date of the original decree or any subsequent intervening proceedings which considered the situation and rights of the parties upon an application for the same relief. Id. at 254. Furthermore, the circumstances which have changed must be those which were not then within the contemplation of the trial court at the time of the original decree. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974). The change of circumstances should be permanent or continuous and not temporary. In re Marriage of Mayer, 347 N.W.2d 681, 683 (Iowa Ct. App. 1984).

The record in this case shows that Bill Jr., at the time of the district court's modification decree, was a sophomore in high school in Maryland. Although only fifteen years old, he was six feet tall and weighed approximately two hundred pounds. He had a 3.5 grade point average on a 4.0 scale and participated in football, wrestling, basketball, and baseball. His performance in these areas leads his mother to believe that he may receive an athletic scholarship to college. The record also shows Bill Jr.'s participation in summer sports camps, his obligation to purchase much of his own athletic equipment, and a number

of medical expenses incurred because of athletic injuries. As we have noted, the district court found the situation to constitute a material change in circumstances warranting an increase in child support obligations. We agree.

In determining the existence of a substantial change in circumstances, we may weigh the factors of increased school and medical expenses as well as the needs of growing children. In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981). In In re Marriage of Pieper, 369 N.W.2d 439 (Iowa 1985), the supreme court of this state found a material, uncontemplated change in circumstances sufficient to support a modification of child support obligations under facts much like those in the present case. In Pieper, appellant's son, subsequent to the 1975 dissolution decree, matured into an able student and competitive basketball player. In 1983, the son decided to attend college where he had been offered an athletic and academic scholarship. The Iowa Supreme Court had "no difficulty upholding the trial court's finding" that those facts were sufficient to allow for the modification of child support provisions.

We have, likewise, no difficulty in holding that given the facts of this case, the district court's modification of the child support provisions was warranted.

Finally, Mary requests reasonable attorney's fees for this appeal. In evaluating such a request, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa 1981). See Iowa Code section 508.36 (1985). We hold that Mary is entitled to a reasonable allowance for attorney's fees in the present case. William shall pay $500 to Mary for attorney services incurred on this appeal. Costs are assessed to William.

AFFIRMED.