IN THE COURT OF APPEALS OF IOWA

No. 4-475 / 94-0816

FILED
DEC 14 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF REBECCA VAN BUSKIRK AND MICHAEL VAN BUSKIRK

Upon the Petition of
REBECCA VAN BUSKIRK, n/k/a/ REBECCA STANLEY,

Appellant,

And Concerning
MICHAEL VAN BUSKIRK,

Appellee.

Appeal from the Iowa District Court for Keokuk County, Dan F. Morrison, Judge.

Rebecca appeals the district court's grant of Michael's petition for modification of the dissolution decree's custody provisions. **REVERSED.**

Robert M. Box of Box & Box Attorneys, Ottumwa, for appellant.

R.T. Starken of Alexander & Starken, Ottumwa, for appellee.

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

CADY, J.

We are asked in this appeal to overturn a decision by the district court which modified the primary care provisions of the parties' decree for dissolution of marriage. In our de novo review, we find insufficient evidence to support modification and reverse.

Rebecca and Michael were divorced in August 1990. They have two children. Nicholas was born February 8, 1984 and Christopher was born August 11, 1987. Rebecca and Michael were awarded joint legal custody of the children under th dissolution decree, with physical custody to Rebecca.

Rebecca is twenty-eight years old, remarried, and l with her husband in Ottumwa. She is a licensed prac nurse and works twenty to forty hours a week at a home in Oskaloosa. Michael is not remarried but li Bonnie Yoder and her two children, Ryan, age el Nicole, age nine, in Fairfield, Iowa. Michael contemplate marriage after the action to diss current marriage is completed. Michael ar lived together since 1990. Michael works infusion manufacturing company in Mt. Pl $9.00 an hour.

Michael filed a petition for m custodial provisions of the dissolu 1993. He requested that physical Christopher be placed with him.

Numerous witnesses testified on behalf of Rebecca and Michael at the modification hearing. Michael presented evidence that the children were unclean, improperly dressed and poorly supervised at times while in Rebecca's care. There were also times when Michael encountered problems exercising visitation. Rebecca has moved frequently since the divorce, including a brief move to Utah. Rebecca and her husband currently reside with the children in the home of Rebecca's mother.

Michael has lived in the same house since the divorce, and has maintained the same job for the two years prior to the modification hearing. His relationship with Bonnie Yoder is strong.

Rebecca testified that any problems with visitation since the divorce have been minimal. She also contradicted Michael's other allegations. The children, especially Christopher, have special educational needs, and Rebecca has been actively involved in their school. School personnel reported the children were generally doing well, were appropriately dressed, and presented no discipline problems. The children are active, and involved in cub scouts.

The district court ordered a home study following the presentation of the evidence. The home study recommended physical care of the children be placed with Michael. The district court subsequently ordered that primary care of Nicholas and Christopher be transferred to Michael. It

found Michael exhibited more maturity than Rebecca and could provide a more stable home environment.

Rebecca appeals. She argues that the court erred in finding a material and substantial change in circumstances. Rebecca also asserts that Michael did not demonstrate that he can more effectively minister to the needs of the children.

Our review is de novo. Iowa R. App. p. 4. We give weight to the findings of the trial court, but are not bound by them. Iowa R. App. p. 14(f)(7).

Several legal principles stand as a predicate to a modification of the custodial provisions of a dissolution decree. The applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the best interests of the children make it advisable to modify custody. In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The changed circumstances must not have been contemplated by the court at the time of the decree, and must be more or less permanent. Id. The parent seeking to become the custodian or physical caretaker must also prove an ability to minister more effectively to the children's well being. Id. This rather heavy burden stems from the established rule that custody or physical care of children should be disrupted only for the most trenchant reasons once it has been established. See In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa

1980); In re Marriage of Leyda, 355 N.W.2d 862, 864-65 (Iowa 1984).

The grounds urged by Michael to establish a change in circumstances since the divorce include trouble exercising visitation, inadequate supervision by Rebecca, and general instability by Rebecca. He also claims a superior ability to provide a better home environment.

We recognize that efforts by a custodial parent to deprive the other parent of court-orderd visitation may constitute a permanent material change in circumstances. In re Marriage of Quirk-Edwards, 509 N.W.2d 476, 480 (Iowa 1993). The evidence of the denial of visitation in this case, however, was vague and inexact. Moreover, the thrust of the brief references in the record to the occasional visitation problems often followed those times when Rebecca would become upset after Michael failed to show up for scheduled visitation. Furthermore, Michael did not allege denial of visitation in his detailed list of grounds to support modification in his petition. He also acknowledged Rebecca allowed his family members to pick up the children for visitation when he was unable to do so.

The other circumstances outlined by Michael to support modification generally amounted to a continuation, or a recital in some instances, of the same circumstances which existed at the time of the divorce. Michael was critical of Rebecca's supervision of the children, but many of the events illustrating the lack of supervision occurred prior

to the divorce. Michael also objected to the number of times Rebecca moved since the divorce, but Michael and Rebecca often moved during their marriage. They even lived with Rebecca's mother at times, as Rebecca does now. A modification of custody proceeding involves circumstances which have materially changed since the divorce, not a relitigation of circumstances which existed at the time of the divorce. See In re Marriage of Cervetti, 497 N.W.2d 987, 901 (Iowa 1993). The child custody provisions of a decree are viewed to be final as to circumstances existing at the time of the divorce. Black v. Black, 203 N.W.2d 121, 124 (Iowa 1972).

The only real change in circumstances since the divorce has been Michael's steady home enviornment and two-year work history. These changes, however, are not so forceful that modification is justified. Michael's three-year live-in female friend was still married to another man at the time of the modification hearing. Michael had also lost his driver's license, and did not have a telephone in his home until two months before the modification hearing. Moreover, his newly found home stability has not translated into a greater awareness of the important educational lives of the children. Michael expressed virtually no interest in the children's school and their special educational needs until the eve of trial.

We recognize the court-ordered home study recommended Michael should receive physical custody of the children.

This recommendation, however, was premised on the investigator's belief that Michael was better able to provide a stable environment with appropriate adult and generational roles. It was based on the current situation of the parties, not a change in circumstances. After their unsuccessful move to Utah, Rebecca and her husband are committed to making their home in Iowa.

In our de novo review of modification actions, we must avoid deciding the issue of physical care under the standards applicable to an original divorce proceeding. A substantial and somewhat permanent change in circumstances must be found at the heart of the case, and those circumstances must be forceful enough to disrupt the permanence sought in establishing a custodial arrangement. The circumstances in this case fall short. Furthermore, Rebecca has appropriately cared for the children since the divorce. She has been active in their educational needs. The children are well-adjusted, in good general health, and acclimated to their custodial arrangement.

We reverse the decision of the district court. The evidence in the case does not meet the essential standards to justify modification.

REVERSED.