IN THE COURT OF APPEALS OF IOWA

No. 0-281 / 99-1766
Filed May 31, 2000

FILED
MAY 31 2000
CLERK SUPREME

IN RE THE MARRIAGE OF TERENCE M. HAAG AND AUDREY JEAN HAAG

Upon the Petition of
TERENCE M. HAAG,
Petitioner-Appellant,

And Concerning
AUDREY JEAN HAAG,
Respondent-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Jon S. Scoles, Judge.

Terence Haag appeals from a district court order denying his petition to modify the primary care provisions of the parties' dissolution decree. He contends the district court erred in refusing to transfer primary physical care of the parties' daughter from Audrey Haag to him. Audrey seeks an award of appellate attorney fees. **REVERSED AND REMANDED.**

John G. Sorensen of Stanton & Sorensen, Clear Lake, for appellant.

F. David Eastman of Eastman Law Office, Clear Lake, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

SACKETT, C.J.

Petitioner-Appellant Terence M. Haag appeals challenging the district court's refusal to modify the custodial provisions of the October 31, 1994, decree dissolving his marriage to Respondent-Appellee Audrey Jean Haag. Terence had petitioned for modification asking he be granted primary physical care of the parties' only child Sarah, born March 12, 1987. Terence contends he met the burden necessary for the change in showing among other things: (1) Sarah's preference for living in his home, and (2) the drug and alcohol use of Sarah's mother. We agree and reverse the district court and transfer primary physical care to Terence. We remand to the district court to fix the child support obligation of Audrey.

The 1994 dissolution decree approved a stipulation where Terence and Audrey agreed they have joint physical care of Sarah and Audrey have primary physical care. The arrangement continued with Terence exercising visitation until the summer of 1999 when at the end of a scheduled one-week visit with her father, Sarah called her mother and told her she wanted to stay with her father. Audrey told Sarah she could not and Sarah told her mother she was not coming home. Audrey initiated a proceeding to have Terence found in contempt of court for not returning Sarah. A hearing was held on July 20, 1999. The judge ordered Terence to return his daughter to her mother. Terence complied and immediately filed this application for modification.

After the dissolution both parents established relationships with a member of the opposite sex. At the time these problems surfaced Terence had lived with Alena and Audrey had lived with Ralph for about five and one-half years. The

four people all testified they each considered their relationships stable and long term. Neither couple is married.

Sarah testified in court chambers. The judge questioned her. The attorney for both her mother and father were present. She made it clear she wanted to live with her father. Her major reasons were her mother and Ralph's use of alcohol; her discomfort with Ralph; and her good relationship with Alena and her father. She testified as to Ralph, "He embarrasses me. But when I'm like home alone when he's there, usually stay in my bedroom because I really don't like to be around him."

It was conceded that while Audrey and Terence were married they used drugs and alcohol. Audrey and Ralph admit the use of alcohol and drugs and taking Sarah to bars. They contended that they had quit using drugs the year of trial. Audrey is employed at a convience store. Ralph has part-time employment putting in docks and other similar work. Ralph has three children from a prior marriage. One child lives on his own and the other children live with their mother. They visit in Ralph's home but not when Sarah is present. She has no relationship with them.

Neither Ralph nor Audrey has a driver's license. Ralph was convicted of driving while intoxicated and ultimately his license was suspended. Audrey drove without insurance and lost her license because she has not paid a property damage claim resulting from an accident. On two occasions law enforcement was called to Audrey's home because of alleged physical violence between Audrey and Ralph. Once the neighbors called and the second time Ralph did. Ralph testified he made the call as a joke. Both Audrey and Ralph in their

testimony tended to minimize the nature and extent of any problems between them.

Terence is gainfully employed and has stability in his job. Alena is also steadily employed. In addition to exercising visitation Terence, accompanied by Alena, has attended Sarah's school activities with greater frequency than Audrey.

We review de novo. Iowa R. App. P. 4. Modification of a custody decree is justified only if there has been some material and substantial change in the circumstances of the parties. *Thayer v. Thayer*, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. *Id.; Mears v. Mears,* 213 N.W.2d 511, 513 (Iowa 1973). Circumstances that have changed must be those that were not within the contemplation of the trial court when the original decree was entered. *In re Marriage of Full*, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. *In re Marriage of Carlson*, 338 N.W.2d 136, 141 (Iowa 1983).

The knowledge of the trial court at the time the award is made is the basis for determining whether there has been a change of circumstances. *Full*, 255 N.W.2d at 159; *Leo v. Leo*, 213 N.W.2d 495, 496 (Iowa 1973). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. *Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa App. 1996); *Mears*, 213 N.W.2d at 514.

Terence was made a joint custodian in the dissolution decree. He consequently is benefited in seeking physical care by the inference he has met the joint custody tests set forth in *In re Marriage of Burham*, 283 N.W.2d 269, 274

(Iowa 1979). However, in seeking a change in physical care he carries a burden similar to that imposed on a parent seeking a change of custody. *In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984). Terence has the burden to establish by a preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that Sarah's interests make it expedient to transfer her physical custody to him. *See In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

Sarah's close relationship with her father is evidenced by her testimony indicating she wants to live with her father. This is given some weight, but less weight in a modification than in an original custodial determination. *Marriage of Mayfield,* 577 N.W.2d 872, 873 (Iowa App. 1998); *see also In re Marriage of Behn,* 416 N.W.2d 100, 101-02 (Iowa App. 1987). Deciding custody is far more complicated than asking children with which parent they want to live. *In re Marriage of Ellerbroek,* 377 N.W.2d 257, 258 (Iowa App. 1985). Iowa Code section 598.41(3)(f) provides:

> In considering what custody arrangement . . . is in the best interest of the minor child, the court shall consider the following factors:
>
> * * *
>
> f. Whether the custody arrangement is in accord with the child's wishes or whether the child has strong opposition, taking into consideration the child's age and maturity.

In determining the weight to be given Sarah's testimony we consider among other things the following factors: (1) Sarah's age and educational level; (2) the strength of Sarah's preference; (3) Sarah's relationship with family members; (4) the reasons she gives for her decision. *See Ellerbroek,* 377 N.W.2d at 258-59.

Sarah is described in testimony as "a very good girl" and "a mature girl". She professes to have a better relationship with her father than with her mother. She testified she has a close and confident relationship with Alena. Sarah is concerned about the time she must spend with Ralph, as well as his drinking. Sarah testified she seeks to get away from him as much she can. However, Yvonne Bird, a friend of Audrey's who frequently is in Audrey's home, testified in response to a question asking for her observations of Ralph and Sarah, "They joke around. They wrestle around. They seem to get along just fine." Sarah's testimony indicates there has been drug abuse in both homes although the abuse in her mother's home is more recent.[1] Sarah claims that her mother and Ralph are heavy drinkers.

Sarah is mature. She has valid concerns about life in her mother's home. There is excessive alcohol use in that home. Sarah does complain about her mother's treatment of Sarah's best friend. However; it does not appear that Sarah seeks a change because there will be less discipline or structure in her father's home.

Terence completed the Children in the Middle course. Audrey did not. While Sarah's preference alone may not be sufficient to change custody the problems that exist in her mother's home support the change. We reverse to modify to make Terence the primary physical custodian. We remand for the purpose of fixing Audrey's visitation and child support obligation.

REVERSED AND REMANDED.

Sackett, C.J. and Huitink, J. concur, Vaitheswaran, J. dissents.

---

[1] The mother and friend said they had ceased drug use in April of the year of the trial in this matter, which was held October 5 and 6, 1999.

VAITHESWARAN, J. (dissenting)

I respectfully dissent. I agree with the district court that "Terry has not met his 'heavy burden' of showing a substantial change in circumstances and an ability to provide for Sarah's needs which is superior to that of Audrey." As the district court noted, Terence's principal argument in support of modification was Sarah's stated preference to live with him. Sarah was twelve at the time of the modification proceedings. When asked the basis for her preference, Sarah stated only, "why I really want to go live with my dad is he pays my bills. . . . He takes me to the doctor for checkups." When asked to explain why she elected to stay with her father for an additional two months one summer in contravention of the decree's visitation schedule, she stated, "I was tired of her yelling at me. I was tired of Ralph always persuading her to do things that she really didn't want to do but she wanted to make him happy so she just did them." I am not convinced these statements are sufficient to satisfy the high burden Terence carries. *See In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998) (child's preference given less weight in a modification).

The district court reached its conclusion to leave Sarah with her mother only after conducting a lengthy and probing interview of Sarah in chambers. The court had the particular benefit that we do not have of seeing and judging the demeanor of both Sarah and her parents. The court carefully weighed Sarah's preference and the other factors cited by Terence before arriving at its considered decision. Although our review is de novo, I believe this case warrants particular deference to the district court's fact findings. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474 (Iowa 1989) (reversing trial court but noting "a

trial court, as first-hand observer of witnesses, holds a distinct advantage over an appellate court, which necessarily must rely on a cold transcript.") Therefore, I would affirm.