FILED
JUN 29 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LINDA LAVON CLARK
AND FORREST ARTHUR CLARK

26

Upon the Petition of)

LINDA LAVON CLARK, now known as LINDA LAVON POWELL,) Filed June 29, 1982

Petitioner-Appellee,)

And Concerning)

FORREST ARTHUR CLARK,)

Respondent.) 2-244
3-67873

PAUL CLARK and VIRGINIA CLARK, Paternal Grandparents,)

Appellants.)

Appeal from Greene District Court - James C. Smith, Judge.

The paternal grandparents of the parties' children appeal from a decree which modified the child custody provisions of the parties' dissolution decree by awarding custody to the petitioner mother. AFFIRMED.

G. Michael Kealhofer of Spellman, Spellman, Spellman, Spellman & Kealhofer, Perry, for appellants.

Randy V. Hefner of Van Werden & Hulse, Adel, for petitioner-appellee.

Nicola J. Martino, Jefferson, guardian ad litem for the children.

Heard en banc.

DONIELSON, J.

The paternal grandparents of the parties' children appeal from a decree which modified the child custody provisions of the parties' dissolution decree by awarding custody to the petitioner mother. We affirm.

I.

Petitioner Linda Lavon Clark filed a petition for dissolution of her marriage to respondent Forrest Arthur Clark in February, 1977. The parties' two children, Paul and Ian, went to live with respondent's parents, Paul and Virginia Clark, in Missouri the same month. The dissolution decree, entered in June, 1977, awarded custody of the two boys to respondent, but they have continued to live with respondent's parents since the date of the decree. Respondent has been with them in Missouri only occasionally and has not actively participated in the children's upbringing.

In July, 1981, petitioner refused to return the children to the grandparents after one of their visits. Soon thereafter, she applied for a modification of the decree, requesting that custody be transferred to her. Respondent resisted the application, stating that his parents should be given custody. Paul and Virginia Clark then moved to dismiss petitioner's application, asserting that the Iowa court did not have subject matter jurisdiction under section 598A.3, The Code, to modify the decree, and that even if it did have jurisdiction, it should decline to exercise that jurisdiction under section 598A.8, The Code, because of petitioner's conduct in refusing to return the children. Petitioner resisted the motion to dismiss, and the trial court denied it. Trial was held and the court granted petitioner's application for modification and transferred custody of the children to her.

II.

On appeal, the grandparents assert the Iowa trial court lacked subject

matter jurisdiction under the Uniform Child Custody Jurisdiction Act, Chapter 598A, The Code. More specifically, they make the following arguments: (1) there was no subject matter jurisdiction under section 598A.3, The Code; and (2) even if the Iowa court did have jurisdiction, it should have declined to exercise jurisdiction under either section 598A.7 because Iowa is an inconvenient forum or under section 598A.8 because the petitioner sought modification after she had refused to return the children to Missouri and improperly retained them in Iowa.

Our review of jurisdictional issues under chapter 598A is de novo. St. Clair v. Faulkner, 305 N.W.2d 441, 445 (Iowa 1981). The trial court generally has continuing subject matter jurisdiction to modify a child custody provision of a dissolution decree. § 598.21, The Code 1981. However, "[o]rders relating to custody of children shall be subject to the provisions of chapter 598A." § 598.21, The Code 1981.

We find the trial court did have subject matter jurisdiction under section 598A.3(b), which provides:

> b. It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; . . . .

The petitioner mother has lived in Iowa continuously since the original Iowa decree that awarded custody to the respondent father. While respondent did have legal custody, for the past four and one-half years he has delegated the actual physical care and custody of the boys to his parents, and apparently he does not want active physical custody. The grandparents and the boys have lived in Missouri continuously but it is not clear from the record in what state the respondent claims to be a resident. We find that under these confusing circumstances, Iowa does have a significant connection because at the time of

filing both the petitioner and the boys were in Iowa. Furthermore, there is substantial evidence available in Iowa concerning the children's present and future care, protection, training, and personal relationships. Additionally, we do not believe this case presents an appropriate set of circumstances to decline jurisdiction under either section 598A.7 or 598A.8. We affirm the trial court's determination that it had subject matter jurisdiction under chapter 598A, The Code.

III.

The grandparents' final assertion is that the trial court erred in granting custody of the boys to petitioner. We disagree.

Our review of modification proceedings is de novo. Iowa R. App. P. 4. The principles governing such proceedings are well established. The best interests of the minor children are our first concern. Iowa R. App. P. 14(f)(15); In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). The noncustodial parent has the burden of establishing by a preponderance of the evidence that there has been a material and substantial change of circumstances since entry of the original decree, not within the contemplation of trial court at that time, which makes it expedient to change custody. Id.; Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976). Where the custodial parent has properly provided for the children's social, moral, and educational needs, and the children have become attached to their environment, the court is not justified in transferring custody except for the most cogent reasons. In re Marriage of Woodward, 228 N.W.2d 74, 76 (Iowa 1975). The parent seeking to take actual custody must show some superior claim based on his or her ability to minister, not equally but more effectively, to the children's well-being. In re Marriage of Ivins, 308 N.W.2d 75, 78 (Iowa 1981). Melton, 256 N.W.2d at 204. We apply these principles in light of the factors enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1976). In re Marriage of

Dawkins, 285 N.W.2d 8, 9 (Iowa 1979).

Because appellants assert that they should be awarded legal custody, we also must address the issue of whether legal custody should be granted to petitioner, the boys' natural mother, or to the boys' paternal grandparents who are third parties. The record reveals respondent has not exercised active physical custody of the boys in the past and does not want such custody now. There is a rebuttable presumption that custody of children should be placed with a natural parent. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511 (Iowa 1976). The burden is upon the third party to rebut the presumption and establish that the natural parents are not suitable custodians of the children. Patten v. Patrick, 276 N.W.2d 390 (Iowa 1979).

We find that petitioner has sustained the burden of demonstrating her superior claim to custody due to changed circumstances. Since the time of the original decree awarding custody to respondent, petitioner has remarried, successfully completed treatment for alcoholism, and established a stable home for Todd, the older half brother of Paul and Ian. In addition, the original decree did not contemplate permanent physical custody of the children being informally granted to third parties. Therefore, we further find that appellants have failed to rebut the presumption favoring the award of custody to a natural parent over a third party. The trial court's modification of custody is affirmed.

AFFIRMED.