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248

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF NANCY LEE ROBBINS AND DAVID T. ROBBINS

Upon the Petition of	)	
NANCY LEE ROBBINS,	)	
Petitioner-Appellant,	)	Filed February 24, 1981
And Concerning	)	0-391
DAVID T. ROBBINS,	)	3-64163
Respondent-Appellee	)	

Appeal from Polk District Court - A. B. Crouch, Judge.

Petitioner mother appeals the trial court order modifying the parties' dissolution decree to award respondent father custody of the parties' two minor children. AFFIRMED.

Gary R. Hassel, of Harding & Hassel, for petitioner-appellant.

William A. Price, of Stevens, Price & Fultz, for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Petitioner Nancy Robbins O'Leary appeals the trial court order modifying the parties' dissolution decree to award custody of the parties' two minor children to respondent David Robbins. We affirm the modification.

Our review of this equitable matter is de novo. Iowa R. App. P. 4.

I.

The eight-year marriage of Nancy and David Robbins was dissolved by trial court decree on April 12, 1979. At that time, both parties sought and were awarded joint custody of the two minor children. The parties had in fact operated under a joint custody arrangement during their separation for a year prior to the dissolution, and each party testified that the other was a "very good" or "fantastic" parent. After expressing some reservations over the arrangement, the trial court allowed the joint custody situation to continue in light of its past success.

On April 26, 1979, the petitioner mother filed an application to modify the joint custody provision of the decree and requested that she be granted sole custody of the children. She alleged as a material change in circumstances her intention to remarry and to reside with her future husband in Connecticut. The respondent father then filed a resistance and cross-application seeking joint custody of the children.

Three days before hearing on the custody matter, the petitioner married David O'Leary. Both petitioner and O'Leary testified that their decision to marry at this time was made to demonstrate to the court their intention to provide a permanent environment for the children. Petitioner also testified that she intended to move to Connecticut regardless of the outcome of the modification hearing because of O'Leary's established position there.

In a social service report ordered prior to the hearing, a social worker expressed concern about the fact that the petitioner had recently adopted the Eckankar religion. The report did not discuss the living arrangement in Connecticut; nor did it include information on the background of David O'Leary. Affidavits and other written statements were introduced at the hearing on the subject of O'Leary's character and the Connecticut environment, and O'Leary appeared and testified at the hearing himself.

Witnesses who appeared for both parties were in the main relatives or friends. Petitioner and respondent testified to their past use of marijuana and amphetamines. Petitioner stated that she has abstained from such use for over a year and a half.

Respondent, on the other hand, acknowledged continued use on a social level or to alleviate pressures deriving from the dissolution and custody proceedings. Other evidence revealed that both parties contributed equally to the actual care of the children. Although the petitioner appears to possess superior homemaking abilities, the respondent spends more time in active games with the children.

The trial court modified the original decree to give sole custody of the children to the respondent, noting the petitioner's recent involvement with the Eckankar religious movement and a concern for what the court described as the "callous manner" in which the petitioner decided to marry and move while this matter was pending. The court also expressed concern about the respondent's use of drugs but found no evidence to indicate that his drug use interferred with his role as a father. Observing that the children have developed a strong relationship with a number of relatives in the Des Moines area, the court then concluded that removing the children from this area would deprive them of this important relationship with their relatives.

II.

Petitioner now appeals the trial court's modification and subsequent grant of custody to the respondent, alleging that the prospect of the two-parent home that she could provide for the children was not adequately balanced against the fact that the children and the respondent would probably reside with the children's grandparents if respondent was awarded custody. We find no merit in petitioner's position.

Child custody provisions of a dissolution decree are final as to circumstances existing at the time of the original decree and should be modified only where subsequent conditions have so changed that the child's welfare requires modification and the party seeking modification can more effectively minister to the child's well-being than the current custodial parent. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976). Our paramount concern is the best interest of the child. Iowa R. App. P. 14(f)(15).

Petitioner's unilateral action in changing her domicile to Connecticut presents a change of circumstances that makes it both expedient and necessary to change the joint custody arrangements provided in the original decree. Clearly, joint custody is no longer a feasible alternative. Faced with this situation, the trial court was forced to determine which of the two parents should now have the sole custody of the children--a decision to be made in accordance with the children's best interests. We conclude on the record presented that the trial court decided this issue correctly. Petitioner's

position appears to be that a sufficient change in circumstances is presented by her remarriage and her ability to provide a two-parent home for the children. In support of her position, the petitioner points out that if the award of custody to the respondent is upheld, it is probable that the children will live with their father in a home provided by their grandparents. Petitioner's argument implies that the prospect of a two-parent home is somehow preferable to the probability of a home for the children provided by the grandparents, but we do not agree that the law recognizes such a preference. The child-grandparent relationship is an important familial right, as is evidenced by the fact that this state grants visitation rights to grandparents where such visitation is in the best interests of the child. § 598.35, The Code 1979. Furthermore, it is increasingly frequent in these days of inflation that grandparents will be called upon to participate financially and otherwise in the raising of their grandchildren where, as here, the children's parents have limited means. For these reasons, we do not believe that the ability to provide a two-parent home should be seen as a change in circumstances sufficient to justify modification of the award of custody to respondent. This is particularly true where, as here, the children have developed a strong relationship with their grandparents but have had very little meaningful exposure to the petitioner's new husband. In short, petitioner has failed to show that her new circumstances would improve the children's situation and modification is therefore not warranted.

Petitioner raises further concerns that the trial court's decision to modify the original custody arrangement was unduly influenced by her recent adoption of the Eckankar religion and that the court improperly ignored the respondent's admitted use of marijuana. Questions have also been raised about the respondent's alleged dependence on his relatives. These are serious concerns that merit discussion. However, we note that the religion factor is not totally irrelevant to the question of custody, see In re Marriage of Moorhead, 224 N.W.2d 242, 244 (Iowa 1974), and we are not prepared to say that the matter received undue attention from the trial court. Furthermore, while we are deeply concerned about the respondent's continued use of marijuana, we have seen no evidence that his drug use affects his demonstrated and acknowledged fitness as a parent. However, we note that any such evidence would be viewed with great disfavor by a court in any subsequent litigation raising the issue of the custody of these children. Finally, if in fact it can be said that the respondent is too dependent on his relatives, we think any such tendency on his part is outweighed by

the lack of stability demonstrated by the petitioner when she decided to marry a man in whose presence she had spent only two and a half weeks and with whom her children had only had contact over a period of time totalling five or six days at most. Nor are we impressed by the petitioner's decision to remove her children to a state and home environment with which they have had absolutely no contact. It is obvious to us that the trial court based its custody determination on known rather than unknown factors, and we are mindful that although we are not bound by the findings of the trial court on de novo review, we may give weight to those findings, particularly where the credibility of witnesses is involved. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). All things considered, we are satisfied that the respondent should have sole custody of these children.

AFFIRMED.

OXBERGER, C.J. (dissenting)

Religion is one factor which may affect the court's determination. In re Marriage of Moorhead, 224 N.W.2d 242 (Iowa 1974). In the instant case, neither parent intends to impose any particular religion upon the children. Nancy's adoption of the Eckankar way of life is personal to her and does not pose a threat to the children's welfare. I note that O'Leary proposed the children be instructed in a main stream religion until they are of an age to decide their own religious pursuits. David, on the other hand, has not actively practiced a religion nor led the children in that endeavor. The religion factor, therefore, does not seem to be a dominant concern in the case.

I believe two factors are of primary concern: the effect of the move to Connecticut on the children and the kind of parenting to be given. The move itself does not reflect upon Nancy's parenting abilities which have already been established. The effect on the children of removal from the relatives is not to be discounted, but in view of the children's ages, combined with liberal visitation provisions, this effect should be minimal and short-lived. The Connecticut environment would afford the children a two parent home as opposed to living under the roof of grandparents and great grandparents. At this stage in the children's lives I find this factor to warrant considerable weight.

David's continued use of marijuana also cannot be ignored when determining the best interests of the children. In addition to the drug's illegality, David's dependence upon its mind-easing effects during pressured times is a factor for us to consider. The evidence does not assure us that the children's environment would be free of this element in the future if they were in David's care. Neither can I conclude, in light of the entire record, that petitioner's decision to marry O'Leary shows a lack of stability on her part.

Notwithstanding David's abilities as a parent and his undisputed love and concern for his children, I find custody should be awarded to Nancy.

Johnson, J., joins in this dissent.