

FILED

JUN 29 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SUSAN KAY YOUNG AND CHARLES RAY YOUNG

UPON THE PETITION OF
SUSAN KAY YOUNG,

Petitioner-appellee,

AND CONCERNING

CHARLES RAY YOUNG,

Respondent-appellant.

)
)
)
)
)
)
0

Filed June 29, 1982

2-176
3-67222

208

Appeal from Jasper District Court, Rod Ryan, Judge.

The father appeals the order awarding permanent custody of the parties' two daughters to the mother. **AFFIRMED.**

R. Eugene Knopf of Diehl, Clayton, Cleverley & Knopf, Newton, for respondent-appellant.

Gerald B. Feuerhelm of Matthias, Tyler, Nuzum & Feuerhelm, Newton, for petitioner-appellee.

Heard en banc.

The father appeals the order awarding permanent custody of the parties' two daughters to the mother. We affirm.

The parties were married on April 11, 1975. They had two daughters, Julie Ann, born September 10, 1975, and Traci Renea, born April 10, 1978. The dispute concerns custody of the two daughters.

The parties separated August 11, 1980. The mother had custody of the children until December 26, 1980. At that time, she voluntarily gave the children to the father. He has had custody since that date.

Trial was held February 10 and 11, 1981. The trial court gave temporary custody to the father. The court stated it wanted further evidence to be presented by August 21, 1981, when it would make a permanent custody award, unless the parties made application to have the question decided at an earlier date.

Such application was made, and on July 20, 1981, an order was filed granting permanent custody to the mother. It terminated the father's temporary custody as of August 16, 1981, subject to the father requesting further hearing by that date. The father did so, further hearing was held, and a new order was filed September 3, 1981. The new order affirmed the award of permanent custody with the mother and ordered the transfer to take place on September 4. On September 3, Justice Allbee entered a temporary stay order, which stayed the transfer pending disposition of the appeal. A permanent order was entered September 11.

On appeal, the husband asserts that the trial court erred in ordering the temporary custody in its final decree, the trial court erred when it gave the mother permanent custody because there was no showing of substantial change of circumstance, and the children's best interest would best be served by remaining with the father.

I. Temporary Custody Award

210

The supreme court discussed temporary orders in final decrees in Marriage of Schlenker, 300 N.W.2d 164 (Iowa 1981). The court discouraged trial courts from retaining jurisdiction to modify decrees without a showing of change of circumstances, but said "there may be exceptional cases justifying a departure from" the rule that the trial court "should make final disposition of cases on the circumstances then existing." Id. at 165. The court stated "[o]nly when the decree unequivocally provides for later trial court review without the necessity of showing a change of circumstances will we say this was the trial court's intent." Id. at 166.

In this case, the trial court decree provided the father was to have temporary custody and that "unless the parties stipulate and agree or request hearing at a sooner date, that this matter shall be reconsidered regarding the custody of the minor children on or before August 21, 1981. At said hearing, final determination of the permanent legal care, custody and control shall be determined." Although the trial judge did not mention change of circumstances, we think this provision "unequivocally" provided for later trial court review and that the trial judge intended to make his decision solely on a best interest of the children standard, rather than a material change of circumstances standard. Therefore, we hold that the custody provision in the decree was temporary only, and that the wife did not need to prove a material change of circumstance in order to have custody transferred to her.

II. The Permanent Custody Award

The first and governing consideration in determining custody is the best interests of the children involved. Iowa R. App. P. 14(f)(15). Factors relevant to this determination are listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

Unfortunately, neither party in this case has exhibited a great deal of maturity. Both parents have good relationships with their daughters, although the

older girl stated she would prefer to remain with her father. The mother voluntarily gave the children to the father, although she testified it was because she was not receiving support payments from him and she was having problems with her parents, with whom she and the girls were living. The girls have been residing with their father since December of 1980.

The mother had primary responsibility for the children during the marriage, but the father has adjusted well to his role as custodian since he has had the children. The father's mother takes care of the girls while he is at work. The children are clean and well cared for. The mother has worked in the past, but no longer is working. Therefore, she would be available to take care of the children on a full-time basis. However, it also means her resources to care for the children will be limited. The mother has resided with her parents in the past, but at the time of the hearing had her own apartment.

When the mother had custody, she did not prevent visitation by the father, except when he threatened to take the children and not return them. At one point, the mother had to call the sheriff to return the children to her. When the father had custody, he frequently interfered with the mother's visitation and at times prevented her from seeing the girls. The mother remained current in her child support payments when he had custody; the father did not when she had custody. After the mother gave the children to the father in December of 1980, she only visited the children twice from then until the February 10 hearing. However, between February and August of 1981, she maintained regular visitation, except when the father prevented her from doing so in August. He stated he was afraid she would not return the children as his reason for denying visitation.

We think the above factors show that the best interests of the children require that the mother have permanent custody. Therefore, the trial court's decree and orders regarding custody are affirmed.

AFFIRMED.

All judges concur except Donielson and Johnson, JJ., who dissent.

DONIELSON, J. (dissenting)

I dissent.

I cannot agree with the majority's conclusion that this is the type of case under Marriage of Schlenker, 300 N.W.2d 164 (Iowa 1981) in which the trial court should be allowed to retain jurisdiction to review and modify the child custody provisions without the necessity of showing a change of circumstances. In Schlenker, the court stated that "[o]nly when the decree unequivocally provides for later trial court review without the necessity of showing a change of circumstances will we say this was the trial court's intent." Id. at 166 (emphasis added). The decree was silent on this point. In my opinion petitioner should have been required to show a material change of circumstances in order to obtain permanent custody.

My review of the record indicates petitioner could not show sufficiently changed circumstances to justify a change of custody. I would reverse the trial court's award of custody to petitioner and award permanent custody to respondent.

JOHNSON, J. (dissenting)

I dissent from that part of the majority's opinion affirming trial court's award of custody to the mother. I believe the best interests of the children require their custody be with respondent-father. While his interference with petitioner's rights of visitation is a negative factor, as is his failure to pay his support on a timely basis, the disposition of custody requires a balancing of all relevant factors. In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). In so doing, I believe respondent can provide a more stable environment in which to raise these two children.