IN THE COURT OF APPEALS OF IOWA

No. 4-256 / 93-1283

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FILED
NOV 28 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JAMES EDMOND BABE AND KATHLEEN JANE BABE

Upon the Petition of
JAMES EDMOND BABE,

Appellee,

And Concerning
KATHLEEN JANE BABE,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Kathleen appeals an order modifying the child placement provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Timothy W. Shuminsky of Shuminsky, Shuminsky & Molstad, Sioux City, and Stanley E. Munger of Munger & Reinschmidt, Sioux City, for appellant.

Bradford Kollars, Sioux City, for appellee.

Considered en banc.

PER CURIAM

James and Kathleen Babe had five children while they were married: Kristina, born July 28, 1978; Melissa, born October 21, 1980; Angela, born October 16, 1981; Stephen, born July 19, 1983; and Michelle, born October 30, 1985. The couple's marriage was dissolved on June 29, 1990. The dissolution decree accepted the parties' stipulation of joint custody with Kathleen having physical care of the children and James having rights of reasonable visitation.

Kathleen remained in the family home with the children. James moved in with his father about one mile away. James had daily contact with the children. He transported them to and from school. He performed household chores at the family home and built an additional bedroom in the basement of that home. James and Kathleen mutually participated in their children's lives and activities after the dissolution much as they did before. Both are loving and caring parents.

In May 1993 Kathleen moved to Colorado to live with a female friend, Jill. Kathleen and Jill maintain a close relationship. Kathleen obtained a transfer as mail carrier with the United States Post Office. The move provides no additional economic benefits. Kathleen must leave for work before the children leave for school and would rely upon Jill to prepare the children for their day. No evidence of Jill's parenting ability was presented to the court.

James and his former brother-in-law have their own business running three miniature golf courses and a spa. James' hours are flexible, and he continues to be available to care for the children before and after school.

After a two-day hearing, the district court concluded Kathleen's move "substantially affects the implementation of the terms of the decree and the manner in which the parties have maintained their relationship with the children." It also found James had proven he is in a superior position to minister more effectively to the children's well-being. The decree was modified to provide physical care of the children would be placed with James during the school year and with Kathleen during summer vacation. Kathleen appeals.

In equity actions such as this, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

"To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to

make the requested change." In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. Frederici, 338 N.W.2d at 158; see also In re Marriage of Gravatt, 371 N.W.2d 836, 838-40 (Iowa App. 1985). This burden stems from the principle once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. Mikelson, 299 N.W.2d at 671.

Conditions since the dissolution decree have materially and substantially changed. Kathleen's move to Colorado affects the implementation of the terms of the decree and the manner in which the parties have maintained their relationship with the children. There is no question Kathleen's relocation to a place more than 500 miles distance constitutes a material and substantial change of the fixed custody arrangement. See In re Marriage of Scott, 457 N.W.2d 29 (Iowa App. 1990) (holding mother's decision to move from Iowa to Virginia and leave child with father for over two years constituted a material and substantial change); In re Marriage of Green, 417 N.W.2d 252 (Iowa App. 1987) (holding mother's move more than 150 miles away constituted material and substantial change).

As a general rule, removal of a child from the state by the custodial parent for good economic reasons provides no justification in itself for a custodial change. See, e.g.,

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In re Marriage of Weidner, 338 N.W.2d 351, 360-61 (Iowa 1983); In re Marriage of Day, 314 N.W.2d 416, 420 (Iowa 1982); In re Marriage of Lower, 269 N.W.2d 822, 826-27 (Iowa 1978)). However, Kathleen's move to Colorado was not mandated by her employer, nor was the move made for a promotion. There is no evidence the relocation was undertaken to better meet the educational, medical, or cultural needs of the children. Iowa case law discussing employment-forced relocations does not govern this case.

In addition to showing a substantial and material change in conditions since the original decree was entered, James has also proven an ability to minister more effectively to the children's well-being. Change in geographic location is a factor to be considered in determining which parental environment will provide the most stability and security to the children. Scott, 457 N.W.2d at 31; In re Marriage of Grabill, 414 N.W.2d 852, 854 (Iowa App. 1987). James' home and environment provides the most stability and security for the children. James will continue to reside in the Sioux City community. James' hours are flexible, and he continues to be available to care for the children before and after school. The children will continue to attend school, church, community functions, and enjoy relationships with family and friends established since birth.

Kathleen relocated the children to a new community and home more than 500 miles from their lifelong residence.

This new environment is dependent upon her maintaining a relationship with Jill. The residence is owned by Jill, and there is no express lease between Kathleen and Jill. Additionally, because of Kathleen's employment, Jill will have to assume the parental responsibilities of seeing the children awakened, dressed, fed, and off to school. We have no evidence of Jill's parenting skills, if any. The children would be removed from a known and stable environment to an unknown environment, including new living conditions, new friends, new schools, and a new community. "Children need stability rather than uncertainty." Green, 417 N.W.2d at 253.

It is true past cases have held stability can be nurtured as much by leaving children with the same custodial parent as by leaving them in the same neighborhood. In re Marriage of Behn, 416 N.W.2d 100, 101 (Iowa App. 1987). However, the relocation to another state is not the only factor at play in this case. James' residence appears to be permanent, and he will be available to care for the children before school. These facts, as well as the consequences of uprooting the children from their hometown, lead us to the conclusion placement of the children with James would be in the best interests of the children.

After reviewing all the evidence, we agree with the district court there was a substantial and material change in circumstances supporting a modification of the custody

provision. We determine the best interest of the children will be served by giving James primary physical care of the children. Kathleen is granted the right of liberal visitation with the children. This liberal visitation shall include six weeks during summer vacation from school. We modify the decree accordingly.

AFFIRMED AS MODIFIED.

Sackett, Habhab, Cady, and Huitink, JJ., concur; Hayden, J., and Donielson, C.J., concur specially.

HAYDEN, J. (concurring specially)

I concur with the majority and write specially to reflect the record.

James, in his petition for modification, alleges at paragraph three as follows:

> 3. That since the entry of said Decree of Dissolution there has been a material and substantial change of circumstances which warrant a modification of the provisions relating to child custody, as follows:
>
> a) The Petitioner has advised the Respondent that she is removing the minor children to the State of Colorado to reside with her live-in lesbian lover without the consent of the Respondent and contrary to the intent of the Decree of Dissolution.
>
> * * *
>
> (g) The living environment to be provided by the Petitioner, i.e. a lesbian home, will cause irreparable damage to the best interests of the children.

Kathleen answered these allegations in the following manner, to-wit:

> 3. Paragraph Three (3) is answered as follows:
>
> a. Admitted in that the Petitioner has advised the Respondent is moving to the State of Colorado but the remainder of said Paragraph is denied.
>
> g. Denied.

By denying these allegations of a lesbian relationship and environment Kathleen placed them in issue before the court at the hearing.

The trial court filed its "Findings of Fact, Conclusions of Law and Ruling Re: Petition for Modification" and determined:

> Kathleen has moved to the Denver area for her own personal reasons which were not disclosed to the Court. She did not move for economic reasons nor for any reasons which would be considered as being in the best interests of the children.

I agree her move to Denver is not in the children's best interests.

On cross-examination, Kathleen testified about her living arrangements with her friend, Jill, in Denver. I refer to a portion of that testimony as follows:

> Q. I guess what I'm looking for, I think you've indicated that you're going to live out there and it's going to be a more stable arrangement? A. Yes, I have indicated that.
> Q. What is the period of the lease at this residence? A. There is no period of lease.
> Q. Okay. So it'd be like a month-to-month lease? A. Well, I don't know if you'd call it a month-to-month lease. I was more hoping that it would be a lifetime lease.
> Q. But that's -- that isn't going to be in writing? A. No, sir, it can't be.

It is apparent to me Kathleen's residence in Jill's household is, at the most, only a tenancy at will, not for a definite time certain, nor any degree of permanency. I determine this to be a tenuous living arrangement for a parent of five minor children.

Donielson, C.J., joins this special concurrence.