



IN THE COURT OF APPEALS OF IOWA SUPREME COURT

IN RE THE MARRIAGE OF KATHRYN LEE WAHL and DARWIN KEITH WAHL

Upon the Petition of	)	
KATHRYN LEE WAHL,	)	
n/k/a KATHRYN LEE DeRONDE,	)	Filed June 30, 1978
Appellant,	)	
And Concerning	)	
DARWIN KEITH WAHL,	)	565
Appellee.	)	3-61199
	)	

Appeal from Marion District Court - Van Wifvat, Judge.

Petitioner appeals denial of her application to modify custody provision of a dissolution decree and attempts to appeal from contempt proceedings involving non-payment of child support. Affirmed on modification issue; appeal dismissed on contempt issue.

James R. Cook, of Marks, Flagg, Hockett & Marks, of Des Moines, for appellant.

Claude H. Freeman, Jr., of Grefe & Sidney, of Des Moines, for appellee.

Heard by Allbee, C.J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Petitioner, Kathy Wahl, now Kathy DeRonde, appeals from the September 30, 1977 order which denied her application to modify the child custody provisions contained in the November 25, 1975 decree dissolving her marriage of nine years to respondent, Darwin Wahl. She also appeals the trial court's failure to find Darwin in contempt for making untimely child support payments, and seeks to recover from Darwin attorney fees incurred at trial and on appeal.

Our review of the custody issue is de novo. Rule 4, Rules of Appellate Procedure. We give weight to the findings of the trial court but are not bound by them. The party seeking to modify a decreed custody arrangement has the burden of showing a material and substantial change of circumstances since the time of that original decree which warrants a transfer of the child to their custody. *Hobson v. Hobson*, 248 N.W.2d 137 (Iowa 1976). In such a case the first and governing concern of the court is the best interest of the child. *Davis v. Davis*, 237 N.W.2d 455 (Iowa 1976).

I. The parties were married in 1966. Two children were born of the marriage, Lisa in 1967 and Jason in 1973. The dissolution decree of November 1975 awarded custody of Lisa to Kathy and custody of Jason to Darwin. This custody provision was appealed by Kathy and the dissolution decree (entered by the same judge who heard the modification proceeding) was affirmed by the supreme court in *In re Marriage of Wahl*, 246 N.W.2d 268 (Iowa 1976).

In the present proceeding for modification, Kathy alleges as material change of circumstances that Darwin has abandoned Jason's care to his mother and that Darwin burned Jason with cigarettes while in his custody. Kathy's present husband, Doug DeRonde, testified that he and a friend, Tim Malone, watched Darwin closely for 16 days preceeding the application for modification and very seldom saw Darwin and Jason together. Darwin and his mother, who acts as Jason's babysitter when Darwin is at work, testified that Darwin works from 11:00 p.m. until 7:00 a.m., then sleeps and collects Jason from his mother's home at about 3:30 p.m. They further testified that Darwin normally had Jason with him from Friday afternoon until Sunday night. Testimony of neighbors supports the claims of Darwin and his mother. From the time of the original decree, and the supreme court review thereof, it has been recognized that a babysitting arrangement would exist similar to that revealed by the evidence. In the past Darwin worked a 3:00 p.m. to 11:00 p.m. shift. He testified that his present

schedule, the choice of which required a pay cut, allows him more time with Jason. We find no basis to change the custody of Jason based upon the time Darwin spends with his son.

We next consider the allegation that Darwin burned Jason with cigarettes. This charge apparently developed when Doug DeRonde noticed sores on Jason's arms during a weekend visitation. Jason told him they were insect bites. Doug called a Dr. Griffin and informed him that he suspected Jason had been burned. The doctor's notes, prepared after treatment, reported that the sores "appear as burns, but not necessarily." Dr. Griffin testified that he asked Jason to pretend the pencil in his hand was a cigarette in Darwin's hand. He then touched Jason's arm with the pencil and asked if his father did "anything like this." Jason said "yes." Dr. Griffin also testified that these markings could very well be insect bites.

When Darwin was later informed that DeRonde had taken Jason to the doctor, and the reason therefor, he took Jason back to see Dr. Griffin at which time Jason denied that Darwin had burned him. Testimony of several witnesses indicated that Jason had been accidentally burned by Darwin's cigarette when the two were playfully wrestling on an occasion prior to the inception of the disputed markings. At trial both Darwin and his mother testified that the sores which were the subject of suspicion were insect bites which the four year old Jason had scratched open. A Dr. Arnott, who had treated Jason for the sores which were the subject of suspicion, testified that the sores were not burns but rather a staph infection. On the whole, we find the evidence fails to support the very serious charge of child abuse which Kathy has leveled at her former husband. The trial court properly refused to change Jason's custody.

II. Kathy also appeals the failure of the trial court to find Darwin in contempt. The original decree required Darwin pay \$15 per week child support for Lisa. Although by the time of the modification hearing Darwin was apparently current with the sum total of his obligation, his payments in the past had not been timely made and were delinquent at the time the contempt proceedings were initiated. The trial court decree "continued without finding for one year" the contempt issue.

The disposition made by the trial court on the contempt issue is not a final judgment and we are therefore without jurisdiction to review it. *Helland v. Yellow Freight System, Inc.*, 204 N.W.2d 601 (Iowa 1973); *In re Swanson's Estate*, 239 Iowa 294, 31 N.W.2d 385 (1948). We therefore dismiss the attempted appeal of the contempt issue.

We do, however, note our disapproval of the delayed disposition made below. Prompt determination of that issue should be made in the trial court upon the conclusion of this appeal. With respect thereto we note that untimely payments create the default which, if willfully done, constitutes a contempt. Sections 598.22 - 598.24, The Code.

III. Finally, Kathy has also requested attorney fees for services at trial and on appeal. With respect to the custody litigation no attorney fees are allowable where modification of a final decree is the issue. *Betzel v. Betzel*, 163 N.W.2d 551, 557 (Iowa 1968); *Arnold v. Arnold*, 258 Iowa 850, 860, 140 N.W.2d 874 (1966); *Addy v. Addy*, 240 Iowa 255, 36 N.W.2d 352 (1949). Regarding attorney fees for services performed in presenting the contempt issue, we note that Kathy will be so entitled only if she ultimately prevails on this issue. Section 598.24, The Code. In such event, no fees should be allowed for services incident to the appeal attempted prior to final judgment.

Affirmed on the modification issue. Appeal dismissed on the contempt issue.

OXBERGER, J., dissents.

OXBERGER, J. (dissenting)

I dissent.

When the original dissolution decree was entered, the trial court split custody. Certainly the court was aware that the paternal grandmother would "babysit" with Jason during Darwin's work hours. The arrangement described, however, even if short of establishing Darwin's abdication to his mother, reflects a choice on his part to arrange his work schedule so that Jason spends every workday evening overnight with his grandparents, sleeping with his grandmother. I would not characterize such a living routine as mere babysitting. I believe Jason in Kathy's custody would be reunited with his sister and placed in the parental custodial home better suited to deal with his long range best interests as he leaves infancy and young childhood and becomes a school-age youngster.

I am also persuaded that Jason's best hope for future development lies within the environment of his mother's home because I consider the medical testimony heavily supportive of inflicted cigarette burns. The trial court and the majority conclude the evidence failed to support this charge. As I see it, the first examining physician, a general practitioner and surgeon on duty at the hospital emergency room, was convinced upon examination they were burns. He testified that if they were burns they were inflicted, rather than the result of an accidental brushing against a cigarette. This doctor testified he could not conclusively say they were cigarette burns unless he actually had seen them inflicted. He thought it was significant, and indicative of cigarette burns, that 1) the lesions were quite circular, 2) the lesions occurred only on the right side of Jason's body, 3) the lesions were not infected and 4) the lesions were shallow ulcerations, red around the edges. There were three lesions: on his arm, a not quite 1/2 inch circle; on his wrist, a 1/4 inch circle; and on his hip, a 1/2 inch by 1/2 inch circle. The doctor testified "... when I finished that night I felt like these were definitely burns." Dr. Arnott did not see Jason until almost a week after the "sores" developed and three days after Dr. Griffin's examination. He thought the lesions were an impetigo or staph infection. He found no significance in the fact that the sores were all on Jason's right side; he gave no testimony concerning whether they were infected; and he concurred that it

was impossible to testify to an absolute certainty that they were burns. He testified he did not find a red circle around the burns which would indicate "... the healing process was going in from the burn..." On this same day Darwin took Jason to Dr. Arnott for treatment, he also consulted with Dr. Griffin but apparently no further examination by Dr. Griffin of Jason was made on that day.

I believe the record on the whole establishes a living routine and a strong suspicion of physical mistreatment which is injurious to Jason's future well-being. I would change his custody to Kathy.