FILED
JAN 30 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SUSAN KAY TROUPE AND ROSS REUBEN TROUPE, JR.

Upon the Petition of)
SUSAN KAY TROUPE,)
Petitioner-Appellant,)

And Concerning)
ROSS REUBEN TROUPE, JR.,)
Respondent-Appellee.)

Filed January 30, 1981

0-299
3-64442

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Petitioner-wife appeals from trial court's order modifying child custody provisions of the parties' dissolution decree asserting that the evidence was insufficient to warrant modification and contending that a new trial should have been granted due to 1) entry of a temporary ex parte order transferring custody of the children to respondent, 2) the bias of trial court shown by entry of the temporary custody order which was undiscoverable at the time of trial, and 3) children's attorney's lack of notice of the modification proceedings. REVERSED IN PART; MODIFIED IN PART.

Timothy S. White, James A. Piersall and Tim A. Estlund, of White, Wenzel & Piersall, Cedar Rapids, Iowa, for petitioner-appellant.

Evan L. Hultman of Hultman & Zimmerman, Waterloo, Iowa, for respondent-appellee.

James L. Wagner, Waterloo, Iowa, for minor children.

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

Petitioner-wife, Susan Kay Troupe, appeals from trial court's order modifying child custody provisions of the parties' dissolution decree. She asserts that the evidence was insufficient to warrant modification. She further contends that a new trial should have been granted due to 1) entry of a temporary ex parte order transferring custody of the children to respondent, 2) the bias of trial court shown by entry of the temporary custody order which was undiscoverable at the time of trial, and 3) the children's attorney's lack of notice of the modification proceedings. We reverse trial court's order granting custody to respondent and reinstate the visitation provisions of the supplemental decree with modification.

Petitioner was awarded custody of the parties' two children by the 1978 dissolution decree. At that time, the attorney for the minor children recommended that custody be awarded to her. On February 16, 1980, respondent-father, Ross Reuben Troupe, Jr., filed an application for modification seeking temporary and permanent custody due to the petitioner's move to Texas and then back to Iowa without notice to respondent thereby frustrating his visitation privileges. The court entered an ex parte order granting respondent temporary custody prior to trial, but this order was not enforced prior to a full hearing on the issue. On April 26, 1979, the court ordered custody transferred to respondent. Trial court granted a stay pending the court's ruling on petitioner's motion for new trial; this motion was overruled on December 5, 1979. The supreme court granted petitioner's motion for a stay, joined in by the children's attorney, on January 11, 1980. Petitioner filed her appeal on December 31, 1979.

I. Scope of Review. 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 child'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. Melton, 256 N.W.2d at 205. We apply these principles in light of the factors enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). In re Marriage of Dawkins, 285 N.W.2d 8, 9 (Iowa 1979).

II. Jurisdictional Matters. Although not raised by either of the parties, at the onset, we note a possible jurisdictional question regarding timeliness of this appeal. Trial court's order modifying the decree was filed April 26, 1979. On May 2, 1979, trial court granted a temporary stay of the custody modification and stated that unless petitioner's motion for new trial was timely, the custody provision would be enforced. Petitioner's motion for new trial was filed May 11, 1979, and full hearing was held on July 31, 1979. Due to the language and obvious intent of the May 2, 1979, order, we characterize trial court's order as a grant of extension of time under Iowa R. Civ. P. 247 and therefore find petitioner's appeal timely.

III. Modification of Custody. Petitioner contends that trial court erred in modifying the original dissolution decree to change custody of the parties' two minor children to respondent. She claims this change is not in the best interests of the children.

Without unnecessary repetition of the record, we note that petitioner's actual parenting ability as it relates to the nurturing and care of the children has not been challenged. At issue here is whether the petitioner's moves from Iowa to Texas and back again without notice to the respondent, and her alleged interferences with respondent's visitation rights resulting from her alleged disregard of trial court's orders and decrees, constitute a substantial and material change of circumstances justifying modification of custody from petitioner to respondent. We conclude they do not.

We find it inappropriate to modify the children's custody at this time where no prior contempt proceedings have been brought against petitioner for her failure to cooperate in visitations. We believe the principles of Spotts v. Spotts, 197 N.W.2d 370 (Iowa 1972), govern this case. 197 N.W.2d at 372. In that case, the mother left the state without notifying the father of her new address; there also was evidence of her uncooperative attitude toward the father's earlier visitations. While the supreme court on review found the father to be more able to care for the children than he had been at the time of the dissolution, the court found no superior parenting claim was shown. The court noted that ". . . trial court could and did reasonably find insufficient evidence was adduced to show a change of circumstances would justify a custody modification." Spotts, 197 N.W.2d at 371.

The Spotts court further stated that custody is not to be awarded for reward or punishment reasons and that "...the best interests of children require a continuing association with their father unless the contrary is clearly shown." Id. at 372. The mother's conduct in denying visitation rights was found to be "...a most serious reflection on her capacity to retain custody." Id. The court held that "[a]ny continuation of this conduct will furnish grounds for similar applications for modification and for contempt citation." Id. (emphasis added). The mother was required thereafter to notify the clerk of court of any changes of address until all of the children reached majority or left the home. The father's contempt application, upon which trial court made no findings, was remanded for disposition.

Here, the hostile behavior of both parties has made visitation difficult. In February of 1978, prior to the court's ruling on respondent's visitation rights in the supplemental decree, respondent took and kept the children without authority, returning them to petitioner only upon court order. In August of 1978, at the conclusion of a hearing on the value of the parties' home, respondent requested an order for specific enforcement of a term of the decree relative to visitations. Evidence presented to the court indicated that the father had been unemployed since March of that year, but did not attempt to exercise his two-week visitation right until there was less than two weeks remaining in the children's summer vacation. The court, in a routine manner, granted this request; no cautionary warnings regarding visitations were made to either party. The weekend visitations were proceeding satisfactorily at that time.

From sometime in August 1978 until sometime in February 1979, petitioner and the children lived in Texas. The evidence shows considerable dispute as to when the respondent actually learned of the whereabouts of the children during that period. Yet even after respondent knew the address, neither he nor the grandparents made any attempts to communicate with the children by telephone or mail. We do know that respondent made one trip to Texas to visit the children. He arrived unexpectedly at petitioner's residence in Texas at approximately 3:00 p.m. on November 22, 1978, requesting to take the children for Thanksgiving vacation. He told petitioner that his visitation started at 5:00 p.m. and that the children had better be ready then. Petitioner testified that she told respondent that he was not welcome in her home until 5:00 p.m. Respondent testified that he did not return to petitioner's residence at 5:00 p.m. He indicated that after conversations with the local sheriff and judge, he felt he would not be permitted his visitation as his decree could not be enforced in Texas at

that time. Respondent returned to Iowa without making any further contacts with petitioner or the children. Whether or not other attempts by respondent to contact the children would have been futile as he contends, consequently, is unknown to us. Since the children's return to Iowa and prior to the modification hearing on March 28, 1979, respondent testified that he had several weekend visits without further difficulties between the parties.

We conclude that on the record before us modification of the decree to award custody of the children to respondent is inappropriate and is, in effect, punishment of petitioner, although we certainly do not condone her actions in moving without notice to respondent.

We conclude that any future difficulties in visitation caused by either party will be grounds for contempt proceedings. We urge the parties to consider the impact of the Spotts court's warnings relating to both parties' responsibilities and the consequences from failure to successfully carry these out. See Id. (emphasis added). See also In re Marriage of Blessing, 220 N.W.2d 599, 606 (Iowa 1974).

Further, as in Spotts, we conclude the father, respondent here, failed to carry his burden of proof to demonstrate a superior parenting ability. His pending remarriage, like petitioner's remarriage, may be considered. We, however, find no evidence of marital difficulties in petitioner's home. The older child is receiving educational training in a private, church-related school similar to that which he would receive in respondent's custody. Both parties are employed, although we note that respondent has had some unemployment in the past which resulted in child support arrearages. Petitioner, on the other hand, has few job skills at this time but her husband has had steady employment with a telephone company for a number of years.

We do not consider respondent's allowance of visitations with the grandparents as a factor contributing to his claim of superior parenting. The grandparents have had the provisions of section 598.35, The Code 1977, available to assist them in securing visitation rights. Their failure to take action on their own does not enhance respondent's position.

We thus conclude that custody of the children should remain with petitioner with visitation provisions of the supplemental decree reinstated, except that respondent shall have a total of four weeks' visitation in the summer. He may chose any four weeks so long as the last day of visitation ends one week before school begins in the fall. He shall give petitioner at least one week's prior written notice of the beginning date and

the length of the visitation period. Because we frequently are confronted with the problem of summer visitations interfering with the children's activities such as camp, little league, swimming lessons, etc., we urge respondent, as the noncustodial parent, to plan for these activities as far as practicable in order to assure that the children's training and needs are met. We disapprove of the custodial parent using scheduled lessons and activities as a means to frustrate summer visitations.

We further modify the decree to provide even greater safeguards for respondent's exercise of his rightful visitation privileges by requiring petitioner to file with the clerk of court of Black Hawk County an instrument stating her new address prior to any future change of address. This filing shall be made personally, by counsel, or by certified mail with return receipt requested. In addition, petitioner shall not remove either or both of the children from the state without the court's approval by order. These modified provisions shall continue in full force and effect until both of the children have left petitioner's home or have reached the age of eighteen.

IV. New Trial. Having reversed the custody provisions of the modification decree to return custody to petitioner, we make no finding on the issue regarding denial of petitioner's motion for new trial.

All other provisions of the supplemental decree not expressly addressed are affirmed. Costs are assessed equally to both parties.

REVERSED IN PART; MODIFIED IN PART.

I would affirm the trial court's order granting custody to the respondent. As I read the record and respondent's brief, he has raised questions concerning the petitioner's ability to provide for the best interests of these children, and I would conclude that he has shown both the material and substantial change in circumstances necessary to modify custody and a superior ability to provide for the children's best interests.

Since the decree was entered, the petitioner has displayed an extremely high level of hostility toward the respondent. This hostility has manifested itself in her decision to move the children twice without knowledge of the respondent or the trial court, her refusal to maintain a normal relationship between the children and their father and grandparents, and her attempts to make the children fear their father. The petitioner's hostile attitude, and the manifestations thereof, can hardly be in the best interests of these two little boys, particularly since as a result the children are cut off, emotionally as well as physically, from their father and grandparents. Given this situation, and the fact that our main concern in cases such as this is the best interest of the children, Iowa R. App. P. 14(b)(15), I would not hesitate to affirm a grant of custody to the respondent. Moreover, the respondent has adequately shown that, all things considered, he would provide better care and a more stable environment for the children. Unlike the petitioner, the respondent appears willing to maintain meaningful contact and a stable relationship between the boys and their grandparents. Additionally, it appears that respondent and his new wife would provide a good, positive, and loving home for the children and would attempt to maintain normal visitation with the petitioner. In short, I do not anticipate that the respondent would do anything that might hinder the emotional development of his children.

Finally, I consider important the trial court's finding that the petitioner has "misrepresented matters to the court and has lied to the respondent on a wholesale basis." While I agree that such conduct alone is not sufficient to justify a change of custody, it is inexcusable and should be considered an aggravating factor in the custody determination. Furthermore, her denial of visitation with the children's father is "a most serious reflection on her capacity to retain custody." Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972). Given these circumstances, it seems superfluous to require that a

contempt action be brought prior to an application for modification of custody. More importantly, petitioner by her conduct has in effect attempted to unilaterally terminate the parental rights of the respondent and thus usurp the power of the court to effect a material and substantial change in the provisions of the original decree. While contempt proceedings are of course available to the respondent, I think modification of custody is an appropriate action to be taken against a party who has tried to take the authority of the court upon herself. I would therefore proceed directly to modify the custody provisions of the decree.

Snell, J., joins this dissent.