

FILED.

AUG - 9 1979

418

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

ROBERT WESLEY WIEDEMANN,)

Appellee,)

Filed August 9, 1979

vs.)

BEVERLY ANN WIEDEMANN,)

Appellant.)

173

3-62724

Appeal from Muscatine District Court - Max R. Werling, Judge.

Respondent mother appeals order of trial court refusing to modify custody provision of dissolution decree. REVERSED WITH ORDER.

John C. Stevens of Lewis & Stevens, P.C., Muscatine, Iowa, for appellant.

J. W. Conway of Gillett, Conway & Allison, Muscatine, Iowa, for appellee.

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

Respondent mother, Beverly Wiedemann, appeals from trial court's judgment dismissing her petition for change of custody of her son, Billy, upon an application for modification of a dissolution decree. We reverse.¹

A May, 1976, Iowa dissolution decree between the parties, entered some three years after their separation, awarded custody of Billy to his father, Robert Wiedemann, pursuant to the parties' stipulation. Billy visited Beverly in the State of Tennessee where she was residing, after which she refused to return him to Iowa. Robert filed a petition for a writ of habeas corpus in the Tennessee courts to force Billy's return. Beverly resisted said petition and, in aid of her resistance, filed a petition for change of custody in the Tennessee court. Following a hearing, a decree was entered on September 19, 1977, denying Beverly's requested relief. In that decree the Tennessee court made a finding that there had not been a sufficient change of circumstances since the May, 1976, Iowa decree to justify a change of custody. This decree was affirmed on appeal by the Tennessee Court of Civil Appeals in March, 1978. On June 1, 1978, Beverly filed the present petition for modification of Billy's custody in the Muscatine County District Court. The matter was tried in August, 1978, and on August 29 the application was denied by the trial court.

L. Effect of Tennessee Decree

Of paramount importance to the trial court's decree was its determination that Beverly's present action was an attempt to relitigate matters which had already been determined in the Tennessee courts. The trial court limited its consideration of changed circumstances to events occurring subsequent to the decree of the Tennessee trial court.² Robert asserts that this was required by the full faith and credit clause of the federal constitution (Article IV, Section 1), citing McKee v. McKee, 239 Iowa 1093, 32 N.W.2d 379 (1948). McKee involved a judgment of a sister state which had modified an Iowa custody decree, while the present case involves a foreign judgment which declined to change the Iowa decree. However, we do not need to determine whether the latter situation is also subject to the constitutional doctrine of full faith and credit. Rather, we hold that under established principles of issue preclusion, Beverly should not

¹ Because of our decision on the merits, we will not discuss all issues raised by appellant on appeal.

² September 19, 1977.

be permitted to relitigate, within a period of a few months, issues which previously have been resolved by a court of competent jurisdiction upon a petition which she herself initiated.

Contrary to Beverly's assertion, there is no showing that the Tennessee court did not have jurisdiction to decide her change of custody petition.³ Certainly Beverly consented to its jurisdiction by bringing her action there and the child was present in the State of Tennessee at the time. Nor can we accept Beverly's present claim that the Tennessee decree was not on the merits. This claim is based upon some remarks made in open court by the Tennessee chancellor at a contempt proceeding in April of 1978, after the chancellor's custody decree had been affirmed on appeal. We view these remarks as intended to assuage Beverly with the thought that she might seek further relief in the Iowa courts. But nothing said at that time could serve to change the legal effect of the September 19, 1977, decree of the Tennessee court which had adjudicated the merits of the issues presented. Thus, we conclude that the effect of the Tennessee decree was to determine as of September 19, 1977, that there had been no change of circumstances since the May, 1976, Iowa decree which would justify the requested modification.

II. Subsequent Change of Circumstances

Trial court ruled that "[t]he change of circumstances which has developed [since September 19, 1977], stated in its simplest form, is that in the nine months during which William [Billy] lived with the Respondent,^[4] in violation of the terms of the consent decree, an affection grew between mother and son which forms the basis of the son's present desire to live with his mother." Upon our de novo review of the evidence contained in the lengthy record of this case, Iowa R. App. P. 4, we conclude Respondent

³ Although Tennessee has not enacted the Uniform Child Custody Jurisdiction Act, see 9 Uniform Laws Annot. 28 (Supp. 1978), section 598A.3(1)(b), permits Iowa to assume jurisdiction to consider child custody when "... the child ... and at least one ... [of its parents] have a significant connection with this state, and there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships" Section 598A.13 also requires Iowa to recognize the initial or modification decree of another state, which "... was made under factual circumstances meeting the jurisdictional standards of this chapter" Thus, even though the Tennessee court refused to modify the original Iowa decree, because its decision went to the merits of that issue, we believe that court's action should be recognized under chapter 598A. See Tenn. CodeAnn. §36-828.

⁴ Due to subsequent proceedings, Billy was permitted to remain in Tennessee until June 1, 1978.

has met her burden of showing by a preponderance that, subsequent to September 19, 1977, there have been material and substantial change of circumstances relating to the child's welfare which make modification expedient or necessary. Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976). We further find that Respondent has proven her superior ability to minister to the child's needs. In re Marriage of Pokrzywinski, 221 N.W.2d 283, 284 (Iowa 1974).

We do not doubt that both Beverly and Robert love Billy or that Billy loves each of his parents. We also do not condone Respondent's undisputed disregard for both the Iowa and Tennessee decrees which granted Petitioner the right to Billy's legal and physical custody, although we observe that Petitioner is not without fault in this regard. But a parent's right to legal custody of his or her minor child is not granted or denied as a reward or punishment. Carey v. Carey, 211 N.W.2d 342, 345 (Iowa 1973).

The following factors lead us to conclude trial court's judgment should be reversed and custody granted to Respondent: testimony of professionals Larry Harris, Omer Wagoner and Ruby Post; improvement in Billy's school performance during the 1977-78 academic year in Tennessee; Petitioner's apparent disregard for the physical well-being of his son through failure to provide of proper eye and dental care. We also view Petitioner's attempts to alienate the children from their mother to be unwarranted and destructive. We find no reciprocal behavior on the part of Respondent. Finally, we give weight to Billy's adamant desire, which the evidence shows remained unchanged over an extended period of time, to live with his mother. This is especially significant when considered in light of his testimony as to the several reasons why he did not wish to remain with his father.

Judgment of trial court is reversed with entry of an order modifying the original decree by granting custody of Billy to Respondent and the following visitation rights to Petitioner:

Petitioner shall have the right to visitation for a period of two weeks during the Christmas season of 1979, and for two weeks during the Christmas season in alternate years thereafter. In 1980, and in succeeding years thereafter, Petitioner shall have the right to have the minor child, Billy, for four weeks during the summer vacation. During any school year within which Petitioner does not have the minor child, Billy, with him for a two-week Christmas visitation, the Petitioner shall have the right to have Billy with him for a period of not less than one week, at a time designated by him, during a period other than the Christmas season, which shall be in addition to the normal four-week summer visitation.

All other provisions of the original decree regarding visitation are to remain unchanged. Upon request of either party, trial court shall determine any child support obligations for Billy.

Costs of this appeal shall be assessed one-half to each party. Despite the provisions of paragraph 15 of the parties' stipulation of May 11, 1976, each party shall pay his or her own attorney fees incurred as a result of this appeal.

REVERSED WITH ORDER.