IN THE COURT OF APPEALS OF IOWA

No. 0-254 / 99-1090
Filed June 28, 2000

FILED
JUN 2 8 2000
CLERK SUPREME COURT

IN RE THE MARRIAGE OF KATHY JEANNE LAWRENCE AND LARRY ROBERT LAWRENCE

Upon the Petition of
KATHY JEANNE LAWRENCE, n/k/a
KATHY JEANNE BRADLEY,
Petitioner-Appellee,

And Concerning
LARRY ROBERT LAWRENCE,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

The respondent appeals a district court ruling denying his application to modify the child custody provisions of the parties' dissolution decree. **AFFIRMED.**

Dennis Currell of the Currell Law Firm, Cedar Rapids, for appellant.

Kathy Jeanne Bradley, Cedar Rapids, pro se, appellee.

Heard by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Larry and Kathy's marriage was dissolved in April 1996. The original decree provided for joint custody of their children: Danielle, born November 3, 1980; Genevieve, born March 8, 1982; and Lucas, born May 25, 1984. Kathy was granted physical care of the children, subject to Larry's visitation rights.

Larry initiated this modification action in August 1998 seeking physical care of the children. Larry's physical care demands were based on his assumption of physical care at Kathy's request and the children's stated preference to reside with him.

At trial the fighting issues concerned Larry's allegations that Kathy was unable to control the children and they had thrived in all respects while residing with him. Kathy denied Larry's allegations concerning her ability to control the children and claimed financial distress was the reason for asking for Larry's help with the children. She also challenged Larry's parental fitness, citing evidence of his drug use and sexual indiscretions. The trial court's findings of fact included the following:

> 3. The evidence in this case shows that it would be in the long-term best interests of the minor children of the parties that they remain in the joint custody of the Petitioner, Kathy Jeanne Bradley, and the Respondent, Larry Robert Lawrence, and that said minor children remain in the primary physical care of the Petitioner, Kathy Jeanne Bradley.
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> 4. The Court further finds that the Respondent, Larry Robert Lawrence, has not established by the preponderance of the evidence that he has a superior ability to minister to the needs of the minor children of the parties more effectively than the Petitioner,

> Kathy Jeanne Bradley, who currently has primary physical care of the children of the parties.
>
> 5. The Court further finds that the Respondent, Larry Robert Lawrence, has not established by a preponderance of the evidence that there has been a substantial and material change in circumstances not within the contemplation of the parties at the time of the filing of the original marriage dissolution decree and attached stipulation on April 16, 1996, which will allow this Court to modify the marriage dissolution decree and stipulation to transfer primary physical care of any of the minor children from Petitioner, Kathy Jeanne Bradley, to the Respondent, Larry Robert Lawrence.

Larry's modification request was denied. On appeal Larry contends the children's improved behavior and scholastic performance while residing with him justifies modification. He also seeks an adjustment of his child support obligation and attorney fees.

II. Standard of Review.

Our review in this equitable matter is de novo. Iowa R. App. P. 4; *see In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We are not bound by the district court's findings but give them deference because the district court had an opportunity to view, firsthand, the demeanor of the parties and evaluate them as custodians. *In re Marriage of Daniels*, 568 N.W.2d 51, 53 (Iowa App. 1997).

III. Modification of Child Custody.

Modification of custodial terms of a dissolution decree may be ordered only when there has been a substantial change in circumstances since the time of the original decree not contemplated by the court when the decree was entered. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). The change must be more or less permanent and relate to the welfare of the children. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The trial court has

reasonable discretion in determining whether modification is warranted, and such discretion will not be disturbed on appeal unless there is failure to do equity. *State ex rel. Pfister v. Larson*, 569 N.W.2d 512, 514 (Iowa App. 1997).

The question is not which home is better, but whether Larry has demonstrated he can offer the child superior care. *See In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). Larry must show an ability to minister to the children's needs superior to Kathy's. *Id.* If both parents are found to be equally competent to minister to the children, custody should not be changed. *Id.*

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of the 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 Smiley*, 518 N.W.2d 376, 378-79 (Iowa 1994).

While the record largely supports Larry's claims concerning the children's favorable experience during their extended stay in his care, we are nevertheless inclined to affirm. In reaching this conclusion we do not intend to minimize the significance of the issues raised or ignore relevant evidence of the parties' respective parental strengths or weaknesses. Our decision turns not so much on Larry's favorable experience as Kathy's reasons for permitting the children to remain in Larry's physical care. Kathy makes, and the record supports, a compelling argument that she turned to Larry for help in the face of acute financial and personal distress. Larry, to his considerable credit, responded by opening his home to the children and offering them security and discipline, which

Kathy was temporarily unable to provide because of circumstances we believe were beyond her control. In doing so, Larry and Kathy have achieved the level of parental cooperation underlying our statutorily expressed preference for joint custody. *See* Iowa Code § 598.41. The decision reached by the district court also advances the notion "parents should be encouraged in time of need to look for help in caring for their children without risking loss of custody." *In re Marriage of Hunnell*, 398 N.W.2d 877, 879 (Iowa 1987) (quoting *In re Guardianship of Sams*, 256 N.W.2d 570, 573 (Iowa 1977)). Lastly, we note that Kathy's decision to turn to Larry for help in a time of special need confirms the wisdom of the trial court's decision to award her physical care in the first instance.

The judgment of the district court is affirmed. Costs of this appeal are taxed to Larry.

AFFIRMED.