

FILED

AUG 26 1980 **341**

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF PATRICIA A. COOK AND ALBERT G. COOK

Upon the Petition of	)	
PATRICIA A. COOK,	)	Filed August 26, 1980
Petitioner-Appellant,	)	
And Concerning	)	
ALBERT G. COOK,	)	<u>0-145</u>
Respondent-Appellee.	)	<u>3-64410</u>

Appeal from Harrison District Court - Leo F. Connolly, Judge.

Petitioner appeals trial court's denial of her application for a contempt citation against respondent for refusing to return the children to her after a visit and trial court's modification of parties' dissolution decree by transferring custody of parties' three minor children to respondent. REVERSED AND REMANDED.

Morris G. Hurd of Hurd Law Firm, Ida Grove, for petitioner-appellant.

Albert G. Cook, pro se.

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

DONIELSON, J.

Petitioner, Patricia A. Cook, appeals trial court's denial of her application for a contempt citation against respondent, Albert G. Cook, for refusing to return the children to her after a visit and trial court's modification of parties' dissolution decree by transferring custody of their three children to respondent. On appeal, Patricia raises four grounds for reversal: Sufficient evidence existed to support a contempt citation against Albert; the trial court should not have considered the report and recommendations of the attorney appointed to represent the children; Albert should not have been allowed to make at the hearing an oral application to modify the custody provisions of the decree; and there was insufficient evidence of a material change in circumstances warranting a modification of custody. We reverse the trial court's denial of a contempt of court citation, and the modification of the original custody decree. We remand this matter to the trial court for reinstatement of the custody provisions of the original decree and entry of an order to compel Albert to return the children to Patricia.

I.

The marriage between Patricia and Albert was dissolved on October 10, 1975. The court awarded Patricia custody of the parties' three children, subject to reasonable visitation by Albert. Albert was ordered to pay child support of \$100 per month per child. On July 6, 1979, Patricia filed an application for a contempt citation against Albert for allegedly failing to return the children following visitation. Subsequently, on July 19, 1979, Patricia filed an application to modify the dissolution decree to deny Albert visitation rights.

Pursuant to section 598.12, The Code 1979, the trial court appointed Gary Altwegg to represent the children. Altwegg filed a report stating the children's expressed desire to live with Albert. Altwegg recommended in his report the custody of all three children be transferred to Albert.

At the hearing on this matter, Albert, appearing pro se, made certain statements the trial court construed as an oral application to modify the dissolution decree to transfer custody of all three children to him. Patricia resisted this action, asserting the court lacked authority to modify the custody provisions without proper and adequate application, notice, and hearing. On November 26, 1979, the trial court entered its judgment and decree modifying the dissolution decree by transferring custody of the

children to Albert, granting Patricia visitation, exempting Albert from paying child support, and denying Patricia's application for a contempt citation.

II.

Patricia asserts there is sufficient evidence in the record to cite Albert for contempt of court. The basis for her charge is Albert's failure to return the children after a reasonable time of visitation and continuing to retain custody in violation of the dissolution decree. Another ground for contempt raised by Patricia on appeal is Albert's delinquency in his child support payments. However, she did not raise this matter in her contempt application. After reviewing the record, we hold Albert should be held in contempt for his disobedience of the dissolution decree.

Our review of this issue is not de novo nor is the decision of the trial court lightly reversed. McDonald v. McDonald, 170 N.W.2d 246, 247 (Iowa 1969); Harkins v. Harkins, 256 Iowa 207, 211, 127 N.W.2d 87, 89 (1964). Evidence to sustain the act charged and a finding of contempt must be clear, satisfactory, and convincing. McDonald, 170 N.W.2d at 247; Harkins, 256 Iowa at 211, 127 N.W.2d at 89. Moreover, the evidence must show the disobedience was willful. Huston v. Huston, 255 Iowa 543, 548-49, 122 N.W.2d 892, 896 (1963); § 598.23, The Code. "Willful" is defined as not only an act "intentionally or deliberately done, but with a bad or evil purpose, as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to a known duty, or without authority, and careless whether [the person committing the act has] the right or not." Huston, 255 Iowa at 548, 122 N.W.2d at 896 (quoting Cozad v. Strack, 254 Iowa 734, 741-42, 119 N.W.2d 266, 270-72 (1963)).

It is undisputed Albert refused to return the children on July 3, 1979. The children had been visiting Albert since May 1979 when Albert, without obtaining Patricia's permission, brought them to the house where he is living. Albert brought them there after receiving a call from the children indicating they wished to live with him. When Patricia went to Albert's house on July 3, he refused to allow her to leave with the children. Albert's only apparent explanation is the children's desire not to live with Patricia. This is not sufficient to excuse Albert's willful and direct contravention of the dissolution decree. See Wells v. Wells, 168 N.W.2d 54, 63-64 (Iowa 1969).

We reverse the judgment of the trial court on its finding of insufficient grounds for contempt and remand it to the trial court for entry of an appropriate order to insure

compliance with the original dissolution decree's provisions on custody and visitation, as well as support payments.

III.

Patricia contends the report and recommendation of the attorney appointed to represent the children should be disregarded. She argues the report is more of an application to modify the custody provisions of the dissolution than a fair and impartial report on furthering the best interests of the children. She also contends the report is not responsive to the issues before the court, which were the contempt citation and a more specific definition of Albert's visitation rights. We hold the attorney's findings are not admissible as evidence in this case.

An attorney appointed pursuant to section 598.12, The Code, is to investigate and to secure the testimony of witnesses helpful to the cause of the children. In re Marriage of Joens, 284 N.W.2d 326, 329 (Iowa 1979). This statute does not provide for a report or recommendation by the attorney. Id. Any findings made by the attorney are not made admissible by the statute as evidence in the case. Id. What the attorney discovers is frequently hearsay; therefore, those who know the facts should testify to provide a more reliable basis for the trial court's ultimate decision. Id. An exception to this rule is when the parties agree or stipulate to present the matter before the court. Id. This is not the case here since Patricia objected to the introduction of this evidence. Id. Accordingly, in our de novo review, we will ignore this attorney's report and recommendation.

IV.

Patricia challenges on two grounds the trial court's modification of the decree by transferring the custody of the children to Albert. She contends allowing Albert to make an oral application to modify the decree denies her due process rights to fair notice and an adequate opportunity to be heard. Patricia also contends Albert did not establish a sufficient change in circumstances justifying modification of the children's custody as in their best interests. In accordance with the principle of deciding cases on nonconstitutional grounds, we address the second issue first and find in favor of Patricia.

Our review of this matter is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, but will not abdicate our duty to review de novo the

facts and determine anew the issues properly presented and preserved. Iowa R. App. P. 14(f)(7).

Section 598.21, The Code, permits changes in the custody provisions of a dissolution decree "when circumstances render them expedient." Id. This has been construed to require a noncustodial parent seeking custody establish by a preponderance of evidence that conditions since the court decree have so materially and permanently changed the child's best interests make the change expedient. In re Marriage of Snyder, 276 N.W.2d 402, 404 (Iowa 1979). In addition, the noncustodial parent must prove an ability to minister more effectively to the child's well-being. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). Our first and governing consideration is the best interests of the child. Iowa R. App. P. 14 (f)(15).

The only change of circumstances apparently advanced by Albert is the preference of two older children to live with him. While we consider the children's preferences, they are not controlling. In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973). We think it significant their preference appears to stem partially from Albert's less strict discipline and supervision. After examining the record, we can find no material change in circumstances making it expedient we change the custody provisions of the original decree. Neither do we find Albert to be able to minister more effectively to the children's well-being. We, therefore, reverse the judgment of trial court and remand this case for reinstatement of the original dissolution decree.

Although Patricia requests that we modify the original decree to deny Albert all visitation rights, we do not find this to be in the children's best interests.

REVERSED AND REMANDED.