

IN THE COURT OF APPEALS OF IOWA
IOWA SUPREME COURT

FILED

JUN 28 1979

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LOWELL JUHL,

)

Petitioner-Appellant,)

Filed June 28, 1979

vs.

)

JANICE JUHL,

)

Respondent-Appellee.)

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3-62202

Appeal from Shelby District Court - Leo F. Connally, Judge.

Petitioner-husband appeals from trial court judgment denying his application for modification of child custody provision in the divorce decree and from trial court's finding it had no jurisdiction over youngest son, born 21 months after divorce decree became final. AFFIRMED.

Bennett Cullison, Jr. of Cullison & Cullison, Harlan, Iowa, for petitioner-appellant.

Rebecca A. Belcher of Des Moines, Iowa for respondent-appellee.

James W. Carney of Des Moines, Iowa, for intervenor.

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

JOHNSON, J.

Petitioner-husband appeals from trial court's ruling which denied his application for modification of a divorce decree and ordered custody of the parties' son, David Juhl, to remain with respondent-mother, with supervisory authority being exercised by maternal grandmother, and from trial court's finding it had no jurisdiction over Jeffrey Juhl, born 21 months after the divorce decree became final. We affirm.

Lowell and Janice Juhl were granted a divorce¹ on September 11, 1967, after a marriage of just over two years. Pursuant to a joint stipulation, custody of the parties' son, David Juhl, born January 25, 1966, was given to respondent. Petitioner was ordered to pay \$50 per month as child support. Respondent gave birth to a second son, Jeffrey, on June 21, 1969, after an attempted reconciliation of the parties. Petitioner has never formally acknowledged the paternity of Jeffrey, nor has he contributed to the child's care and support with the exception of the period immediately preceding this action.

On November 15, 1977, ten years after the divorce and eight years after the birth of Jeffrey, petitioner filed an application to modify the decree with regard to the custody of both children. Without authority, petitioner removed both boys from the home of their maternal grandmother (where they resided with their mother) and took them to Colorado where he resided with his second wife, Wanda. The children remained in Colorado during the pendency of a Colorado habeas corpus proceeding filed by respondent² and during the consideration of motions and appeals filed in Shelby County District Court.³

On June 28, 1978, trial court declared that it had no jurisdiction over Jeffrey Juhl in the custody action and that petitioner had failed to show such change of circumstances that would justify a change in custody of David Juhl.

¹ Present Chapter 598, Dissolution of Marriage, was enacted as 1970 Session of the 63rd G.A., ch. 1266, §§ 2-35.

² That proceeding was continued by the Colorado court until the completion of a report by the Colorado guardian ad litem.

³ On November 17, 1977, the Shelby County District Court ordered reports from appropriate social service agencies in Page and Polk County, Iowa, and Adams County, Colorado. Respondent moved to set aside the order and for a change of venue to Polk County, Iowa. The motion on venue was overruled orally and respondent and third-party intervenor-grandmother made joint application for Interlocutory Appeal. Proceedings were stayed until December 22, 1977, at which time both motions were overruled. On January 19, 1978, respondent's petition for appeal was denied by the Iowa Supreme Court. On February 8, 1978, the parties were ordered to proceed to full hearing without unnecessary delay. Trial was held June 14, 1978.

I. We will first address the issue regarding trial court's finding that it had no jurisdiction as to Jeffrey Juhl, who was born June 21, 1969, some 21 months after the divorce decree became final. Pursuant to § 598.21, The Code 1977, "[w]hen a dissolution of marriage is decreed, the court may make such order in relation to the children . . . as shall be justified." A court of equity also has the "power to vacate or reopen the decree, or to entertain a supplemental petition in the original action to determine the issues of custody and child support, and to determine whether the husband is the father of the child," 24 Am. Jur.2d Divorce & Separation § 876 (1977). None of these actions was taken in the present case.

Respondent informed petitioner of her pregnancy, which followed their unsuccessful attempt at reconciliation, and expressed a desire to remarry. Petitioner left town without telling respondent where he was going and she lost contact with him for some time. Petitioner did not begin any regular visitation with either of the boys until 1974. No support was ever paid for Jeffrey's care. Petitioner, in fact, denied paternity for a period of years. We find that custody of Jeffrey Juhl has always been with respondent and that the question of his custody has never been properly presented to trial court for determination. Thus, trial court did not err in finding it had no jurisdiction to determine Jeffrey's custody in the present modification proceedings.

II. We next turn to the matter of the custody of David Juhl. Our review in custody cases is de novo and, while the court will give weight to findings of trial court, we will not abdicate our responsibility to review the record. Iowa R. App. P. 4. Boyes v. Boyes, 247 N.W.2d 265 (Iowa 1976). To warrant modification of the custody provisions of a decree, the party seeking such change must show that there has been a material and substantial change in circumstances that relate to the child's welfare. In re Marriage of Brown, 247 N.W.2d 2 (Iowa 1976). In the instant case, petitioner alleged that respondent's history of mental instability since 1969 was a material and substantial change of circumstances. The record shows that respondent had been receiving psychiatric treatment since shortly after the divorce in 1967. Further, she had been hospitalized for five brief periods during the years 1969 to 1977, and in 1977 spent 3 months at The State Mental Health Institute in Clarinda. Although respondent testified that petitioner's parents, and usually petitioner himself, were aware each time she was hospitalized, it was not until November, 1977, that petitioner ever expressed any

interest or concern about the state of her health or the welfare of the children.⁴ Since her release from Clarinda in November, 1977, respondent has been treated regularly, on an out-patient basis, at the Hickman Mental Health Center in Des Moines. Her treating psychiatrist testified that it was his professional opinion that respondent previously had been improperly diagnosed, received improper treatment, and was over-medicated with drugs dangerous to her physical health. He further testified that these conditions have been corrected, that she has responded favorably, and that she has shown steady improvement. Additionally, testimony at trial showed that the boys were healthy, well-adjusted and adequately cared for by their mother and that her alleged mental instability did not prevent her from being a fit mother.

Rule 344(f)(15) Iowa R. Civ. P. requires that the governing concerns of the court in custody determinations be the best interests of the children. Zaerr v. Zaerr, 222 N.W.2d 476, 477 (Iowa 1974); In re Matter of Pokrzywinski, 221 N.W.2d 283, 284 (Iowa 1974). We find that petitioner has failed to prove any superior claim or that he could minister more effectively to David's well-being than respondent. In re Marriage of Morton, 244 N.W.2d 819 (Iowa 1976).

Although petitioner and his second wife appear to have a stable and happy marriage, and both express desire for custody, the record shows that David's schoolwork has suffered, that he has fewer friends and playmates in Colorado, and that petitioner has used gifts and promises to entice or coerce both David and Jeffrey to express their desire to remain in petitioner's custody. While the court has held that a child's wishes may be considered, they are not controlling but only one factor to be considered. Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970). Further, the Iowa cases have repeatedly held that siblings should not be separated absent good and compelling cause. Id. Wells v. Wells, 168 N.W.2d 54, 60 (Iowa 1969).

For all of the above reasons, we find that petitioner has failed in his burden of showing sufficient change of circumstances and that custody of David Juhl should remain with respondent.

⁴ A few days prior to respondent's release from Clarinda in 1977, petitioner, without respondent's knowledge or consent, removed both boys to Colorado.

III. The children's maternal grandmother, Mary Belle Pope, filed as a third-party intervenor in this action. Trial court reserved the right to rule on the issue of whether she was a proper party to the action. However, there is no record that such a ruling was made. We find, therefore, that error was not properly preserved as to this issue. Additionally, failure in the brief to state, argue or to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 14(a)(3).

The court looks with disfavor on intervention by grandparents or other third parties where both parents are alive, willing and able to assume custody. However, because both of the minor children and their mother have lived with the maternal grandmother for the past eight years, we believe trial court did not abuse its discretion in awarding sole custody to the mother, with supervisory authority to be exercised by the maternal grandmother.

The judgment of trial court is affirmed.

AFFIRMED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent from Division II of the majority's disposition of the custody of David Juhl. I am opposed to placing custody with the grandparents when there is no disqualifying reason petitioner should not have custody of his children. At the time of trial, respondent was residing in the YWCA and not with her mother or the children. Additionally, respondent's father is deceased and her mother totally disabled from emphysema.

I would find under the broad jurisdictional provisions of section 598.21, The Code 1977, that Jeffrey Juhl is the son of Lowell and Janis Juhl even though it was not raised by the parties. The importance of these boys being together in these times of turmoil requires the law to proceed with this determination as a matter of justice. The record reveals no serious dispute as to the necessity of such findings and the fact that the parties are the parents of Jeffrey Juhl has not been seriously contested.

Although parties often seek modification of a dissolution decree without sufficient grounds shortly after it was entered, in this appeal that is not the case. Since the original decree was entered, the circumstances of Janis's mental health have changed dramatically. Janis's mental instability is very extensive necessitating psychiatric treatment approximately 350 times and hospitalization was required on six occasions. She has been diagnosed paranoid schizophrenia at Broadlawns and the Clarinda mental hospital. Her present psychiatrist says she is manic-depressive with a current diagnosis of schizo-affective illness which lies somewhere between the two previous diagnoses. Her mental illness is most serious and is a factor to be considered by this court. Andreesen v. Andreesen, 252 Iowa 1152, 110 N.W.2d 275 (1961).

The two children have indicated, both to the court and to a social worker for the Polk County Department of Social Welfare, a desire to be with their father. While this desire is not controlling, it is a factor to be considered. Petitioner's conduct has not been exemplary but he suffers no disqualifying legal disability that should result in custody of his children being placed with a third party. He has a stable and happy marriage and can provide the children with a good home. I would modify the custody provision to award custody of the children to the petitioner.