IN THE COURT OF APPEALS OF IOWA

JAN 29 '97
CLERK SUPREME COURT

No. 6-805 / 96-0933

IN RE THE MARRIAGE OF ANN M. ENGLER AND LLOYD L. ENGLER

Upon the Petition of

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ANN M. ENGLER,

Petitioner-Appellee,

And Concerning

LLOYD L. ENGLER,

Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Lloyd Engler appeals from a district court judgment entered modifying the parties' dissolution decree. **AFFIRMED.**

David A. Lemanski, Dubuque, for appellant.

Richard L. Boresi of King, Smith & Boresi, Cedar Rapids, for appellee.

Barbara H. Liesveld of Thinnes & Liesveld, Cedar Rapids, for minor child.

Considered by Habhab, C.J., and Streit and Vogel, JJ.

STREIT, J.

Father appeals from a district court judgment entered modifying the parties' dissolution decree. He contends the district court erred in transferring primary physical care of the parties' child to the mother.

The fourteen-year marriage of Lloyd and Ann Engler was dissolved by a Clayton County district court decree entered in 1992. The decree provided, among other things, that the parties would have joint legal custody of their daughter, Megan, born August 28, 1984, and her primary physical care would be with Lloyd. The court of appeals affirmed the district court's decree, *In re Marriage of Engler,* 503 N.W.2d 623 (Iowa App. 1993).

In May 1994, Ann filed a petition for modification in Linn County district court alleging a substantial change of circumstances had occurred warranting a change in the custodial provisions of the decree in that Megan had been living with her since June 1993. The petition further asked for child support. The district court denied Lloyd's motion for change of venue, and the court's ruling was affirmed on interlocutory appeal. *In re Marriage of Engler*, 532 N.W.2d 747 (Iowa 1995).

At the time of the modification hearing, Ann was forty-three years old and lived in an apartment in Cedar Rapids. She had a B.S. in nursing and was working with the Visiting Nurses Association. She was in good health and was engaged to

marry Dan Fountain. Lloyd was forty-four and resided on a farm in rural Garnavillo. Megan was age eleven.

In April 1996, the court entered a ruling modifying the custody provisions of the decree. The court found a number of substantial changes of circumstances had occurred. Megan had testified out of the parties' presence she was very unhappy living on the farm, she would be more comfortable living with her mother as she nears puberty, her father was never around, she did not believe she could talk to her father, that her father was always late picking her up, and she preferred living with her mother.

The court also noted testimony that Lloyd had restricted Megan's visitation with Ann and Megan's maternal grandparents, that Lloyd has held Ann "captive" and has spit on her, and that Megan had gained weight and been depressed since being returned to the farm. The court ruled the parties would continue to have joint legal custody but that primary care of Megan would be transferred to Ann.

The court established visitation and ordered Lloyd to pay $96.30 per month in child support. The court made Ann responsible for Megan's attorney fees and ordered the parties to pay their own fees.

Lloyd appeals. He suggests the court erred in finding a substantial change of circumstances. He also maintains the court failed to consider the previous court of

appeals decision, the fact that Ann now lives in rural Iowa City and the fact that Megan was doing well in his care.

We review the record de novo in a proceeding to modify the custodial provisions of a decree for dissolution of marriage. *In re Marriage of Zabecki,* 389 N.W.2d 396, 398 (Iowa 1986). At the same time, we recognize the virtues inherent in listening to and observing the parties and witnesses. *Id.* Consequently, we give weight to the findings of the trial court, although they are not binding. *Id. See also* Iowa R. App. P. 14(f)(7).

Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the children. *In re Marriage of Frederici,* 338 N.W.2d 156, 158 (Iowa 1983). Additionally, the parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Id.* This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons. *In re Marriage of Anderson,* 530 N.W.2d 741, 741-42 (Iowa App. 1995). Moreover, as in all cases involving the question of custody, our first consideration in proceedings to modify custody is the best interest of the children. *In re Marriage of Jenkins,* 240 N.W.2d 667, 668 (Iowa 1976).

The district court made a list of substantial changes in circumstances since the entry of the original dissolution decree. The most notable are those circumstances in which Lloyd has interfered with Megan and Ann's relationship because of his continuing love for Ann.

There is no question that Lloyd loves Megan and has provided Megan's daily needs. Successful parenting following a dissolution, however, implicates far more than a parents' ability to attend to the daily details of raising a child. The parent must also have the ability to set aside understandable resentments and act in the best interests of the child. Although this is most certainly easier said than done, this fundamental requirement nevertheless remains essential to the effective exercise of joint custodial care. Constructive dialogue and cooperation on matters of mutual parental concern are unlikely if the custodial relationship is strained by contentiousness and hostility between the parents. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-75 (Iowa 1989) (mother used child as a pawn, injecting the child into the very vortex of the pathetic and irrational attempts to draw father back from his new wife); *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984) (mother sought to obscenely denigrate and deny the emotional relationship between the father and their child in total disregard of the child's emotional well-being); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659 (Iowa App. 1991)(mother's flagrant

and continuing destructive conduct interfered with the children's association with their father).

The adverse effect of the custodial parent's interference with the rights of the noncustodial parent based on a preponderance of the evidence that a permanent material change of circumstances occurred will require a change of physical custody. *See In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993) (mother willfully sought to deprive father of court-ordered visitation constituted a material change). Since Megan returned to Lloyd's home after spending the 1993-94 school year with her mother, Lloyd has exerted an unhealthy control over the development of Megan's relationship with her mother and grandparents. He has restricted phone contact between Megan and her mother, refused to allow Ann to pick Megan up from school, spit on Ann in front of Megan, made other impermissible actions, and made it difficult for Ann to leave when she arrived at Lloyd's to pick up Megan for visitation.

We understand part of Lloyd's alienation may stem from the fact that after Lloyd was awarded custody, Ann told Lloyd that she loved him and was sorry that they had gone through the divorce and the parties went through a brief reconciliation. We find, however, Lloyd's conduct sufficiently establishes a material change of circumstances to justify a change in custody. There is also evidence that this behavior has had an adverse effect on Megan, causing her to gain excessive weight and become

depressed. Lloyd's inability to let Ann go prevents him from acting in the best interests of Megan.

We believe the present circumstances were not contemplated by the court when the decree was entered. We must still decide whether Ann has shown an ability to more effectively minister to Megan's well-being. We find Ann is more able to develop a strong relationship with both parents than Lloyd. Ann is more available to spend time with Megan and communicate emotionally and physically with Megan.

Based on our de novo review, Lloyd's acts of misconduct, as well as his alienation towards Ann, warrants a change in custody. It is in Megan's best interests that Ann have primary physical custody of Megan and joint legal custody with Lloyd. The trial court is affirmed.

AFFIRMED.