

FILED
JUN 30 1978
158
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF LINDA RAE CARLSON AND RICHARD VERNON CARLSON
UPON THE PETITION OF)
LINDA RAE CARLSON,)
Appellee,) Filed June 30, 1978
AND CONCERNING)
RICHARD VERNON CARLSON,)
Appellant.) 566
3-61240

Appeal from Polk District Court - Harry Perkins, Jr., Judge.

Respondent appeals from dismissal of his application for modification of the child custody aspect of a dissolution decree. AFFIRMED.

James A. Waters, of Herman, Waters & Anderson, of Ankeny, counsel for appellant.

Mike Wilson and Ronald A. Baybayan, of Wilson Law Firm, of Des Moines, counsel for appellee.

Submitted to Albee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Respondent-Richard Vernon Carlson appeals the dismissal of his application for modification of the child custody aspect of the marriage dissolution decree entered July 3, 1974 which provided that petitioner-Linda Rae Carlson was to have permanent custody of the two minor children, ages 8 and 12 at the time this matter was heard by the district court. Richard contends that the trial court erred in (1) finding that petitioner's alleged immoral conduct does not make her an unfit or improper custodial parent; (2) finding that it is in the children's best interests that she retain custody; and (3) balancing the positive and negative contributions of petitioner rather than the respective contributions of both parties in determining with which parent the best interests of the children could be served.

Our review in this matter is *de novo*. Rule 4, Rules of Appellate Procedure. We give weight to the trial court's findings of fact, but we will not abdicate our responsibility to review the record *de novo* on appeal. Rule 14 (f)(7), R. App. P.; *In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976).

In cases involving applications for modification of custody arrangements, the party seeking a change in custody has the burden of showing by a preponderance of the evidence that the circumstances extant at the time the original decree was entered have changed so materially and substantially as to warrant a transfer of the children to his or her custody. The parent seeking to take custody from the other must show some superior claim based on his or her ability to minister, not equally, but more effectively to the children's well-being. The best interests of the children involved remain our first and governing consideration. Rule 14(f)(15) R. App. P. In deciding the question, we seek neither to punish one parent nor to reward the other. *Hagen v. Hagen*, 226 N.W.2d 13, 15 (Iowa 1975); *In re Marriage of Brown*, 247 N.W.2d 2, 3-4 (Iowa 1976); *Davis v. Davis*, 237 N.W.2d 455, 457 (Iowa 1976).

The record reflects that the two minor children resided with Linda in a home in Des Moines from the date of entry of the dissolution decree until April 5, 1977, when they were taken to Richard's home by Linda's sister. Since the dissolution, Richard has remarried and he and his present wife, who has a child of her own, reside in Ankeny. Since April 5, they have had the two children in their home.

At the hearing on the application, Richard introduced evidence that on April 5, 1977, Linda went out of town overnight with her boyfriend and left the children in the care of a 16-year-old girl who, with Linda's permission, had invited her boyfriend over to the house. A neighbor noticed that one of the children was sitting outside and unable to get into the house. The babysitter and her boyfriend became locked in the house and the bedroom. However, the circumstances under which they became locked in was never clearly resolved. There was also some evidence presented that this babysitter had physically mistreated these and other children on a previous occasion and that Linda had been informed of this fact.

The record is uncontroverted that Linda has been associating with a married man who sleeps with her one or two nights a week and who states that he plans to marry her. Apparently, both children and the neighbors are aware of this relationship.

Linda presented several witnesses who testified that she is a good mother and that while the children were in her care, they were clothed, fed and given proper supervision. The children were described as normal, healthy and happy and, as the trial court observed, there appears to be love and affection between the mother and children.

In its findings of fact, the trial court initially noted that Richard and his wife are both employed outside the home and during the day when not in school, the children are left with a babysitter. Linda was not employed outside the home while the children resided with her. Although concluding that Richard had not sustained his burden of proving the requisite change of circumstances, the court criticized Linda for using poor judgment in the choice of a babysitter and in her relationship with her boyfriend. However, the court concluded that these negative factors were outweighed by the positive actions she has taken to properly care for the children the majority of the time.

We agree with the reasoning of the trial court. Although we are disturbed by the matters brought out at the hearing, we do not feel that they provide a sufficient basis, in and of themselves, for a transfer of custody. Furthermore, the record is essentially devoid of any affirmative evidence which would indicate that Richard could better minister to the children's needs than Linda. Finally, we feel compelled to make the observation that the sincerity and strength of Richard's convictions regarding these children is seriously undermined by the fact that he has continually been delinquent in

the payment of his \$50 per week child support obligation even though the record establishes that his income ranges from \$700 to \$1000 per month. As a result of this delinquency, Linda has been forced to obtain public assistance.

After reviewing the entire record, we conclude that Richard's contentions are without merit and that the trial court correctly denied the application for modification. We sincerely share in the hopes expressed by the trial court that Linda has learned from these experiences and will do better in the future. The judgment of the district court is affirmed.

AFFIRMED.