

IN THE COURT OF APPEALS OF IOWA

FILED

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CLERK SUPREME COURT

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189

STEPHANIE IRELAND BERNHAGEN; SEAN IRELAND,
a Minor; and SETH IRELAND, a Minor; by
STEPHANIE IRELAND BERNHAGEN, THEIR Mother,
Natural Guardian, and Next Friend,

Plaintiffs-Appellants,

vs.

BARRY A. IRELAND,

Defendant-Appellee.

1-452
3-67028

Appeal from Clay District Court, James H. Andreasen, Judge.

Plaintiff, Stephanie Ireland Bernhagen, and her two minor children appeal from a trial court decree denying their petition for declaratory judgment that Iowa was the children's home state and that the custody provisions of the Idaho dissolution decree could be modified only by an Iowa court. On appeal, plaintiffs assert that Iowa was the children's home state, that an Iowa court had jurisdiction to modify the custody provisions of the Idaho dissolution decree, that the trial court should not have given full faith and credit to an Idaho custody modification, and that the trial court abused its discretion in refusing to appoint counsel to represent the children's interest. REVERSED IN PART, AFFIRMED IN PART, AND REMANDED FOR PROCEEDINGS CONSISTENT WITH OUR DECISION.

Rosemary Sackett of Sackett, Sackett, Hemphill & Howe, Spencer, for plaintiffs-appellants.

David A. Scott of Cornwall, Avery, Bjornstad & Scott, Spencer, for defendant-appellee.

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

Plaintiff, Stephanie Ireland Bernhagen, and her two minor children appeal from a trial court decree denying their petition for declaratory judgment that Iowa was the children's home state and that the custody provisions of the Idaho dissolution decree could be modified only by an Iowa court. On appeal, plaintiffs assert that Iowa was the children's home state, that an Iowa court had jurisdiction to modify the custody provisions of the Idaho dissolution decree, that the trial court should not have given full faith and credit to an Idaho custody modification, and that the trial court abused its discretion in refusing to appoint counsel to represent the children's interest. We reverse in part, affirm in part, and remand for proceedings consistent with our decision.

Plaintiff Stephanie Bernhagen and defendant Barry Ireland were divorced in Idaho in November 1978. The Idaho court awarded custody of their two sons to Stephanie. She remarried and moved to Iowa with the two boys and her new husband in December 1978.

Barry traveled to Iowa from Idaho in June of 1979 to exercise his summer visitation rights, but he was not allowed to take the children with him. Stephanie applied to the Iowa District Court for Clay County in July 1979 for a modification of the Idaho decree requesting that Barry's visitation rights be terminated. Barry filed a special appearance to challenge the Iowa court's jurisdiction. The Iowa court sustained the special appearance and declined to exercise jurisdiction on the ground that Iowa was an inconvenient forum for the determination of Barry's visitation rights. Stephanie appealed, and the Iowa Court of Appeals affirmed.

In October 1979, Barry applied to the Bonner County, Idaho, District Court for a modification of the Idaho decree requesting that custody of the children be transferred to him. His application was granted on February 6, 1980.

On November 13, 1979, Stephanie filed a petition for declaratory judgment in the Clay County District Court that Iowa is the children's home state and that only Iowa has jurisdiction to modify custody. Later she also applied for appointment of counsel to represent the children, but that application was never ruled on.

Barry answered and asserted there was no justifiable controversy, that the issue had been resolved by the Court of Appeals decision, and that Stephanie's contempt in denying him visitation barred her request for relief. Barry additionally asserted that the Idaho custody modification should be given full faith and credit in Iowa.

The parties appeared for trial in November 1980, but reached a settlement so the trial was continued pending implementation of the settlement. The settlement fell through, and on November 26, 1980, Stephanie again applied for counsel to represent the children. The application was denied on March 6, 1981.

Trial was held on March 6, 1981. The trial court found that the parties had already litigated the issue of Iowa's jurisdiction and that Stephanie had not sustained her burden of showing Idaho did not have jurisdiction once Barry introduced the Idaho modification. The trial court denied the petition for declaratory judgment and gave full faith and credit to the Idaho modification. Stephanie appealed.

I. Idaho's Jurisdiction. Idaho had jurisdiction to modify the custody provisions if it was the children's "home state" at the time the proceeding was commenced or within the preceding six months, or the children's "best interest" required an assumption of jurisdiction because of their and at least one parent's significant connection with Idaho. Section 598A.3, The Code 1979.

Stephanie asserts that Iowa, rather than Idaho, is the children's home state. Home state is defined in section 598A.2(5) as: "the state in which the child, immediately preceding the time involved, lived with the child's parents, a parent . . . for at least six consecutive months."

We determine whether the six-month period is met by looking at the time of the filing of the petition for modification. Pierce v. Pierce, 287 N.W.2d 879, 882 (Iowa 1980). Barry filed the petition for modification in Idaho in October 1979. The children last lived in Idaho in December 1978, thus the "home state" test indicates that Idaho is not the children's home state.

When we look at the best interests of the children, we see that they have lived in Iowa since December 1978. Sean is doing well in an Iowa school, and they have friends and relatives in Spencer. They are provided for in Iowa by their mother and stepfather. Most of the people who would testify about their present and future care, protection, training, and personal relationships are in Iowa. In the best interests of the children, Iowa is the proper state to determine the proposed custody modification, not Idaho.

Since the children have not been in Idaho since 1978 and since their best interests indicate that Iowa has a more significant connection, we think that Idaho does not have the necessary connection with them to require us to give full faith and credit to that custody modification. See generally, Slidell v. Valentine, 298 N.W.2d 599 (Iowa 1980).

We note that this court previously ruled that Iowa was an inconvenient forum in which to determine Barry's visitation rights. See In re Marriage of Ireland, No. 65157 (Iowa Ct. App. Filed Sept. 23, 1980). This decision was made for a number of reasons. Stephanie filed the modification action to terminate Barry's rights in Iowa only seven months after the parties' dissolution decree had been entered in Idaho. Until shortly after the decree was entered, all the parties resided in Idaho. The evidence and witnesses concerning the relationship were in Idaho. Visitation was to occur in Idaho. Therefore, the Iowa court found that Idaho was the appropriate forum to hear Stephanie's modification action.

This action, however, requires that Iowa courts decide it. At the time this suit was filed, the children's new home state was Iowa, their mother lived and worked in Iowa, Sean attended an Iowa school, and the people who would testify about the children's present and future care lived in Iowa. Clearly the children's best interests require an Iowa forum to decide the custody question. We see no conflict, therefore, in allowing Idaho to decide the visitation question while we refuse to grant full faith and credit on the custody question.

II. Clean-hands Principle. Barry alleges that Stephanie has thwarted his visitation rights by leaving Idaho, by refusing to let him take the children from her for summer visitation, and by ignoring both the Idaho and Iowa courts. Section 598A.8(1) provides that:

If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if it is just and proper under the circumstances.

However, the above statute is not to be followed if doing so would jeopardize the welfare of the children. Barcus v. Barcus, 278 N.W.2d 646, 650 (Iowa 1979). Under the considerations of this case, Iowa is the appropriate forum because of the children's best interests.

In his brief, Barry states that Stephanie and her new husband left Spencer, Iowa, and moved to New York state immediately after Judge Andreasen ruled in the case. We must restrict our consideration to the record made at trial. In re Marriage of Callenius, 309 N.W.2d 510, 513 (Iowa 1981). Therefore we cannot consider the additional information supplied by Barry in his brief.

III. Attorney for children. Stephanie has made several requests to have an attorney represent the children's interests. Section 598.12, The Code, provides: "The court may appoint an attorney to represent the interests of the minor child

or children of the parties." This language has been held to be directory only and not mandatory. Boyes v. Boyes, 247 N.W.2d 265, 268 (Iowa 1976). We can see no abuse of discretion on Judge Andreason's part in refusing the request to appoint an attorney for the children.

IV. Conclusion. Iowa should not give full faith and credit to the Idaho custody modification. Idaho is neither the home state of the children anymore, nor is having the proceedings there in the best interests of the two children. Iowa courts should proceed to determine the custody issue, and we reverse and remand for proceedings to determine the custody of the children.

We affirm the trial court's decision not to appoint counsel for the children.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED FOR PROCEEDINGS CONSISTENT WITH OUR DECISION.

All judges concur except Donielson, J., who dissents, and Carter, J., who concurs specially.

CARTER, J. (concurring specially)

I concur in the result as being in accord with Slidell v. Valentine, 298 N.W.2d 599 (Iowa 1980). I believe, however, that the better view is that where, as here, the Idaho court has adjudicated the jurisdictional issue (which is a factual as well as a legal issue), that any error should be correctable only on a direct appeal of the Idaho decree.

DONIELSON, J. (dissenting)

I dissent. The majority's resolution of this case is directly contrary to the general purposes of chapter 598A, The Code 1981, and will serve to frustrate the legislative intent of chapter 598A.

In many instances a trial court or an appellate court attempting to interpret and apply a statute enacted by the legislature must search diligently to determine the intent and purpose for which the statute was enacted. Luckily, we are not confronted with this difficult task when we apply the Uniform Child Custody Jurisdiction Act, chapter 598A, The Code 1981, to the facts of this case. In section 598A.1, the Iowa legislature clearly spelled out its legislative intent as well as the general purposes of chapter 598A. The majority's opinion clearly frustrates both the legislative intent and general purposes of the portions of section 598A.1, The Code 1981, set out below:

1. Avoid jurisdictional competition and conflict with courts of other states in matters of child custody, which have in the past resulted in the shifting of children from state to state with harmful effects on their wellbeing.

* * *

4. Discourage continuing controversies over child custody, in the interest of greater stability of home environment and of secure family relationships for the child.

5. Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

6. Avoid relitigation of custody decisions of other states in this state insofar as feasible.

7. Facilitate the enforcement of custody decrees of other states.

8. Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

* * *

This chapter shall be construed to promote the general purposes stated in this section.

I fail to see how the majority opinion has construed chapter 598A to promote the general purposes set out above in any way. I believe the majority's decision encourages many of the problems which chapter 598A was enacted to remedy.

I disagree with the majority's conclusion that Idaho does not have jurisdiction to modify child custody. The majority relies only upon section 598A.3(1)(a) and (b) to reach this conclusion. In so doing, they ignore section 598A.3(1)(d) as well as the procedural and factual history of this case by limiting the holding of In re Marriage of Ireland, No. 65157 (Iowa Ct. App. Filed Sept. 23, 1980) to only the issue of visitation. I would find that our prior holding applied to both visitation and custody. I would then further find that Idaho did have jurisdiction to modify the child custody provisions of the Idaho divorce decree under section 598A.3(1)(d) because after our previous holding it was clear "another state [Iowa] has declined to exercise jurisdiction on the ground that [Idaho] is the more appropriate forum to determine custody of the child, and that it is in the best interest of the child that [Idaho] assume jurisdiction." Id. In addition, jurisdiction could be properly withheld under section 598A.6 because at the time Stephanie filed her action in Iowa for a declaratory judgment, the Idaho action was already pending. The Idaho proceeding appears to be in substantial conformity with chapter 598A because it was promptly filed after Iowa declined jurisdiction.

The majority seems to feel that our prior case only declared that Iowa was an inconvenient forum for determination of visitation rights. I believe we should consider the fact that the children had been out of Idaho for less than a year when Barry filed for modification and that the alleged reason for Stephanie denying visitation was her concern about the "adequacy of conditions in Idaho for the care

of the children." If this was the factual and legal issue to be argued in Idaho for termination of Barry's visitation rights, I submit it is nearly identical to the factual and legal issues that would be argued to determine custody. The evidence presented by Stephanie to cut off Barry's visitation rights would be the same evidence she would use to argue against modification of custody. By allowing the Idaho court to assume jurisdiction over both custody and visitation, and by giving full faith and credit to the Idaho decree we would best serve both the best interests of the children and the purposes of chapter 598A.

While I agree with the majority that we cannot properly consider the fact that Stephanie has now taken the children to New York, I do believe that this fact does clearly show the futility of the majority's decision to remand this case for a new hearing to relitigate the issue of custody in Iowa. The only impact of the majority opinion is to promote a continuing controversy over the parties' children which will result in relitigation of the custody decision as the mother moves from state to state and ignores the decisions of the courts she has left in her wake. Under the majority's decision we are perpetuating and encouraging further costly legal manipulations that make it increasingly difficult for the appellee to resolve the matter by having his day in court. I believe the majority is unalterably wrong in the manner it has applied chapter 598A to this case.

I strongly believe that it is in the best interest of the parties' children that the issue of custody be swiftly and finally determined. Barry's suit to modify custody in Idaho was filed shortly after Iowa was held to be an inconvenient forum by this court. I believe Barry's action in filing suit to modify in Idaho was proper and I would give full faith and credit to the Idaho modification of custody.

I would affirm the trial court.