IN THE COURT OF APPEALS OF IOWA

No. 7-634 / 97-372

FILED
FEB 25 1998
CLERK SUPREME COURT

IN RE THE MARRIAGE OF TONI DEANNA KAY AND GARY ALAN KAY

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Upon the Petition of
TONI DEANNA KAY,
Appellee,

And Concerning
GARY ALAN KAY,
Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

Gary Kay appeals a district court ruling dismissing his application for modification of primary physical care of the minor children. **REVERSED AND REMANDED.**

Richard C. Schenck of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellant.

Michael J. Winter, Council Bluffs, for appellee.

Considered by Streit, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Toni and Gary Kay were married in 1984. They have two children, Mitchell, born in 1986, and Lindsay, born in 1989. A dissolution decree was filed on January 26, 1993. The parties have joint legal custody of the children, with Toni having primary physical care.

Within a few months after the dissolution, Toni began to cohabit with Harry Trafton, who owns the I-80 Lounge. Toni quit her job and began to work without pay at the lounge. The children would come to the lounge after school and wait there until Toni took them home. After the application for modification was filed, Toni obtained a trailer, parked on the premises, for the children to stay in after school, instead of waiting for her in the lounge.

In February 1996, Gary obtained a different job, with substantially increased income and fewer hours. He lives with Pattianne Belitz.

On April 5, 1996, Gary filed an application for modification of the custody provision of the dissolution decree. He claimed it was detrimental to the children to spend lengthy amounts of time at the I-80 Lounge. He also claimed Lindsay's allergies were aggravated by second-hand smoke at the lounge. Toni also filed an application for modification, seeking to increase Gary's child support obligation.

The parties agreed to have a home study performed by Cathie Keister, a licensed mental health counselor. Keister recommended the children be placed in

Gary's care. She reported concerns over Toni's excessive use of alcohol. She also reported safety concerns because the children were staying in the trailer for one to two hours at a time, without supervision. The children told Keister they wanted to live with Gary.

The court found the children were doing very well living with Toni and concluded the children should remain in Toni's physical care. The court determined the home study was not useful in determining the result of the case.

Scope of Review. Our scope of review in dissolution cases is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown,* 487 N.W.2d 331, 332 (Iowa 1992).

A party seeking modification of custody has the burden to show a substantial change in circumstances. *In re Marriage of Weidner,* 338 N.W.2d 351, 361 (Iowa 1983). A parent must also prove an ability to minister more effectively to the children's well-being. *In re Marriage of Howe,* 471 N.W.2d 902, 903 (Iowa App. 1991).

Primary Physical Care. The trial court rejected the testimony of Cathie Keister, the person chosen by both parties to conduct a home study. During the modification hearing, the court asked Keister if she knew the origin of the term

"significant other." The court then stated when unmarried people lived together, he called it "shacking up." The following exchange then occurred:

> THE COURT: So what is your conclusion about the importance of what I refer to of shacking up on the children?
>
> KEISTER: I believe that if it's a healthy environment with boundaries and rules set, that they'll develop through it effectively.
>
> THE COURT: Did you ever live under those circumstances?
>
> KEISTER: Yes, I did.
>
> THE COURT: Did you ever smoke or drink?
>
> KEISTER: No. I never smoked. I drink occasionally.

Appellate courts rely on the credibility assessment of the trial court. Objective observations explained by a trial court are helpful in the review process. *In re Jenkins,* 503 N.W.2d 425, 427 (Iowa 1993). However, here, the trial court judge unnecessarily exposed personal information regarding the mental health counselor. She had been employed, by the agreement of both parties, to be of professional assistance to the court. Courts need all the help they can get in developing sufficient information upon which to make sensitive and important decisions. *State v. Kempf,* 282 N.W.2d 704, 711 (Iowa 1979). They should not arbitrarily reject such help when it appears. *Id.* The court's personal comments regarding Keister were repeated in the ruling:

> One of the licensed psychologists with a master's degree testified that she had also lived with another man without the benefit of marriage.

> She also questioned the drinking habits of Toni who was identified as a social drinker and she ultimately admitted that she also drank alcoholic beverages.

In some circumstances, the personal life choices of a witness, even an expert witness, may properly be considered in evaluating a witness's credibility. This is not one of those cases. Without a showing these choices somehow reflected on her professional judgment, it was not proper for the court to evaluate Keister's testimony using such criteria.

In our de novo review of all of the factors in this case, we find Gary has met the heavy burden necessary to modify a custodial arrangement. We find there has been a substantial change in circumstances since the date of the dissolution decree. The home study was unbiased, and presented considerable information regarding the children's situation and both parents. We have also carefully examined the testimony of the children's school counselor.

Toni required the children to spend time after school at a tavern, which was detrimental to their well-being. The children reported they had seen Toni intoxicated on numerous occasions, and this had an adverse affect upon them. On one occasion, Toni had the children in the car when she had been drinking and she hit a structure. Harry testified Toni might have had one or two beers before the accident. We also have concerns about Toni's supervision of the children while they were at the I-80 Lounge. The children reported they would play alone for one to two hours at a time

in the trailer or elsewhere on the property. Furthermore, Lindsay's allergies were aggravated by the smoke in the lounge as well as by smoking in the home of Toni and Harry.

We determine Gary can provide a more suitable home for the children. A psychological test showed Gary was secure and emotionally stable. He has a good relationship with his fiancé, Pattianne. He owns an acreage outside of Council Bluffs and keeps horses. In his home, each child would have his or her own bedroom. The children are required to share a bedroom in Toni's home. Gary provides the children with more appropriate and consistent supervision which allows them to be in a safe environment.

We are unable to determine Toni's child support obligation from the record before us. We remand for a hearing on the issue of child support. We do not retain jurisdiction.

We reverse the decision of the district court and remand. Costs of this appeal are assessed to Toni.

REVERSED AND REMANDED.