IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF GARY CLARK RUDOLPH
AND DAINA D. RUDOLPH

Upon the Petition of)
GARY CLARK RUDOLPH,)
Petitioner-Appellant,)
And Concerning)
DAINA D. RUDOLPH,)
Respondent-Appellee.)

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8-265
86-1803

Appeal from the Iowa District Court for Polk County (CE23-13173), Rodney J. Ryan, Judge.

Appellant appeals after unsuccessfully seeking to modify a 1982 dissolution decree to gain physical custody of the parties' minor child. **AFFIRMED AS MODIFIED.**

Raymond Rosenberg of the Rosenberg Law Firm, Des Moines, for petitioner-appellant/cross-appellee.

Philip F. Miller, Des Moines, for respondent-appellee/ cross-appellant.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

PER CURIAM

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This is an appeal from a directed verdict and dismissal of a petition to modify a 1982 dissolution decree which awarded custody of the couple's child to the mother. Petitioner-father appeals. We affirm as modified.

I.

Gary and Daina Rudolph were married in 1975 and are the parents of one child, Erik, born in 1979. The couple was divorced in California in 1979 with custody of Erik being given to Daina. Following the dissolution, Daina and Erik moved to Des Moines, while Gary remarried and now lives in Fargo, North Dakota.

A short time after the dissolution Gary began to voice concern to Daina regarding Erik's development, specifically his reluctance to develop language skills and problems with his physical motor skills. The record is replete with evidence Erik has suffered from a number of behavioral and social disorders during his short life. These problems have led to disagreements concerning his care between Gary and Daina, and ultimately this modification proceeding instigated by Gary to gain physical custody of his son.

After eight and one-half days of trial, the trial court sustained Daina's motion for directed verdict and dismissed Gary's petition. The trial court also reduced Gary's visitation and ordered him to pay increased child support. In addition, Gary was ordered to pay $15,000

toward Daina's attorney fees and court costs in connection with this proceeding. It is from this order which Gary now appeals.

II.

Gary contends it is in Erik's best interest he should be given his custody. He alleges Erik is not doing well in the custody of his mother. Gary urges, specifically, Daina has been unresponsive to recommendations for outside counseling in relation to Erik's developmental, emotional, and social disabilities. Further, Erik has grown dependent on adults and is deprived of peer interaction. Gary also claims Daina's parents, who provide much of Erik's care, are overprotective. He also challenges the trial court's order reducing his visitation rights, increasing the amount of child support, and awarding Daina $15,000 in attorney fees and costs in connection with the petition.

Daina believes the trial court properly exercised its discretion after it found Daina is a good parent and Erik has no current problem relating with other children and has made significant progress with his disabilities while in Daina's custody. In short, Daina urges Gary's allegations are not sufficient to show the requisite substantial change in circumstances that would lead this court to modify the earlier dissolution decree.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court,

especially when considering credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value. We must base our decision primarily on the particular circumstances of the parties in each case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

III.

A. Modification of Physical Custody. Our review is guided by a number of well-founded legal principles. Our paramount consideration in determining custody is the best interests of the child. In re Marriage of Weidner, 338 N.W.2d at 356. The moving party in a modification action carries a heavy burden when seeking a change in custodial provisions of a dissolution decree. This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. In re Marriage of Michaelson, 299 N.W.2d 670, 671 (Iowa 1980).

As the Iowa Supreme Court in In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983), stated:

> To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well being.

In these matters the court realizes the parents may have divergent approaches to deal with a child's problems. It is only when one of these approaches is manifestly not in the best interests of the child involved will we find evidence sufficient to modify a custody decree. Speculation that one parent may have acted more quickly or correctly pinpointed a child's problem under given circumstances, will not, by itself, meet this heavy burden. In this case, Gary alleges Daina's actions contributed to Erik's developmental problems and that she purposely chose not to attend to the needs of her son. We do not believe the evidence lends itself to such a conclusion.

We agree Daina may not have acted as swiftly to confront Erik's problems as may have been prudent, and once she did it may not have been for the proper reasons. However, we do not find, after reviewing the record here, Gary, if given custody, could demonstrate clearly superior parenting skills or Erik's problems could be more effectively dealt with. Once Erik began to receive counseling and other evaluations through the school, the area education agency, and private counselling, he has shown progress in overcoming his problems. This progress has been steady and the record indicates he has become comfortable with those professionals which are currently aiding him. Thus, we do not find the evidence here

sufficient to warrant the modification of the 1982 dissolution decree awarding physical custody of Erik to his mother.

B. Modification of Visitation. Gary argues because the trial court determined no substantial change in circumstances had occurred warranting modification of custody, the trial court should not have modified the terms of the decree relating to visitation. The standard for modification of visitation privileges is the demonstration by the party seeking modification of a change in circumstances since the entry of the dissolution decree. In re Marriage of Burwinkel, 426 N.W.2d 664, 665 (Iowa App. 1988). The burden in a modification of visitation rights is different from the burden in child custody change. Generally, a much less extensive change of circumstances need be shown in visitation rights cases. In re Marriage of Fortelka, 425 N.W.2d 671, 672 (Iowa App. 1988).

We agree with the district court that Erik's behavioral problems and ongoing need of counseling warrants a change in circumstances not contemplated in the original decree. However, we determine from our review the trial court's modifications to the visitation schedule were not reasonable. Thus, we find the modifications relating to visitation should be as follows:

1. Summer Visitation: 45 days between June 15th and August 15th of each year.

2. Christmas: Each alternate Christmas holiday season from 6:00 p.m. the day school closes until 6:00 p.m. the day prior to resumption of school.

3. Thanksgiving: Each alternate Thanksgiving, but not in the same year as Christmas visitation, from 6:00 p.m. the day school closes until 6:00 p.m. on the following Sunday.

4. Weekends: One weekend per month from Friday at 6:00 p.m. until Sunday at 6:00 p.m.

5. Telephone: We do not limit the number of telephone conversations that may be made between the father and his son, except to point out that it be limited to reasonable times and duration.

C. Modification of Child Support. Gary next argues no substantial change in circumstances exists warranting an increase in his monthly child support payments. We disagree and affirm the trial court's findings in this area.

D. Attorney Fees. Finally, Gary argues the trial court erred in awarding attorney fees and costs to Daina in connection with the petition for modification. Section 598.36 of the Iowa Code (1987) provides: "In a proceeding for the modification of an order or a decree under this chapter, the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court." We find Gary commenced this action in good faith,

believing the welfare of Erik was at stake. In addition, we find Gary's petition was not frivolous, but instead rooted in a genuine concern for the future well-being of his son. Simply because Daina prevailed in this matter, we cannot say she is without fault. It appears neither party has shown an interest in communicating with the other, nor set aside certain problems that led to the original dissolution decree. Had these lines of communication been open and the parties acted differently, this action may never have come about. We do not believe all the blame may be attached to Gary. We hold, because of the relative financial positions of the parties, Gary should pay $7,500 of Daina's attorney fees accrued at the trial court. In addition, the parties shall split the court costs at both the trial court and for this appeal, and each party shall pay his or her own attorney fees for this appeal.

AFFIRMED AS MODIFIED.