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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RUTHIE D. WILLIAMS AND BILLIE RAY WILLIAMS

Upon the Petition of)
RUTHIE D. WILLIAMS,) Filed October 18, 1979
Petitioner-Appellee,)
And Concerning) 203
BILLIE RAY WILLIAMS,) 3-62924
Respondent-Appellant.)

Appeal from Clinton District Court - Max R. Werling, Judge.

Respondent-father appeals trial court's order dismissing his application for modification of the custody provisions of a final decree of dissolution of marriage which awarded custody of two minor children to petitioner-mother. AFFIRMED.

A. John Frey, Jr., Clinton, Iowa, for respondent-appellant.

Robert Timothy Yeager, Clinton, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Respondent-father, Billie Ray Williams, appeals trial court's order dismissing his application for modification of the custody provisions of a 1975 decree of dissolution of marriage which awarded custody of two minor children, Malika Williams (born May 29, 1967) and Eddie Williams (born December 2, 1970), to petitioner-mother, Ruthie D. Williams. On appeal respondent argues trial court improperly found he had failed to prove a change of circumstances since entry of the 1975 decree necessitated a modification of its custody provision and urges this court to reverse trial court's order. Although the facts present a close case, we decline to do so and, therefore, affirm trial court's judgment.

The parties' marriage of August 3, 1963, was dissolved by final decree on June 25, 1975. Petitioner received custody of the children; respondent was granted visitation rights and ordered to pay $200 per month child support. Respondent filed his application for modification on June 20, 1978, alleging, **inter alia**, that for the prior six months, petitioner had avoided granting his visitation rights and had totally denied his visitation since April, 1978. He also alleged material and substantial change of circumstances affecting the children's best interests which made it expedient to award their custody to him. Hearing on the application was held in November, 1978.

I. Our review in custody cases is **de novo** and, while the court will give weight to findings of trial court, especially with regard to credibility of witnesses, we will not abdicate our responsibility to review the record. Iowa R. App. P. 4; Boyes v. Boyes, 247 N.W.2d 265 (Iowa 1976). Rule 14(f)(15), Iowa R. App. P., requires the governing concerns of the court in custody determinations to be the best interest of the children. Zaerr v. Zaerr, 222 N.W.2d 476, 477 (Iowa 1974). In this regard we are guided by the factors delineated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). However, to warrant modification of the custody provisions of a decree, the party seeking such change must show by a preponderance of the evidence that there has been a permanent, material, and substantial change of circumstances relating to the children's welfare which necessitate the change and that the party has a superior claim or can more effectively minister to the children's well-being than the current custodial parent. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976).

II. Respondent's major argument for modification in the instant case centers on the petitioner's demonstration of immaturity, instability, poor moral character and pattern of placing her own needs and desires before those of the children. Petitioner and the children resided in Clinton in the family home awarded to her by the final decree until August, 1978, when she and the children moved in with petitioner's mother, Esther Hughes where they remained at time of hearing. Also residing at the Hughes' household in Clinton were Esther's twenty-year-old daughter, Annette; Annette's eight-year-old child; Esther's twenty-one-year-old son, Willie, who has had mental problems requiring institutionalization, professional care and medication; Esther's nine-year-old son, Kenney; and Esther's thirteen-year-old grandson, whose mother had deserted him. Esther, Annette, and petitioner shared household and babysitting responsibilities.

Prior to moving to the Hughes' residence, petitioner had several male friends who shared her bedroom; the minor children had knowledge of these circumstances. Petitioner's marriage to one of the companions lasted from March, 1977 to May, 1978. While living in the family residence the children were alone in the home for varying lengths of time, although petitioner's evidence established she usually had made arrangements with a neighbor to check in on the children during these periods. Petitioner testified she generally was at work, shopping or seeking employment during these absences.

The record also discloses petitioner has been somewhat inattentive to the children's educational needs and, in the spring of 1978, removed them from school three weeks before the end of the school year. Testimony at hearing, however, indicated the children were getting along adequately, although their performance in specific areas was somewhat below average. Witnesses from the school testified the children at all times appeared to be well adjusted, well behaved and properly cared for.

Respondent has been steadily employed at the same industrial plant for 13 years and has been married to his present wife, Charlene, since October 15, 1977. They reside in a home in Camanche, Iowa. Respondent has consistently demonstrated his care and concern for the children, although his record of child support payments to petitioner at times has been erratic and in arrears. Respondent and his second wife appear to have a stable, happy marriage and both express a desire for custody. At hearing both testified Charlene would remain at home to care for the two children if custody were awarded to respondent.

III. In applying the law to the foregoing facts, we conclude respondent has not met his burden of proving permanent, material and substantial change of circumstances. The children have lived with petitioner for more than 3 years. While petitioner's conduct has been less than exemplary and, in many regards, contrary to traditional mores, there is no indication the children have been detrimentally affected. Further, petitioner testified her living arrangement in the Esther Hughes' residence was a temporary situation necessitated by her unemployment. At the time of hearing, she had secured a job in Davenport and hoped to relocate there. While we do not condone petitioner's interference with respondent's visitation rights, there is substantial evidence to indicate this was a temporary problem, in part, related to hostilities and misunderstandings between petitioner and respondent's current spouse. These appeared to have been resolved by the time of hearing.

While we are not required to wait until actual injury occurs to minor children, and must base our decision on probabilities rather than certainties, we do not find petitioner's behavior has turned the children's home environment into a scene of strife and confusion likely to detrimentally affect their welfare. C.f. In re Marriage of McCreary, 276 N.W.2d 399 (Iowa 1979). For all of the above reasons, we find respondent has failed in his burden of showing sufficient change of circumstances and that custody should remain with the petitioner subject to respondent's right of visitation.

IV. There is no authority to permit assessing respondent's attorney fees against petitioner in this matter; thus, respondent's request is denied. The costs of this appeal are assessed against respondent.

AFFIRMED.

DONIELSON, J. (dissenting)

I dissent from the majority's affirmance of the denial by the trial court of respondent's application to modify custody of the parties' two children, currently residing with petitioner. The evidence produced at trial establishes there has been a material and substantial change of circumstances, justifying modification of custody. Dworak v. Dworak, 195 N.W.2d 740, 742-43 (Iowa 1972). Moreover, the evidence also establishes that respondent is better able to provide for the well-being of the two children, In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), our first and governing concern. Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976).

The change in the children's living environment is substantial and material. At the time of the decree, June 25, 1975, petitioner and the children were living in the family home in Clinton. In August 1978 petitioner and the children moved in with her mother and five other relatives. Their current living circumstances may best be described as unsettled and lapsing at times into pandemonium.

The children now must share bedrooms with their cousins, aunts, and uncles. One uncle residing with them has been hospitalized twice for illnesses during the summer of 1978, and at the time of trial he was on medication and under the care of a doctor. An aunt and a visiting uncle using a hammer were involved in a fight with another person at the residence. Additionally, an acquaintance of petitioner's while residing with her was arrested for indecent exposure at a neighbor's home. In another instance, petitioner removed the children from school three weeks before the end of the school term. Petitioner has also been involved in a number of affairs with other men. One other troubling aspect of this case is that the grandmother has become, as described by Doctor Burns, as a "psychological parent," a consequence probably not within the trial court's contemplation.

Respondent, meanwhile, has remarried and established a stable, comfortable living environment, which would provide wholesome, enriching living conditions. Courts must act to prevent the well-being of children from being damaged and should not wait until actual injury occurs. We must act, as the majority points out, on probabilities, not certainties. The probabilities of this case weigh strongly against allowing custody of these two children to remain with petitioner in her current condition. In re Marriage of McCleary, 275 N.W.2d 399, 402 (Iowa 1979).

Snell, J., joins this dissent.