

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

PUTNAM V. PUTNAM

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CASEY JOE PUTNAM, APPELLEE,
V.
BECKY S. PUTNAM, APPELLANT.

Filed February 12, 2008. No. A-07-622.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Becky S. Putnam, now known as Becky S. Wier or Becky S. Brown, appeals from an order of the district court for Frontier County, Nebraska, which modified the parties' decree of dissolution by increasing Casey Joe Putnam's visitation with the parties' child. Becky claims that the court erred in finding that Casey proved a material change of circumstances existed and that the modification of visitation was in the child's best interests. Pursuant to this court's authority under Neb. Ct. R. of Prac. 11B(1) (rev. 2006), this case was ordered submitted without oral argument. Because we find no merit to Becky's assertions, we affirm.

BACKGROUND

Becky and Casey were divorced pursuant to a decree of dissolution entered on March 17, 2003. The parties are the parents of one child born August 2, 2002. The dissolution decree awarded the care, custody, and control of the child to Becky, subject to Casey's visitation. Visitation was to be supervised by Becky or someone designated by her. Casey was granted visitation every other Saturday and the immediately following Sunday, from 1 to 4 p.m. each day. This visitation was to last until the child reached 3 years of age, at which time visitation would be every other weekend. The decree specified that Casey should not consume alcohol or illegal drugs, including marijuana, immediately before or during any visitation and provided that Becky or her designated supervisor could terminate the visitation if alcohol or drugs were detected on Casey.

On March 14, 2006, Casey filed a petition for modification of decree in which he sought an increase in his visitation with the child. Casey alleged that a material and substantial change of circumstances had occurred since the entry of the decree and requested that he be awarded overnight weekend visitation with the child and such other visitation as the court found to be in the child's best interests. Casey specifically alleged that the parenting time previously ordered was not in the child's best interests, that the initial parenting time schedule was set up for 3 hours each day because the child was an infant, that Becky had allowed him to exercise overnight visitation with the child, and that Becky had moved to Cambridge, Nebraska.

Becky filed an answer on April 12, 2006, admitting that Casey was to have increased visitation with the child when he turned 3 years old and that the docket notes, but not the decree, stated that when the child turned 3, Casey should have unsupervised visitation with the child of every other weekend from 9 a.m. Saturday to 6 p.m. Sunday. Becky further admitted that she had been allowing this increased visitation to occur. Becky denied that Casey's visitation rights should be modified.

The matter was heard on October 10, 2006, and Casey appeared pro se. In a journal entry entered October 16, the trial court denied Casey's petition for modification of decree. The court noted that Casey had requested 48 continuous hours of visitation every other weekend, 2 weeks in the summer, and every other holiday. The court found that Casey presented no evidence to show that any material change had occurred since the entry of the dissolution decree.

On December 4, 2006, Casey filed an application for an order to show cause which alleged that Becky should be held in contempt of court for failing and refusing to allow Casey to exercise his parenting time with the child on Saturday, November 4, and Sunday, November 5, 2006.

On January 16, 2007, Casey, by new counsel, filed a complaint for modification of decree and praecipe, alleging that a material and substantial change of circumstances had occurred. Casey alleged that he and Becky could not agree on parenting time for the child, that Becky was trying to alienate the child from Casey, that it was no longer necessary for Casey to have supervised parenting time, and that Becky had violated previous court orders regarding his parenting time. Casey requested that his parenting time with the child be changed to every other weekend from Friday at 5 p.m. to Sunday at 6 p.m.; every Wednesday from 5 to 8 p.m.; summer parenting time of 1 week in June, 1 week in July, and 1 week in August; and holidays pursuant to the local court rules.

Becky filed an answer on March 21, 2007, denying that there had been a material or substantial change of circumstances since the entry of the prior order and requesting the court to dismiss Casey's complaint for modification.

Casey's application for order to show cause and complaint for modification of decree were heard on April 26, 2007. Casey testified that he was 45 years old and was self-employed as a disc blade sharpener. He had a house in Cambridge, but was often on the road and stayed in motels 200 nights a year. Casey exercised his visitation at his parents' or siblings' homes, about 1 hour away from Becky's home in Cambridge. Casey was not allowed to have visitations with the child on the weekends of November 4 and 5, 2006, and March 10 and 11, 2007, although he called Becky in advance and told her he wanted visitation those weekends. Casey stated that Becky told him he needed to call first to tell her whether he was going to exercise his parenting

time. Casey testified that there was no communication between him and Becky even though he had tried to call her many times to talk about the child. Becky did not tell Casey that the child was having surgery for tubes in his ears, and Casey was unsure if the child was starting kindergarten that year. Casey stated that since he and Becky were last in court, their level of communication and animosity had gotten worse, as had her attempts to alienate the child from him. Casey offered a proposed parenting time schedule which was admitted into evidence.

Becky testified that she worked as a nurse at a nursing home and that because of her work hours, she asked Casey to confirm his visits in advance. Becky acknowledged that the dissolution decree did not require Casey to call her to confirm a visitation. Becky testified that it was important for the child to have a relationship with Casey and that the child loved Casey. Becky did not inform Casey that the child was having surgery, nor did she discuss with Casey when the child would start school. Becky stated that the surgery was a 20-minute outpatient procedure. Becky confirmed that the child did not see Casey on the weekends of November 4 and 5, 2006, and March 10 and 11, 2007. She objected to Casey's proposed parenting time schedule, stating that she did not want Casey to have any summer visitation time, that she did not want Casey to have expanded weekend visitation, and that she did not want a specific holiday schedule. She testified that she would notify Casey of future doctor visits if she was ordered to do so. Becky stated that she had not intentionally denied Casey visitation since the October 2006 hearing.

In an order entered May 3, 2007, the trial court granted Casey's complaint for modification of decree. The court found that Casey had demonstrated a material change of circumstances existed to modify the prior visitation order. The court specifically found that Becky had failed to notify Casey of the child's medical procedures; that Becky required Casey to notify her of visitations, although that requirement was not a part of the visitation order; and that Becky would only allow parenting time and sharing of information concerning the child if ordered by the court. The court also found that it was in the child's best interests to modify visitation. The court ordered that Casey should have visitation as set forth in an attached exhibit, including every other weekend, two 1-week visitations in the summer, and holiday visitation consistent with *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987).

Regarding the motion for contempt, the trial court found that Casey had not shown that Becky willfully disobeyed the order of the court, and the court dismissed the order to show cause.

Becky filed a motion to amend judgment on May 8, 2007, which requested clarification on which specific weekends Casey would have visitation, and the trial court modified its previous order in a journal entry dated May 16, 2007, by specifying when the visitation was to begin and that it should occur regardless of holiday visitation. Becky timely appealed the trial court's order granting Casey's application to modify the dissolution decree, as modified by the May 16 order.

A supplemental transcript was filed showing that on June 11, 2007, Casey filed an application for an order to show cause, alleging that Becky should be held in contempt of court for failing to allow him visitation on Friday, June 1, and for failing to allow him summer visitation during the week of June 4. A hearing was held on July 16, and Casey requested that Becky be held in contempt of court for failing to allow visitation the weekends of June 15, June 29, and July 13, 2007, as well as two 1-week summer visitations. In an order entered July 27, the

court found Becky in contempt of court for willfully disobeying the court's order. The court sentenced her to 30 days in jail but allowed her to purge herself of the contempt by complying with future visitation.

ASSIGNMENT OF ERROR

Becky claims, restated, that the trial court erred in modifying the decree to include additional parenting time for Casey.

ANALYSIS

STANDARD OF REVIEW

Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. See *Mace v. Mace*, 13 Neb. App. 896, 703 N.W.2d 624 (2005). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *State ex rel. Jacob v. Bohn*, 271 Neb. 424, 711 N.W.2d 884 (2006).

In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another. *Mace v. Mace, supra*.

MODIFICATION OF DISSOLUTION DECREE

Becky alleges that the trial court erred in modifying the decree of dissolution by adding additional parenting time for Casey. She argues that there was no material change of circumstances between the October 2006 hearing, when Casey's petition for modification was denied, and the April 2007 hearing, and she claims that the specific reasons cited by the trial court in its order do not constitute a material change of circumstances.

Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children. *Willcock v. Willcock*, 12 Neb. App. 422, 675 N.W.2d 721 (2004). The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). See Neb. Rev. Stat. § 42-364 (Reissue 2004). In the context of marital dissolutions, a material change of circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Willcock v. Willcock, supra*.

In granting Casey's complaint, the trial court specifically found that Becky had failed to notify Casey of the child's medical procedures; that Becky required Casey to notify her of visitations, although that requirement was not a part of the visitation order; and that Becky would only allow parenting time and sharing of information concerning the child if ordered by the

court. The court further found that it was in the child's best interests to modify visitation. We have reviewed the record de novo and find no abuse of discretion by the trial court. We find that the record supports the reasons cited by the trial court and that these reasons constitute a material change of circumstances affecting the child's best interests.

CONCLUSION

We conclude that the trial court did not abuse its discretion in granting Casey's complaint for modification of decree. The judgment of the trial court is affirmed.

AFFIRMED.