IN THE COURT OF APPEALS OF IOWA

No. 1-023 / 00-0457
Filed February 28, 2001

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF JOHN H. GRAP AND KRISTIE M. GRAP

Upon the Petition of
JOHN H. GRAP,
Petitioner-Appellee,

And Concerning
KRISTIE M. GRAP n/k/a KRISTIE M. FREDRICHS,
Respondent-Appellant.

Appeal from the Iowa District Court for Crawford County, John P. Duffy, Judge.

Kristie Fredrichs appeals from the district court's ruling on her petition to modify the primary care provisions of the parties' dissolution decree. She contends the district court erred in refusing to transfer primary care of one of the parties' two sons, Tommy, to her. **AFFIRMED.**

Bryan J. Tingle, Des Moines, for appellant.

Kermit L. Dunahoo and Jennifer A. Russell, Des Moines, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Respondent-Appellant Kristie M. Fredrichs, formerly known as Kristie M. Grap, appeals challenging the district court's refusal to modify the 1989 dissolution decree dissolving her marriage to Petitioner-Appellee John H. Grap. Kristie asked that the decree be modified to transfer to her primary physical care one of the parties' two sons, Thomas Dean Grap, born in October of 1985. We affirm.

The primary physical care of the two children was contested in the dissolution. The district court awarded John primary physical care of Thomas and his brother James, born in July of 1983. Kristie was named a joint custodian.

Kristie was only eighteen when she had two children and shortly thereafter the marriage began to tumble. She established a relationship with another man and acted irresponsibly towards her husband and children. John, receiving physical care of the two children, relied extensively on his aunt and uncle to assist him with the children's care.

John testified he struggled to raise James and Thomas. For a period he received little or no help from Kristie. By February of 1997 John was having problems with James. There were complaints James was involved in a theft and assault that resulted in a finding James was a delinquent child. Juvenile court authorities became involved and James remained in John's home. The juvenile officer found John cooperative. By summer of 1997 James was accused of sexually assaulting the daughter of a woman living in John's home. James could not remain in the home as long as the female child was there and he spent time in the Boys' and Girls' Home in Sioux City. During James' time in the institution

Kristie, now older and probably wiser, spent considerable time with him and was actively involved in the program at the home. John, though cooperative, was not as active a participant.

In February of 1998 the juvenile court gave John and Kristie temporary care, custody and control of James, and he was placed in Kristie's home. James was yet residing with Kristie under that order at the time of the hearing from which this appeal was taken.

It was about this time that John and Kristie signed what they referred to as a "Trial Custody Modification Agreement" in regard to Thomas' custody. The agreement subsequently approved by the district court provided that (1) the parties felt Thomas should have a trial period to live with his mother; and (2) if Thomas wished to return to live with his father, he could do so without either his mother's permission or the consent of the court. The agreement was to be extended from month to month unless "five days prior to the end of a month John provides written notice to Kristie of his intent to terminate it." John, beginning on March 1, 1998 and for as long as Thomas was living with Kristie, was to pay Kristie $300 a month child support.

With the agreement in place Thomas resided in Alaska and then South Dakota with his mother and stepfather. His stepfather is in the military. In August of 1999 John filed a petition to modify the decree contending that he had primary physical care of Thomas and that Kristie should be required to pay child support, attorney fees and the costs of this action. Kristie resisted the modification and sought additional child support. Despite the terms of the

agreement John was not given physical care. He did not yet have physical care at the time the matter came on for trial on December 16, 1999.

At that hearing each party asked to be named the primary care parent. The district court and the parties treated the matter as Kristie's application for modification of the dissolution decree that awarded John primary physical care. The district court found that (1) Kristie failed to meet her burden of showing a substantial change of circumstances; (2) Thomas wanted to live with his father; (3) there were no cogent reasons to change the custodial arrangement; and (4) it was in Thomas' best interest to remain in his father's primary physical care. The court modified John's child support obligation. Kristie was given specific visitation.

Kristie contends she has met the burden necessary for modification. She further contends that the district court (1) should have given greater weight to keeping brothers together, and (2) should have given less consideration to the wishes of Thomas.

The primary question is whether the physical care should have been modified. Our review is de novo. Iowa R. App. P. 4.[1] We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

To change the custodial provision of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since

[1] The district court without objection from the parties tried the case as though it were at law with the district court ruling on objections and excluding evidence from the record.

the decree was entered have so materially and substantially changed that Thomas' best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Kristie, as the party seeking to take custody from John, must prove she has an ability to minister more effectively to Thomas' well being. *Id.*; *see also In re Marriage of Gravatt*, 371 N.W.2d 836, 838-40 (Iowa Ct. App. 1985). 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 Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). This is not an original custody determination. The question, therefore, is not which home is better, but whether Kristie has demonstrated she can offer Thomas superior care. *See In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). The burden for a party petitioning for a change in a dissolution decree is heavy. *See In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa Ct. App. 1988).

Kristie was made a joint custodian in the dissolution decree. She therefore is benefited in seeking physical care by the inference she has met the joint custody tests of *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979); *see In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984). However, in seeking a change in physical care, she carries a burden similar to that imposed on a parent seeking a change of custody. *Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997).

Kristie has shown certain conditions have changed substantially since the dissolution decree. She has remarried. James, having been found to be a delinquent child, is in her primary physical care under a juvenile court order.

Kristie also has a stepson living in her home as well as a half sibling of James and Thomas. Kristie's physical location has changed since the dissolution. Her current husband is in the military, and the family lived in Alaska and now lives in South Dakota.

While there have been changes in the parties' circumstance, Kristie's burden does not end there. She still must show that Thomas' interests make it expedient to award custody to her. *See In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994); *In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa Ct. App. 1985); *Gravatt*, 371 N.W.2d at 839. That is, Kristie must show an ability superior to John's to minister to Thomas' needs. *See In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *Crary v. Curtis*, 199 N.W.2d 319, 320 (Iowa 1972). If both parents are found to be equally competent to minister to Thomas, custody should not be changed. *Whalen*, 569 N.W.2d at 628.

In assessing whether Kristie has met her burden we also consider the relationship between James and Thomas. Kristie correctly argues that our courts have recognized that siblings should be separated only for good and compelling reasons. *In re Marriage of Blume*, 473 N.W.2d 629, 631 (Iowa Ct. App. 1991) (Citing *In re Marriage of Winter*, 223 N.W.2d 165, 168 (Iowa 1974)). In attempting to foster the best interests of the children, we ordinarily attempt to keep together children of a broken home. *In re Marriage of Ellerbroek*, 377 N.W.2d 257, 260 (Iowa Ct. App. 1985).

Kristie contends that the brothers are close. John contends that they are not and that James is a bad influence on Thomas. There is evidence to support

a finding that James' problems have caused difficulties for Thomas. The district court found the brothers were not close. We do not disagree with this finding.

We also recognize, as Kristie argues, that though Thomas told the judge he wanted to live with his father, there is a question of what part Thomas' preference should play in determining his primary physical care. The ultimate question of whether Thomas should be in his father's care is far more complicated than merely asking Thomas with which parent he wants to live. *Ellerbroek,* 377 N.W.2d at 258, citing *In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). Although a preference of a minor child cannot be ignored, it is not controlling in a custody dispute. *In re Marriage of Burham*, 283 N.W.2d 269, 276 (Iowa 1979). In a modification action a child's preference is generally given less weight than it would be given in an original custody decision, particularly where a child is seeking to leave the home of his or her primary caregiver. *See In re Marriage of Johnel*, 506 N.W.2d 473, 475 (Iowa Ct. App. 1993). In assessing Thomas' preference, we look at, among other things, his age and educational level, the strength of his preference, his relationship with family members, and the reasons he gives for his decision. *See Ellerbroek*, 377 N.W.2d at 258-59.

Thomas told the judge that he told his mother when they lived in Alaska that he wanted to live with his father. He said he made the same request in South Dakota. Thomas said he was in school in Denison from preschool through sixth grade and had friends most of whom yet live in the Denison area. He told the judge he had not been told by either parent what to say and that neither parent knew what he was going to say. The judge asked him whether he had

complaints about life with his mother and his father. He had no complaints about either living situation but just wanted to live with his father.

Thomas was in special education in both Iowa and Alaska. He did well in his courses in both states. He only attends special education in South Dakota for one and one half hours a day, and then Kristie says she home-schools him. There is no evidence that she has either a curriculum or assistance with the home schooling, nor is there any evidence that she is trained in education.

When Kristie visited Iowa during the time she and her family lived in Alaska she allowed the children to visit John's aunt but did not contact John. This is not to Kristie's credit. Situations where one parent puts the other in a bad light or does not cooperate to allow for maximum contact with the other parent factor against the offending parent being awarded primary care. *See Leyda*, 355 N.W.2d at 865-67; *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994); *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659-60 (Iowa Ct. App. 1991); *In re Marriage of Gratias*, 406 N.W.2d 815, 817-18 (Iowa Ct. App. 1987).

Giving the required deference to the district court's findings we affirm its refusal to modify the custody decree.

AFFIRMED.